S. HRG. 99-141, PT. 2

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY AND THE DEPARTMENT OF JUSTICE

JUNE 12, 19, 26, JULY 10, 17, 24, 31, SEPTEMBER 11, 18, 25, OCTOBER 2, 16, 17, 23, 30, NOVEMBER 1, 6, 14, 22, DECEMBER 4 AND 10, 1985

PART 2

Serial No. J-99-7

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
57-176 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-52

SENATE COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

Dennis W. Shedd, *Chief Counsel and Staff Director*
Diana L. Waterman, *General Counsel*
Deborah G. Bernstein, *Chief Clerk*
Mark H. Gitenstein, *Minority Chief Counsel*

CONTENTS

WEDNESDAY, JUNE 12, 1985

STATEMENTS

Page
Thurmond, Hon. Strom (chairman) 1
DeConcini, Hon. Dennis 1
Goldwater, Hon. Barry 2
Trible, Hon. Paul 3
Warner, Hon. John 4, 6
Roth, Hon. William 5

TESTIMONY OF NOMINEES

Broomfield, Robert C., of Arizona, to be U.S. district judge for the district of Arizona 7
Hilton, Claude M., of Virginia, to be U.S. district judge for the eastern district of Virginia 11
Smith, Loren A., of Virginia, to be a judge of the U.S. Claims Court 14

SUBMISSIONS

Biographies 17

WEDNESDAY, JUNE 19, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 19
Sundquist, Hon. Don, a Representative in Congress from the State of Tennessee 19
Livingston, Hon. Bob, a Representative in Congress from the State of Louisiana 19
Nickles, Hon. Don 20
Sasser, Hon. Jim 21
Gore, Hon. Albert, Jr. 23

TESTIMONY OF NOMINEES

Alley, Wayne E., of Oklahoma, to be U.S. district judge for the western district of Oklahoma 24
Todd, James D., of Tennessee, to be U.S. district judge for the western district of Tennessee 27
Walter, Donald E., of Louisiana, to be U.S. district judge for the western district of Louisiana 29

SUBMISSIONS

Biographies 31

WEDNESDAY, JUNE 26, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 33
Moynihan, Hon. Daniel Patrick 33

Page
D'Amato, Hon. Alfonse 34

TESTIMONY OF NOMINEE

Stanton, Louis L., of New York, to be U.S. district judge for the southern district of New York 34

SUBMISSION

Biography 39

WEDNESDAY, JULY 10, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 41
Hawkins, Hon. Paula 41
Warner, Hon. John 43
Durenberger, Hon. David 43
Roth, Hon. William V., Jr 45
Chiles, Hon. Lawton 47
Boschwitz, Hon. Rudy 59

TESTIMONY OF NOMINEES

Farnan, Joseph J., Jr., of Delaware, to be U.S. district judge for the district of Delaware 48
Marcus, Stanley, of Florida, to be U.S. district judge for the southern district of Florida 51
Scott, Hon. Thomas E., of Florida, to be U.S. district judge for the southern district of Florida 54
Lawn, John C., of Virginia, to be Administrator of the Drug Enforcement Agency 55
Rosenbaum, James M., of Minnesota, to be U.S. district judge for the district of Minnesota 61

SUBMISSIONS

Biographies 62

WEDNESDAY, JULY 17, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 65
D'Amato, Hon. Alfonse 65
Moynihan, Hon. Daniel Patrick 67
Fish, Hon. Hamilton, a Representative in Congress from the State of New York 68
Gilman, Hon. Benjamin A., a Representative in Congress from the State of New York 69
Solomon, Hon. Gerald, a Representative in Congress from the State of New York 70
Stratton, Hon. Samuel S., a Representative in Congress from the State of New York 71
Pressler, Hon. Larry 73
Abdnor, Hon. James 73
Wilson, Hon. Pete 75
Cranston, Hon. Alan 76
Dixon, Hon. Alan 77
Simon, Hon. Paul 78
DeConcini, Hon. Dennis 78

TESTIMONY OF NOMINEES

Miner, Judge Roger L., of New York, to be U.S. circuit judge for the second circuit 80
Wollman, Judge Roger L., of South Dakota, to be U.S. circuit judge for the eight circuit 81

Page
Mills, Judge Richard H., of Illinois, to be U.S. district judge for the central district of Illinois 83
Strand, Judge Roger G., of Arizona, to be U.S. district judge for the district of Arizona 85
Walker, John M., of New York, to be U.S. district judge for the southern district of New York 87
Kozinski, Judge Alex, of California, to be U.S. circuit judge for the ninth circuit 89

TESTIMONY OF WITNESSES

Tobias, Robert M, national president, the National Treasury Employees Union 101
    Prepared statement 106
Devine, Thomas, legal director, government accountability project 111
    Prepared statement 115
O'Conner, K. William, special counsel for the Merit Systems Protection Board 127

SUBMISSIONS

Letter to Chairman Thurmond from special counsel K. William O'Connor, dated July 17, 1985, re nomination of Chief Judge Kozinski 129
Letter to Hon. K. William O'Connor from Representative Patricia Schroeder, dated October 15, 1982, congratulatory 131
    Responses 134
Memorandum from Alex Kozinski to investigators, dated May 11, 1982, re review of allegations 144
Letter to Chairman Thurmond from Ruth T. Prokop, dated July 17, 1985, in support to Judge Alex Kozinski 146
Biographies 147

APPENDIX

Letter to Chairman Thurmond from Judge John P. Wiese, dated July 15, 1985, in favor of Chief Judge Alex Kozinski's nomination 150

WEDNESDAY, JULY 24, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 153
Kennedy, Hon. Edward M 153
Warner, Hon. John 155
Laxalt, Hon. Paul 156
Bentsen, Hon. Lloyd 157
Gramm, Hon. Phil 156, 160

TESTIMONY OF NOMINEES

Willard, Richard Kennon, of Virginia, to be Assistant Attorney General for the Civil Division, U.S. Department of Justice 156
Ginsburg, Douglas H., of Massachusetts, to be Assistant Attorney General for the Antitrust Division, U.S. Department of Justice 182

SUBMISSIONS

Response to questions submitted to Richard K. Willard by Senator Specter 180
Letter to Senator Hatfield from J. Paul McGrath, dated February 1, 1985, concerning resale price maintenance enforcement programs 187
Letter to Senator Hatfield from Charles F. Rule, dated July 1, 1985, final report of the Department of Justice on its resale price maintenance enforcement activities 191
Response to questions submitted to Douglas Ginsburg by Senator Biden 195
    Memorandum, conflicts of interest 205
Letter to Senator Specter from Charles F. Rule, dated July 23, 1985, concerning the proposed acquisition of Conrail 207
Letter to Senator Hatfield from J. Paul McGrath, dated February 1, 1985, Antitrust Division's report concerning enforcement of the law against resale price maintenance 210

Page
Answers to questions submitted to Richard K. Willard 214
Letter to Senator Hatfield from Charles F. Rule, July 1, 1985, constituting the final report of the Department of Justice on its resale price maintenance enforcement activities from January 1 through June 10, 1985 230
Biographies 232

WEDNESDAY, JULY 31, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 233
Wilson, Hon. Pete 233

TESTIMONY OF NOMINEE

Fernandez, Ferdinand F., of California, to be U.S. district judge for the central district of California 235

SUBMISSION

Biography 238

WEDNESDAY, SEPTEMBER 11, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 239
Hatch, Hon. Orrin G 239
Garn, Hon. Jake 240
Levin, Hon. Carl 241
Cochran, Hon. Thad 242
Stennis, Hon. John C 243
Dixon, Hon. Alan J 243
Porter, Hon. John Edward, a Representative in Congress from the State of Illinois 244
Helms, Hon. Jesse 245
East, Hon. John P 246
Gramm, Hon. Phil 247
Riegle, Hon. Donald W 248

TESTIMONY OF NOMINEES

Anderson, Stephen H., of Utah, to be U.S. circuit judge for the tenth circuit 249
Duff, Brian B., of Illinois, to be U.S. district judge for the northern district of Illinois 251
Guy, Ralph B., Jr., of Michigan, to be U.S. circuit judge for the sixth circuit 253
Davidson, Glen H., of Mississippi, to be U.S. district judge for the northern district of Mississippi 254
Maloney, Robert B., of Texas, to be U.S. district judge for the northern district of Texas 256
Sentelle, David Bryan, of North Carolina, to be U.S. district judge for the western district of North Carolina 257

SUBMISSIONS

Biographies 258

WEDNESDAY, SEPTEMBER 18, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 261
Garn, Hon. Jake 261
Hatch, Hon. Orrin G 263
Wilson, Hon. Pete 264
Heinz, Hon. John 267
Specter, Hon. Arlen 267
Pressler, Hon. Larry 268
Cranston, Hon. Alan 275

TESTIMONY OF NOMINEES

Page
Sam, David, of Utah, to be U.S. district judge for the district of Utah 270
Ludwig, Edmund V., of Pennsylvania, to be U.S. district judge for the eastern district of Pennsylvania 272
Wilson, Stephen V., of California, to be U.S. district judge for the central district of California 273
Argetsinger, J.C., of Virginia, to be a commissioner of the Copyright Royalty Tribunal 275

SUBMISSIONS

Biographies 278

WEDNESDAY, SEPTEMBER 25, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 281
Glenn, Hon. John 281
Cochran, Hon. Thad 282
Stennis, Hon. John C. 283
Broomfield, Hon. William S., a Representative in Congress from the State of Michigan 284

TESTIMONY OF NOMINEES

Nelson, David A., of Ohio, to be U.S. circuit judge for the sixth circuit 286
Ryan, James L., of Michigan, to be U.S. circuit judge for the sixth circuit 289
Wingate, Henry T., of Mississippi, to be U.S. district judge for the southern district of Mississippi 293

TESTIMONY OF WITNESS

Barrett, Richard, of Learned, MS 296
  Prepared statement 299

SUBMISSIONS

Letter to Chairman Thurmond from David A. Nelson, dated September 25, 1985, re membership in the Cort of Nisi Pruis 289
Letter to Chairman Thurmond from Senator Carl Levin, dated September 23, 1985, expressing support for nomination 293
Biographies 303

WEDNESDAY, OCTOBER 2, 1985

STATEMENTS

Mathias, Hon. Charles McC 305
McConnell, Hon. Mitch 306
Goldwater, Hon. Barry 308
Lugar, Hon. Richard G 308
DeConcini, Hon. Dennis 308
Kennedy, Hon. Edward M 309, 330
Kolbe, Hon. James, a Representative in Congress from the State of Arizona 309
Specter, Hon. Arlen 333

TESTIMONY OF NOMINEES

Block, Michael K., of Arizona, to be a member of the U.S. Sentencing Commission 314
Nagel, Ilene H., of Indiana, to be a member of the U.S. Sentencing Commission 314
Robinson, Paul H., of New York, to be a member of the U.S. Sentencing Commission 324

Submissions

Page
Letter to Chairman Thurmond from Senator Bill Bradley, dated October 1, 1985, in favor of nominee ... 307
Bibliographies:
  Michael Block ... 311
  Ilene Nagel ... 312
  Paul H. Robinson ... 313
Letter to Chairman Thurmond from Senator Dan Quayle, in favor of nominee ... 316
  Statement and curriculum vitae of Ilene H. Nagel ... 317
Biographies ... 345

WEDNESDAY, OCTOBER 2, 1985

Statements

McConnell, Hon. Mitch ... 347
Packwood, Hon. Robert ... 347
Wilson, Hon. Pete ... 349
Gorton, Hon. Slade ... 351
Evans, Hon. Daniel J. ... 351
Weicker, Hon. Lowell ... 352
Dodd, Hon. Christopher ... 354
Gramm, Hon. Phil ... 355

Testimony of Nominees

Silberman, Laurence H., of the District of Columbia, to be U.S. circuit judge for the District of Columbia ... 356
Brown, Paul N., of Texas, to be U.S. district judge for the eastern district of Texas ... 382
McDonald, Alan A., of Washington, to be U.S. district judge for the eastern district of Washington ... 383
Nevas, Alan H., of Connecticut, to be U.S. district judge for the district of Connecticut ... 385

Testimony of Witness

Williams, Lynn C., of Branford, CT ... 387

Submissions

Georgia Law Review article ... 361
Prepared statement of Lynn C. Williams ... 390
Biographies ... 390

WEDNESDAY, OCTOBER 16, 1985

Statements

Thurmond, Hon. Strom (chairman) ... 393
Pressler, Hon. Larry ... 393
Abdnor, Hon. James ... 395
Wilson, Hon. Pete ... 396
Cranston, Hon. Alan ... 398
Zorinsky, Hon. Edward ... 399
Exon, Hon. James ... 404
Stangeland, Hon. Arlan, a Representative in Congress from the State of Minnesota ... 405

Testimony of Nominees

Battey, Richard H., of South Dakota, to be U.S district judge for the district of South Dakota ... 407
Fuste, Jose Antonio, of Puerto Rico, to be U.S district judge for the district of Puerto Rico ... 408
Rhoades, John S., Sr., of California, to be U.S district judge for the southern district of California ... 413

Page

Strom, Lyle E., of Nebraska, to be U.S district judge for the district of Nebraska 414

SUBMISSIONS

Letters to Senator Zorinsky expressing support for nominee 401
Letters to Chairman Thurmond expressing support for nominee 411
Biographies 416

THURSDAY, OCTOBER 17, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 419
Warner, Hon. John 419
Biden, Hon. Joseph R., Jr 420
DeConcini, Hon. Dennis 420
Hatch, Hon. Orrin G 421
Metzenbaum, Hon. Howard M 422
Simon, Hon. Paul 424
East, Hon. John P 439, 483, 502
McConnell, Hon. Mitch 484
Heflin, Hon. Howell 501

TESTIMONY OF NOMINEES

Markman, Stephen J., to be Assistant Attorney General of the United States for Legal Policy 424
Fried, Charles, to be Solicitor General of the United States 485

TESTIMONY OF WITNESSES

Schwartz, Herman, professor of law, the American University, Washington, DC 447
Panel consisting of: Althea T.L. Simmons, director, NAACP, Washington, DC Bureau; Anthony T. Podesta, president, People for the American Way, Washington, DC; and Susan M. Liss, director, Judicial Selection Project, Washington, DC 504

SUBMISSIONS

Prepared statement of Stephen J. Markman 442
Responses of questions submitted to Stephen J. Markman by Senator Biden 443
Prepared statement of Herman Schwartz 448
"The New Right's Court Packing Campaign," by Herman Schwartz 450
Prepared statement of Althea T.L. Simmons 506
Prepared statement of Anthony T. Podesta 512
Prepared statement of Susan M. Liss 524
Biographies 529

WEDNESDAY, OCTOBER 23, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 531
Denton, Hon. Jeremiah 532
East, Hon. John P 533
Laxalt, Hon. Paul 534
Biden, Hon. Joseph R., Jr 556
McConnell, Hon. Mitch 569

TESTIMONY OF NOMINEE

Cooper, Charles Justin, of Alabama, to be Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice 545

TESTIMONY OF WITNESS

Arrington, Hon. Richard, Jr., mayor of the city of Birmingham, AL 607

SUBMISSIONS

Page
Letters to Chairman Thurmond in support of nominee 535
Biography 545
Responses to questions from Senator Biden concerning the Birmingham litigation 553
Responses to questions from Senator Biden concerning *Bratton* v. *City of Detroit* 554
Responses to questions from Senator Specter 571
"On Appellate Matters" 588
Responses to questions for Robert S. Pomerance submitted by Senator Kennedy 599
Responses to questions for Lawrence G. Wallace submitted by Senator Kennedy 602
Responses to questions for John F. Murray submitted by Senator Kennedy 604
"Political Aides Forced Shift on Bias Policy," by Lawrence M. O'Rourke, dated January 12, 1982, from the St. Louis Post-Dispatch 606
Letter to Chairman Thurmond from David P. Whiteside, Jr., dated October 29, 1985, in support of nominee in his activity in the *Birmingham Reverse Discrimination* cases 609
Prepared statement of Richard Arrington, Jr 616

APPENDIX

Letter to Chairman Thurmond from Phillip D. Brady, Acting Attorney General, dated October 16, 1985, list of all matters in which Mr. Cooper played a role 633

WEDNESDAY, OCTOBER 30, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 643
Hawkins, Hon. Paula 644
Moynihan, Hon. Patrick 645
D'Amato, Hon. Alfonse 645
Wilson, Hon. Pete 646
Cranston, Hon. Alan 648
Domenici, Hon. Pete 648
Bingaman, Hon. Jeff 651
Lujan, Hon. Manuel, Jr., a Representative in Congress from the State of New Mexico 652
Skeen, Hon. Joe, a Representative in Congress from the State of New Mexico 652
Bradley, Hon. Bill 653
Lautenberg, Hon. Frank R 653
Roth, Hon. William V., Jr 655

TESTIMONY OF NOMINEES

Buckley, Hon. James L., of Connecticut, to be U.S circuit court judge for the District of Columbia circuit 658
Thompson, David R., of California, to be U.S. circuit judge for the ninth circuit 664
Baldock, Bobby Ray, of New Mexico, to be U.S. circuit judge for the tenth circuit 666
Cowen, Robert E., of New Jersey, to be U.S district judge for the district of New Jersey 668
Korman, Edward R., of New York, to be U.S district judge for the eastern district of New York 669
Zloch, William J., of Florida, to be U.S district judge for the southern district of Florida 671
Roth, Jane R., of Delaware, to be U.S district judge for the district of Delaware 672

TESTIMONY OF WITNESSES

Fisher, Clarkson, chief judge, U.S. district court 654
Connolly, Ronald G., of Wilmington, DE 680
Crompton, Charles, president, Delaware Bar Association, Wilmington, DE 687

Page

Tucker, Marna S., past president of the District of Columbia Bar, Washington, DC 690

Submissions

Letter to Chairman Thurmond from Richard L. Jacobson, dated October 29, 1985, in opposition to nominee 662
Letter to L. Susan Faw from Richard E. Poole, dated May 17, 1985, re complaint of Ronald G. Connolly against Mrs. Roth 676
Letter to Chairman Thurmond from Ronald G. Connolly, dated October 21, 1985, re court case against Mrs. Roth 685
Prepared statement of Marna S. Tucker, past president, District of Columbia Bar 698
Biographies 700

FRIDAY, NOVEMBER 1, 1985

Statements

Thurmond, Hon. Strom (chairman) 703
Metzenbaum, Hon. Howard M 704
Hatch, Hon. Orrin G 705
Levin, Hon. Carl 721
DeConcini, Hon. Dennis 735

Testimony of Nominee

Kozinski, Alex, designee for U.S. circuit court judge for the ninth circuit .. 890, 910

Testimony of Witnesses

Eastwood, Mary, Washington, DC 738
Hollingsworth, John Fred, Shippensburg, PA 802
Collins, Lynn R., Deputy Special Counsel, Merit Systems Protection Board, Washington, DC 812
Caldwell, William E., Managing Director for Operations, Office of Special Counsel, Merit Systems Protection Board, Washington, DC 881
Olivier, William K., attorney, Newport Beach, CA 887
O'Connor, William, Special Counsel of the Office of Special Counsel, Merit Systems Protection Board 904

Submissions

"Senate Committee to Reconsider Judicial Nominee," by Howard Kurtz, from the Washington Post 709
Affidavit of Beth L. Don 716
Affidavit of Mary Eastwood 744
Brief in the matter of *Nathaniel Sims* v. *District of Columbia Government* 752
  Corrected version 759
  Opinion 766
Memorandum to Laura Chin from Alex Kozinski on the communication with field personnel 792
Corrections in draft letter to Secretary Samuel R. Pierce, Jr., Housing and Urban Development 795
Memorandum to Alex Kozinski from Mary Eastwood, re potential reassignment to San Francisco 798
Affidavit of John F. Hollingsworth 804
Affidavit of Horace Clark 815
Survey of Office of Special Counsel Personnel 824
Memorandum to Elliott H. Davis from Dorothy J. Springfield, re administrative closeout 851
Memorandum of conversation with Larry Shearer and Stephen McHale, re *Saldana* and *Spanton* Cases 853
Routing slip 856
Letter to Chairman Clarence Thomas, Equal Employment Opportunity Commission, from H. Robert Mayer, Acting Special Counsel, dated August 25, 1982, re the reassignment and removal of Sandy Padilla 857

Page
Memorandum to Lynn R. Collins from Shigaki J. Sugiyama, re work performance of Horace G. Clark 869
Memorandum to Lynn R. Collins from Horace G. Clark, re whether the recommendations and statements proscribed in 5 U.S.C. are limited to those made by Senators and Representatives 870
Answers of Lynn R. Collins to questions from Senator Levin 878
Broadcast editorial 892
Affidavit of Jesse James 912
Transcript of hearing *Phillippe M. Neff, v. Hon. Alex Kozinski* 917
Affidavit of Laura Chin 953
Memorandum from Tom Devine re summary of conversation with Laura Chin. 958
Routing slip 962
Memorandum to Laura Chin, from D. Kevin Dugan, re picnic date 965
Memorandum from Alex Kozinski re training seminar for attorneys 966
Corrected brief 967
1984 Year-end Report on the Judiciary by Warren E. Burger 983

WEDNESDAY, NOVEMBER 6, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) 1017
D'Amato, Hon. Alfonse 1017
Wilson, Hon. Pete 1019
Andrews, Hon. Mark 1020
Bumpers, Hon. Dale 1022
Pryor, Hon. David H 1023
Hatch, Hon. Orrin G 1024
Burdick, Hon. Quentin V 1026
Gramm, Hon. Phil 1030
Bentsen, Hon. Lloyd 1030

TESTIMONY OF NOMINEES

Altimari, Frank X., of New York, to be U.S. circuit judge for the second circuit 1020
Noonan, John T., Jr., of California, to be U.S. circuit judge for the ninth circuit 1024, 1059
Archer, Glenn L., Jr., of Virginia, to be U.S. circuit judge for the Federal circuit 1027
Arnold, Morris S., of Arkansas, to be U.S district judge for the western district of Arkansas 1031
Conmy, Patrick A., of North Dakota, to be U.S district judge for the district of North Dakota 1034
Hughes, Lynn N., of Texas, to be U.S district judge for the southern district of Texas 1036
Tsoucalas, Nicholas, of New York, to be a judge of the U.S. Court of International Trade 1037

TESTIMONY OF WITNESSES

Kaplan, Richard J., president, Customs and International Trade Bar Association, New York, accompanied by David Busby, Esq 1039
Rogers, Estelle H., national director, Federation of Women Lawyers' Judicial Screening Panel, Washington, DC 1050

SUBMISSIONS

Prepared statement of Richard J. Kaplan 1042
Prepared statement of Estelle H. Rogers 1053
Letters to Chairman Thurmond in support of nominee Prof. John T. Noonan, Jr., from:
  Jesse Choper, dean, University of California 1065
  James Vorenberg, dean, Harvard Law School 1067
  Erwin N. Griswold, of Jones, Day, Reavis & Pogue, Washington, DC 1068
  Guido Calabresi, dean, Yale Law School 1069
Biographies 1070

THURSDAY, NOVEMBER 14, 1985

Page

STATEMENTS

Laxalt, Hon. Paul ... 1073
Dole, Hon. Robert ... 1074
Kassebaum, Hon. Nancy Landon ... 1077
Quayle, Hon. Dan ... 1078
Warner, Hon. John ... 1079
East, Hon. John P ... 1080
Bradley, Hon. Bill ... 1081
Lautenberg, Hon. Frank R ... 1081
Courter, Hon. Jim, a Representative in Congress from the State of New Jersey ... 1082

TESTIMONY OF NOMINEES

Tacha, Deanell Reece, of Kansas, to be U.S. circuit judge for the tenth circuit. 1082
Brown, Garrett E., Jr., of New Jersey, to be U.S. district judge for the district of New Jersey ... 1104
Miller, Robert L., Jr., of Indiana, to be U.S. district judge for the northern district of Indiana ... 1105
Bolton, John R., to be Assistant Attorney General, Office of Legislative and Intergovernmental Affairs ... 1107

TESTIMONY OF WITNESSES

Hinman, Dr. Myra, professor of English, University of Kansas ... 1108
Ende, Richard von, executive secretary, University of Kansas ... 1140

SUBMISSIONS

"Ms. Tacha's Potential for Federal Bench," November 13, 1985, from the Kansas City Star ... 1077
Letters to Chairman Thurmond in support of nominee Deanell R. Tacha ... 1085
Prepared statement of Myra Hinman ... 1111
Biographies ... 1142

FRIDAY, NOVEMBER, 22, 1985

STATEMENTS

Thurmond, Hon. Strom (chairman) ... 1145
Gramm, Hon. Phil ... 1145
Bartlett, Hon. Steve, a Representative in Congress from the State of Texas ... 1146
Wallop, Hon. Malcolm ... 1147
Inouye, Hon. Daniel K ... 1149
Simpson, Hon. Alan K ... 1153
Warner, Hon. John W ... 1154
Denton, Hon. Jeremiah A ... 1155
Heflin, Hon. Howell T ... 1158

TESTIMONY OF NOMINEES

Fitzwater, Sidney A., of Texas, to be U.S district judge for the northern district of Texas ... 1159
Moon, Albert I., Jr., of Hawaii, to be U.S district judge for the district of Hawaii ... 1163

SUBMISSIONS

Letters indicating extent to which Mr. Moon was involved in the drafting of charter for a merit selection plan ... 1172
Biographies ... 1178

WEDNESDAY, DECEMBER 4, 1985

STATEMENTS

Grassley, Hon. Charles E ... 1181

Page
Moynihan, Hon. Daniel P. 1181
D'Amato, Hon. Alfonse 1182
Mattingly, Hon. Mack 1184
Wilson, Hon. Pete 1185
Nunn, Hon. Sam 1187
O'Brien, Hon. George M., a Representative in Congress from the State of Illinois 1190
Dixon, Hon. Alan J 1190
Cranston, Hon. Alan 1203

TESTIMONY OF NOMINEES

Burns, Arnold I., of New York, to be Associate Attorney General 1191
Johnson, Hon. Alan B., of Wyoming, to be U.S. district judge for the district of Wyoming 1193
Revercomb, Hon. George H., of Virginia, to be U.S. district judge for the District of Columbia 1195
Fitzpatrick, Duross, of Georgia, to be U.S. district judge for the middle district of Georgia 1197
Leinenweber, Harry D., of Illinois to be U.S. district judge for the northern district of Illinois 1199
Letts, J. Spencer, of California, to be U.S. district judge for the central district of California 1200
Tevrizian, Hon. Dickran M., of California, to be U.S. district judge for the central district of California 1202

SUBMISSIONS

Biographies 1204

TUESDAY, DECEMBER 10, 1985

STATEMENTS

Denton, Hon. Jeremiah A 1207
Simon, Hon. Paul 1207
Specter, Hon. Arlen 1208

TESTIMONY OF NOMINEE

Sporkin, Stanley, of Maryland, to be U.S. district judge for the District of Columbia 1210

SUBMISSIONS

Letters to Senator Denton on the suitability of Stanley Sporkin for appointment to a Federal judgeship 1226
Affidavit of David A. Ross 1230
"Watching the Watchdogs," by Robert M. Bleiberg, dated September 11, 1978, from Barron's 1231
"After the Dirks Case," by Robert M. Bleiberg, dated July 11, 1983, from Barron's 1233
Biography 1235

ALPHABETICAL LISTING OF NOMINEES FOR FEDERAL APPOINTMENTS

Alley, Wayne E., of Oklahoma, to be U.S. district judge for the western district of Oklahoma 24
Altimari, Frank X., of New York, to be U.S. circuit judge for the second circuit 1020
Anderson, Stephen H., of Utah, tc be U.S. circuit judge for the tenth circuit 249
Archer, Glenn L., Jr., of Virginia, to be U.S. circuit judge for the Federal circuit 1027
Argetsinger, J.C., of Virginia, to be a commissioner of the Copyright Royalty Tribunal 275
Arnold, Morris S., of Arkansas, to be U.S. district judge for the western district of Arkansas 1031
Baldock, Bobby Ray, of New Mexico, to be U.S. circuit judge for the tenth circuit 666

Page

Battey, Richard H., of South Dakota, to be U.S. district judge for the district of South Dakota 407

Block, Michael K., of Arizona, to be a member of the U.S. Sentencing Commission 314

Bolton, John R., to be Assistant Attorney General, Office of Legislative and Intergovernmental Affairs 1107

Broomfield, Robert C., of Arizona, to be U.S. district judge for the district of Arizona 7

Brown, Garrett E., Jr., of New Jersey, to be U.S. district judge for the district of New Jersey 1104

Brown, Paul N., of Texas, to be U.S. district judge for the eastern district of Texas 382

Buckley, Hon. James L., of Connecticut, to be U.S. circuit judge for the District of Columbia circuit 658

Burns, Arnold I., of New York, to be Associate Attorney General 1191

Conmy, Patrick A., of North Dakota, to be U.S. district judge for the district of North Dakota 1034

Cooper, Charles Justin, of Alabama, to be Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice 545

Cowen, Robert E., of New Jersey, to be U.S. district judge for the district of New Jersey 668

Davidson, Glen H., of Mississippi, to be U.S. district judge for the northern district of Mississippi 254

Duff, Brian B., of Illinois, to be U.S. district judge for the northern district of Illinois 251

Farnan, Joseph J., Jr., of Delaware, to be U.S. district judge for the district of Delaware 48

Fernandez, Ferdinand F., of California, to be U.S. district judge for the central district of California 235

Fitzpatrick, Duross, of Georgia, to be U.S. district judge for the middle district of Georgia 1197

Fitzwater, Sidney A., of Texas, to be U.S. district judge for the northern district of Texas 1159

Fried, Charles, to be Solicitor General of the United States 485

Fuste, Jose Antonio, of Puerto Rico, to be U.S. district judge for the district of Puerto Rico 408

Ginsburg, Douglas H., of Massachusetts, to be Assistant Attorney General for the Antitrust Division, U.S. Department of Justice 182

Guy, Ralph B., Jr., of Michigan, to be U.S. circuit judge for the sixth circuit 253

Hilton, Claude M., of Virginia, to be U.S. district judge for the eastern district of Virginia 11

Hughes, Lynn N., of Texas, to be U.S. district judge for the southern district of Texas 1036

Johnson, Hon. Alan B., of Wyoming, to be U.S. district judge for the district of Wyoming 1193

Korman, Edward R., of New York, to be U.S. district judge for the eastern district of New York 669

Kozinski, Judge Alex, of California, to be U.S. circuit judge for the ninth circuit 89, 890, 910

Lawn, John C., of Virginia, to be Administrator of the Drug Enforcement Agency 55

Leinenweber, Harry D., of Illinois, to be U.S. district judge for the northern district of Illinois 1199

Letts, J. Spencer, of Calirornia, to be U.S. district judge for the central district of California 1200

Ludwig, Edmund V., of Pennsylvania, to be U.S. district judge for the eastern district of Pennsylvania 272

Maloney, Robert B., of Texas, to be U.S. district judge for the northern district of Texas 256

Marcus, Stanley, of Florida, to be U.S. district judge for the southern district of Florida 51

Markman, Stephen J., to be Assistant Attorney General of the United States for Legal Policy 424

Miller, Robert L., Jr., of Indiana, to be U.S. district judge for the northern district of Indiana 1105

Mills, Judge Richard H., of Illinois, to be U.S. district judge for the central district of Illinois 83

Page

Miner, Judge Roger L., of New York, to be U.S. circuit judge for the second circuit 80
Moon, Albert I., Jr., of Hawaii, to be U.S. district judge for the district of Hawaii 1163
Nagel, Ilene H., of Indiana, to be a member of the U.S. Sentencing Commission 314
Nelson, David A., of Ohio, to be U.S. circuit judge for the sixth circuit 286
Nevas, Alan H., of Connecticut, to be U.S. district judge for the district of Connecticut 385
Noonan, John T., Jr., of California, to be U.S. circuit judge for the ninth circuit 1024, 1059
Revercomb, Hon. George H., of Virginia, to be U.S. district judge for the District of Columbia 1195
Rhoades, John S., Sr., of California, to be U.S. district judge for the southern district of California 413
Robinson, Paul H., of New Jersey, to be a member of the U.S. Sentencing Commission 324
Rosenbaum, James M., of Minnesota, to be U.S. district judge for the district of Minnesota 61
Roth, Jane R., of Delaware, to be U.S. district judge for the district of Delaware 672
Ryan, James L., of Michigan, to be U.S. circuit judge for the sixth circuit 289
Sam, David, of Utah, to be U.S. district judge for the district of Utah 270
Scott, Hon. Thomas E., of Florida, to be U.S. district judge for the southern district of Florida 54
Sentelle, David Bryan, of North Carolina, to be U.S. district judge for the western district of North Carolina 257
Silberman, Laurence H., of the District of Columbia, to be U.S. circuit judge for the District of Columbia 356
Smith, Loren A., of Virginia, to be a judge of the U.S. Claims Court 14
Sporkin, Stanley, of Maryland, to be U.S. district judge for the District of Columbia 1210
Stanton, Louis L., of New York, to be U.S. district judge for the southern district of New York 34
Strand, Judge Roger G., of Arizona, to be U.S. district judge for the district of Arizona 85
Strom, Lyle E., of Nebraska, to be U.S. district judge for the district of Nebraska 414
Tacha, Deanell Reece, of Kansas, to be U.S. circuit judge for the tenth circuit . 1082
Tevrizian, Hon. Dickran M., of California, to be U.S. district judge for the central district of California 1202
Thompson, David R., of California, to be U.S. circuit judge for the ninth circuit 664
Todd, James D., of Tennessee, to be U.S. district judge for the western district of Tennessee 27
Tsoucalas, Nicholas, of New York, to be a judge of the U.S. Court of International Trade 1037
Walker, John M., of New York, to be U.S. district judge for the southern district of New York 87
Walter, Donald E., of Louisiana, to be U.S. district judge for the western district of Louisiana 29
Washington, Alan A., of Washington, to be U.S. district judge for the eastern district of Washington 383
Willard, Richard Kennon, of Virginia, to be Assistant Attorney General for the Civil Division, U.S. Department of Justice 156
Wilson, Stephen V., of California, to be U.S. district judge for the central district of California 273
Wingate, Henry T., of Mississippi, to be U.S. district judge for the southern district of Mississippi 293
Wollman, Judge Roger L., of South Dakota, to be U.S. circuit judge for the eighth circuit 81
Zloch, William J., of Florida, to be U.S. district judge for the southern district of Florida 671

CONFIRMATION HEARING ON: ROBERT C. BROOMFIELD, CLAUDE M. HILTON, AND LOREN A. SMITH

WEDNESDAY, JUNE 12, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon and DeConcini.

Staff present: Frank Klonoski, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order. I had a meeting in the White House and just got back. I am sorry if I delayed anyone.

We have met today to consider the nominations of Judge Robert C. Broomfield, of Arizona, to be U.S. district judge for the district of Arizona. I see Senator DeConcini is here.

Then after that, Claude M. Hilton, of Virginia, to be U.S. district judge for the eastern district of Virginia. Senator Warner is here, I see, and Senator Trible; U.S. Claims Court, Loren A. Smith, of Virginia, to be judge of the U.S. Claims Court. Senator Warner, Senator Trible and Senator Roth are here.

We will take the senators first so they can be excused. They are welcome to remain if they want to. We will now hear from Senator DeConcini.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DeConcini. Mr. Chairman, thank you very much. I am honored to be here to recommend Robert C. Broomfield for the position of U.S. district judge for the district of Arizona.

Bob and I have been friends for a long time, having gone to law school pretty close to each other, being there at the same time. Judge Broomfield received his undergraduate degree from Pennsylvania State University and his law degree from the University of Arizona.

He served in the U.S. Air Force. In 1961, he received his officer of the year award in the Arizona Air National Guard. In the same year, Judge Broomfield worked as law clerk and bailiff for Hon. Jack D.H. Hays, who is superior court judge of Maricopa County.

The following year, he joined the firm of Carson, Messenger, Elliott, Laughlin & Regan, and in 1967 became a full partner with that firm. Judge Broomfield left his legal practice, Mr. Chairman, in 1971 to assume his present position as superior court judge of Arizona, Maricopa County.

In addition, he has received numerous honors and awards. I will just put the balance of this statement in the record, Mr. Chairman, because of the other Senators and the time that we have here.

[Statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, I am honored to recommend Robert C. Broomfield for the position of United States District Judge for the District of Arizona. Bob and I have been friends since law school and I know him to be an outstanding lawyer and judge as well as a good family man.

Judge Broomfield received his undergraduate degree from Pennsylvania State University and his law degree from the University of Arizona. He served in the United States Air Force and in 1961 he received the Officer of the Year Award in the Arizona Air National Guard.

In the same year, Judge Broomfield worked as a law clerk and bailiff for the Honorable Jack D.H. Hays of the Superior Court of Arizona in Maricopa County. The following year he joined the firm of Carson, Messinger, Elliott, Laughlin and Ragan and in 1967 became a full partner with the firm. Judge Broomfield left his legal practice in 1971 to assume his present position as Superior Court Judge of Arizona's Maricopa County.

In addition, he has received numerous honors and awards, such as the Maricopa County Bar Association Distinguished Public Service Award. Judge Broomfield has served as chairman of the National Conference of State Trial Judges and of the National Conference of Metropolitan Courts. He, has also served on the Judicial Planning Committee of the Arizona Supreme Court and is currently president of the Arizona Judges Association.

Because of his background Robert C. Broomfield will be an excellent addition to the Federal judiciary. I recommend him without reservation and urge the Committee and the Senate to confirm his appointment.

Senator DECONCINI. I also would like to ask the distinguished chairman to put Senator Goldwater's statement in the record, who has submitted Judge Broomfield's name to the President and is very pleased that the White House has sent his nomination up here.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR BARRY GOLDWATER

Mr. Chairman, I have the honor and great pleasure today to wholeheartedly support the nomination of Robert C. Broomfield to the United States District Court for the District of Arizona.

Judge Broomfield already has over 24 years of professional experience in the law, although he is a young man of 52 years. He is currently serving as presiding judge of the entire Maricopa County Superior Court and earlier served as presiding judge of its Juvenile Division. He has been on the superior court since 1971 and and became presiding judge in 1974. Upon graduating from the school of law at the University of Arizona in 1961, Robert Broomfield served as law clerk and bailiff to then Superior Court Judge Jack Hays and then became a partner in a leading Phoenix law firm where he served from 1962 through 1970. Thus, his legal and judicial experience is extensive.

Mr. Chairman, I can say from first hand knowledge that Judge Broomfield is highly respected in Arizona among the entire legal fraternity and is recognized as being an outstanding jurist and tireless worker. Judge Broomfield is known in our State as an exceptionally able administrator, as well as being an excellent trial judge.

The legal community assures me that Judge Broomfield is the epitome of integrity, fairness and correct judicial temperament, whose commitment to public service and his country is intense.

Judge Broomfield has always been and continues to be active in public service beyond his position as presiding judge. He has served his country in the United States Air Force and the Arizona Air National Guard and United States Air Force Reserve and has performed numerous services through his community activities and participation on judicial organizations, such as the National Conference of State Trial Judges, ABA Committee on Court Administration and the Arizona Judicial Ethics Advisory Committee. Under his leadership, the Superior Court in Maricopa County has successfully attacked the problem of trial court delay bringing Judge Broomfield to national attention.

To sum up, Judge Broomfield is eminently qualified by reason of ability, accomplishment, intelligence and experience to serve as a United States District Court judge and I commend his nomination to you and the committee with my total endorsement.

Senator DECONCINI. With that, Mr. Chairman, I would like to introduce you to Judge Broomfield, who is prepared to answer any questions.

The CHAIRMAN. We are very glad to have you with us.

I want to congratulate you, Judge Broomfield, on being nominated by the President, and also for being supported by both of your Senators. They are both very prominent gentlemen here in the Senate and their recommendation, of course, will be of great benefit to you.

Now, do you want to stay or do you want to go, Senator DeConcini?

Senator DECONCINI. I am going to stay a little bit.

The CHAIRMAN. Stay awhile.

Senator DECONCINI. Very good.

The CHAIRMAN. All right, we will take the other Senators so we will not delay them. Senator Warner and Senator Trible. We have Mr. Claude M. Hilton, of Virginia, for U.S. district judge.

Senator Warner, we would be pleased to hear from you.

Senator WARNER. I thank you, Mr. Chairman. I should like to defer to my distinguished colleague, Mr. Trible. We have a gentlemen's understanding as to judicial nominations that we take them in alternating order. He had the prime responsibility for selecting this outstanding candidate and I will defer to him.

The CHAIRMAN. We would be glad to hear from you, Senator Trible.

STATEMENT OF A PANEL CONSISTING OF: HON. PAUL TRIBLE, A U.S. SENATOR FROM THE STATE OF VIRGINIA; AND HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator TRIBLE. Mr. Chairman, Senator Warner and I are pleased to be here today to present to the committee Mr. Claude Hilton. Among his many virtues, Mr. Hilton has the singular distinction of being my first judicial nominee recommended to this committee and he is a man of rare ability.

Mr. Hilton will bring to the Federal bench a wealth of trial experience and the personal attributes of an excellent jurist—intellectual rigor, a judicial temperament, and a deep appreciation of the American legal system.

He not only has an outstanding record as a trial lawyer in private practice, but he has served with distinction as an assistant commonwealth attorney, as the commonwealth's attorney in Arlington County, and as commissioner in chancery in Arlington County, VA.

In addition, Claude Hilton has an active history of community involvement. He has been a member of the Arlington County School Board and has belonged to a number of civic and community service organizations.

He holds a bachelor's degree from Ohio State University and a J.D. from American University. Mr. Chairman, I have known Claude Hilton for many years and I can say without reservation that he is eminently qualified to serve on the Federal bench. I hope this committee will report his nomination favorably to the full Senate.

The CHAIRMAN. Is your Commonwealth attorney in Virginia your prosecuting attorney, similar to a district attorney or a solicitor?

Senator TRIBLE. That is exactly right, Mr. Chairman. Virginia consists of five commonwealths and we call our State's attorney or prosecuting attorney the Commonwealth's attorney.

The CHAIRMAN. Is he elected by the people?

Senator TRIBLE. In Mr. Hilton's case, he was appointed by the judges to fill a vacancy and served ably during that period of time.

The CHAIRMAN. I see.

Senator TRIBLE. Normally, it is an elected office, a constitutional office.

The CHAIRMAN. In South Carolina, we call them solicitors. In some places, they call them district attorneys, but it is the same position.

Senator TRIBLE. Exactly.

The CHAIRMAN. Senator Warner.

Senator WARNER. Mr. Chairman, Mr. Simon, in view of the shortage of time, I should like to ask unanimous consent that my statement may be made a part of the record.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman and distinguished members of the Committee, I wish to join in the support of my Virginia colleague, Senator Trible, in the nomination of Claude M. Hilton to be the United States District Judge for the Eastern District of Virginia.

As a native Virginian from Scott County and a former Commonwealth Attorney for Arlington County now engaged in private practice in Arlington, I believe Mr. Hilton is especially attuned to the prosecuting and defense roles of our legal system.

I am confident his wealth of experience will be of invaluable benefit to him as a member of the Federal bench.

Mr. Chairman, I believe Mr. Hilton is exceptionally well qualified for this important position, and I urge the Committee's approval of his nomination.

Senator WARNER. I wholeheartedly endorse this candidate and Mr. Trible has spoken most eloquently on his behalf.

The CHAIRMAN. Mr. Hilton, I want to congratulate you upon your appointment by the President—one of the finest Presidents I think this country has ever had. And I want to congratulate you, also, for having the endorsement of the able senior Senator from Virginia, Mr. Warner, and the able junior Senator from Virginia, both of whom stand high in this body—highly respected—and their endorsement will mean a great deal to you.

Now, if you Senators want to go, you are at liberty to leave or you may remain if you please.

Now, our next nomination is Loren A. Smith, of Virginia, to be a judge of the U.S. Claims Court. We have Senator Warner, Senator Trible and Senator Roth.

STATEMENT OF HON. WILLIAM ROTH, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Thank you, Mr. Chairman. I am very pleased to be here today to introduce Mr. Loren Allan Smith, who, as you have already stated, has been nominated by President Reagan to be a judge of the U.S. Claims Court.

Loren Smith is currently chairman of the Administrative Conference of the United States. In this capacity he directs all activities of the Conference, which, as you know, is the Government's expert advisory agency on questions of administrative law, procedure, and governmental processes.

In addition to these considerable duties, he serves as a member of the Cabinet Council on Legal Policy and Management and Administration. For 4 years, Loren has served most ably in this position, as he has in other positions of responsibility in the field of law for the past 15 years.

He is a very capable attorney and I believe he will become a distinguished justice of this court. Loren Smith received his undergraduate degree from Northwestern University in 1966, and 3 years later earned his law degree from Northwestern University's School of Law.

In the interests of saving time, Mr. Chairman, I will not go through all the many splendid duties of this individual, but he served both in private practice and with the Government in a number of capacities.

My own association with him dates back to 1976 when he and his family moved to Yorklyn, a neighboring community to mine in the State of Delaware. With his acknowledged legal expertise, he became assistant professor, and shortly thereafter an associate professor at the Delaware Law School.

I might say, Mr. Chairman, that the only negative thing I can say about him is he was a citizen of Delaware for 4 years and is now in the process of becoming a citizen of the State of Virginia. Hopefully, someday he will come back home.

[The prepared statement follows:]

PREPARED STATEMENT OF SENATOR WILLIAM ROTH

Mr. Chairman, today, I am very pleased to introduce Mr. Loren Allan Smith, who has been nominated by President Reagan to be a judge of the U.S. Claims Court.

Loren Smith is currently chairman of the Administrative Conference of the United States. In this capacity, he directs all activities of the conference, which, as you know, is the Government's expert advisory agency on questions of administrative law and procedure and governmental processes. In addition to these considerable duties, he serves as a member of the Cabinet Councils on Legal Policy and Management and Administration.

For nearly four years, he has served most ably in this capacity, as he has in other positions of responsibility in the field of law for the past 15 years. He is a very capable attorney, and I believe he will become a distinguished justice of this court.

Loren Smith received his undergraduate degree from Northwestern University in 1966 and three years later earned his law degree from Northwestern University School of Law. Upon his admission to the Illinois bar in December 1970, he became general counsel and secretary-treasurer of Kimberly-Churchill, Inc. and the Dental Institute of the United States.

The following September, he became general counsel and corporate director for Robert Suggs, Inc.—a position he held for approximately two years. For much of that time, he also served as consultant to the law firm of Sidley & Austin and its predecessor firm: Leibman, Williams, Bennett, Baird & Minow.

From May 1973 to April 1975, Loren Smith held several responsible positions within the Government. Initially, he was a staff attorney in the General Counsel's Office at the Federal Communications Commission. Then, he was appointed an Assistant to the Special Counsel to the President in the White House. Finally, he received a four month special appointment from the Office of the Deputy Attorney General to serve as Special Assistant United States Attorney for the District of Columbia.

From July 1975 until he assumed the chairmanship of the Administrative Conference in July 1981, Loren Smith became actively involved in the political arena. He served as general counsel for Citizens for Reagan; secretary and Washington counsel for Citizens for the Republic; chief counsel for the Reagan for President, Reagan-Bush Committee and the Reagan Bush Compliance Fund; and Deputy Director, Office of Executive Branch Management during the transition period.

My own association with Loren Smith dates back to the winter of 1976, when he and his family moved to Yorklyn, a neighboring community to mine in the State of Delaware. With his acknowledged legal expertise, he became an assistant professor, and shortly thereafter an associate professor, at the Delaware Law School. During his four year stay, prior to taking a leave of absence so he could serve in the Government, he distinguished himself in such areas as administrative law, equity, trial technique, constitutional law, election law and agency decisionmaking. He also provided legal counsel to the State of Delaware's Department of Civil Defense, my own office and various foundations and institutes.

My only regret is that Loren Smith has recently chosen, for some inexplicable reason, to leave the State of Delaware and take up residence in the Commonwealth of Virginia. I am sure, however, that he will distinguish himself as a citizen of Virginia in the same way that he did in Delaware.

Mr. Chairman, I am confident that Loren Smith will serve our Nation well as a judge of the U.S. Claims Court. I appreciate your giving me the opportunity to speak in his behalf today.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Warner.

Senator WARNER. Mr. Chairman, in the interests of time I will submit my statement.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman and distinguished members of the Committee:

I am pleased to appear before you to add to the eloquent remarks offered by Senator Roth in behalf of the nomination of Loren A. Smith for the judgeship position on the U.S. Court of Claims.

My colleague from Delaware has informed the Committee of Mr. Smith's qualifications, and I wish to associate myself with his comments on Loren Smith's excellent qualifications.

Mr. Smith is no stranger to Virginia where he resided from 1973 to 1977 while he served in the General Counsel's office at the Federal Communications Commission before moving on to the White House as Special Counsel to the President, and later as the General Counsel for the Citizens for Reagan Committee.

In his current position as Chairman of the Administrative Conference of the United States, I understand that Mr. Smith has appeared before this committee on several occasions.

I trust that the Committee is aware of his varied talents which will serve him well as a member of the Court of Claims.

I join with Senator Roth in commending him to this Committee for the judiciary position on the Court of Claims.

Senator WARNER. I would like to make the observation that regardless of which jurisdiction this outstanding nominee selects for his residence, the citizens of the United States are fortunate to receive his services, subject to the advice and consent of the Senate.

I was immediately attracted to this gentleman because of our mutual interest in the Administrative Conference. By coincidence, I was once a law clerk to Hon. E. Barrett Prettyman, chief judge of the Federal circuit court of appeals, who is acknowledged to be the father in many respects of the Administrative Conference. At that time, I worked with that distinguished jurist on some of the early, formative planning for the conference. My interest continues to this day and has been fostered by this nominee.

Mr. Chairman, I yield to my distinguished colleague.

The CHAIRMAN. Senator Trible.

Senator TRIBLE. Mr. Chairman, it is a pleasure to join my distinguished colleagues in support of Mr. Loren Smith's nomination. In every respect, he is well qualified to assume a seat on the Court of Claims. His legal experience, his academic duties, and his writings all indicate fitness to serve and I commend his nomination to this committee.

The CHAIRMAN. Mr. Smith, I want to congratulate you upon your appointment by the President. You not only have two Senators; you have got three Senators endorsing you, so that is unusual. You have got an endorsement here of Senator Roth, the chairman of the Governmental Affairs Committee and a very influential man in the Senate, and then you have the endorsement of your two Virginia Senators where you reside, I believe.

I feel that from all they have said about you, unless something comes out we do not foresee, you will have no trouble being confirmed and I congratulate you again upon your appointment.

Now, do you Senators want to leave or do you want to stay?

Senator WARNER. Mr. Chairman, I wonder if the Senators would take just a moment to introduce the wives who are present.

The CHAIRMAN. Yes; I am going to call on each one of them to introduce their families in just a few minutes.

Senator WARNER. That is fine.

The CHAIRMAN. I think the first thing we will do is ask them all to stand and be sworn, all three of them. We will swear them at one time. Will you just come around the table and stand up and be sworn?

Will the testimony in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Judge BROOMFIELD. I do.

Mr. HILTON. I do.

Mr. SMITH. I do.

The CHAIRMAN. Now, I believe the first one we had was Judge Broomfield. Judge, if you have any family here or friends you want to introduce, feel free to do that.

TESTIMONY OF ROBERT C. BROOMFIELD, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Judge BROOMFIELD. Well, thank you, Mr. Chairman. My wife is back home minding our grandchildren and our 3 children are at work. It is sort of a far piece, as we say in Arizona, from Washington and a difficult price tag, so I am alone.

The **Chairman**. As I recollect, you were born in Michigan. You got your law degree in Arizona and you have been there since that time?

Judge **Broomfield**. I have been in Arizona, Mr. Chairman, since I got my law degree and during law school.

The **Chairman**. Judge Broomfield, you have been a judge of the Superior Court of Arizona, Maricopa or Maricopa—how do you——

Senator **DeConcini**. Maricopa, Mr. Chairman.

The **Chairman**. Maricopa County, since 1971. This court, I believe, is a State trial court of general jurisdiction, is it not?

Judge **Broomfield**. Yes, sir, Mr. Chairman, it is.

The **Chairman**. Now, do you foresee any difficulty in the transition from your present position of a trial judge in the Superior Court of Arizona to that of a trial judge at the Federal district level?

Judge **Broomfield**. Mr. Chairman, I do not. Arizona, as you may know, is one of those States that has adopted the Federal rules of civil procedure, as well as rules of evidence which are common to both court systems.

I have also served on the State Federal judicial council in Arizona and I am familiar with Federal practice, and I suppose the process of judging is pretty much the same, so I really do not foresee a problem, sir.

The **Chairman**. Judge Broomfield, do you feel that a judge should assume direct control over complex issues in cases in order to avoid delays and to effectively manage such cases?

Judge **Broomfield**. Mr. Chairman, I have relatively strong views on the subject of caseload management. I believe the people who are appearing before courts, whether they are in civil or criminal matters, are entitled to fair, even handed justice, but they are also entitled to justice in a reasonable period of time.

I believe it is the obligation of courts to insure that they get that expeditious justice. I spent a good deal of my judicial career on that subject. I was involved with the American Bar Association in their recent adoption of some standards which had as its basis more expeditious processing of litigation in trial courts.

And in our own trial court, as its presiding judge, I have been responsible for a delay reduction program that has essentially cut our caseload and the time it takes to process cases almost in half. Justice is not just fairness; it is with some dispatch, also.

The **Chairman**. Judge Broomfield, there is frequently a conflict between the deep-felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Judge **Broomfield**. Well, Mr. Chairman, I believe it is the obligation of judges to follow the law—to find out the law, interpret it and follow it, and not to impose their personal views on others.

However, when they come to difficult questions, it is their obligation to follow that law, wherever it may lead them.

The **Chairman**. Judge Broomfield, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Judge Broomfield. Well, Mr. Chairman, I would believe that phrase would mean deciding cases or issues that are not really before you, if judicial activism is referred to with respect to the substantive law.

I believe judges have an obligation to decide those cases that are brought before them and not matters that are not before the court. But as I say, when the matters are brought before them, they must decide them, difficult or easy, in accordance with the law.

The Chairman. Some judges have taken over the operation of hospitals, school districts, and other State institutions that many people feel are beyond their jurisdiction. We have a division of powers of the Constitution. The powers of the Federal Government are set out in the Constitution, and those that are not set out—the 10th amendment says that all powers not specifically delegated to the Federal Government, to the Union, are reserved to the States.

If they are reserved to the States, it seems that they should be left to the States, unless there is some issue there involving constitutional rights in some way. How do you feel about this?

Judge Broomfield. Well, Mr. Chairman, I am well aware of the 10th amendment that powers not given to the Federal Government are reserved to the States and to the people, and I believe the 10th amendment is as much a part of the Constitution as any other provision.

I believe judges are called upon to decide those questions that are properly placed before them. If, of course, some Federal Constitution question is before a court, the judge must decide that question, but he must not search out areas that do not exist in lawsuits properly before the court.

The Chairman. One of your Senators is a very prominent member of this committee; we are very proud of him and he introduced you here today. I do not know whether he has any questions or not.

Senator DeConcini, do you have any questions?

Senator DeConcini. Well, Mr. Chairman, thank you. Judge Broomfield, something has come up just today that I think Senator Simon is going to get into in his questions.

I have spoken to Judge Broomfield about it and I think he can explain the particular incident that has been raised, and so I would yield to the distinguished Senator from Illinois.

The Chairman. The distinguished Senator from Illinois.

Senator Simon. Thank you very much, Mr. Chairman, Senator DeConcini.

First of all, let me say just in general—and I do not mean this disrespectfully to the other two nominees or to any other nominees—I think the idea of moving on to the Federal bench people who have had experience, who have been tried, and we know will be good judges is a sound procedure, in general, and I give you special welcome because of that.

Judge Broomfield. Thank you.

Senator Simon. There were some questions that came up at the last minute. Frankly, they came up at the last minute because a member of Senator Biden's staff had a death in the family and things just did not move along as rapidly as they could have.

So, earlier, I indicated that maybe we should not proceed with the hearing, but after getting a phone call from Senator DeConcini, I indicated that I thought it was alright to go ahead. I would like to inquire about the property that was purchased that has a restrictive covenant on it.

Do you want to explain the circumstances there and what the situation is?

Judge **Broomfield**. Certainly, Senator. I purchased a home about a year-and-a-half ago. It is an older home in an older area in Phoenix. I understand—and I found out during the FBI investigation that this deed restriction was there. I was unaware of it before that time.

I understand it was platted in 1946, at which time the restriction was placed upon the property. At that time, I was 13 years of age and resided in Pennsylvania. I understand—well, the *Kramer* case in, I believe, 1951, of course, properly invalidated all such deed restrictions. And, of course, this deed restriction is as invalid as any other is in my mind and I believe in the mind of the law.

Senator **Simon**. I thank you, and I think that——

Senator **DeConcini**. Would the Senator yield?

Senator **Simon**. Yes, I would be pleased to yield.

Senator **DeConcini**. I just wanted to point out for the record, too, you are the grantee of the property, right? You did not sign even the transfer of the property?

Judge **Broomfield**. That is correct, Senator DeConcini.

Senator **DeConcini**. You were only the recipient in the sale of it?

Judge **Broomfield**. That is correct. I am the grantee and my name is—I did not execute the deed or convey the property.

Senator **DeConcini**. Thank you, and the property is in community property name or is it in your name alone?

Judge **Broomfield**. I do not recall whether we took it in community or in joint tenancy, Senator.

Senator **DeConcini**. It makes no difference.

Judge **Broomfield**. Probably in joint tenancy.

Senator **DeConcini**. But neither you nor your wife had any signature on the transaction of transferring this property?

Judge **Broomfield**. Only if it was in joint tenancy and we signed the usual exception in Arizona that we accept in joint tenancy, as it is in derogation of the Arizona community property law, but that reason alone.

Senator **DeConcini**. Thank you, Judge Broomfield.

Thank you.

Senator **Simon**. I thank you. I think the combination of your, No. 1, not knowing about it and, No. 2, any such restriction being totally invalid anymore, in addition to everything else, clarifies that.

Two other questions very briefly. One, has anyone asked you any questions in order to be either nominated or since the nomination that you felt were improper?

Judge **Broomfield**. No, sir. The only conversations I have had were when the President called me personally and told me and asked me nothing, other than if it was all right that he sign the nomination. I allowed that that was all right. And the other was this morning when I went to the Justice Department and they told me where the hearing room was. That is all.

Senator SIMON. And then finally, canon 2 of the American Bar Association's Code of Professional Responsibility says that a lawyer, and I am quoting now, "regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Do you want to say how you may have responded to that in your service as an attorney or as a citizen?

Judge BROOMFIELD. Senator, I served as a volunteer referee for our superior court's juvenile division and, in another context, represented people who were disadvantaged. In addition, about a year-and-a-half, maybe 2 years ago, I signed a letter that went to every member of the bar in Maricopa County, which is about 4,500, urging pro bono work on behalf of disadvantaged people in matters that come before the courts or legal problems that each of them had.

And I am led to believe that that response—that letter received considerable response from the practicing bar in Maricopa County.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. I think that is all the questions that we have, Judge. We hope you enjoy your tenure on the bench and your nomination will come up before the committee at a reasonably early date for confirmation.

Judge BROOMFIELD. Thank you very much, Mr. Chairman. It was a delight for me to be nominated by the President and to appear before such a distinguished panel. Thank you, sir.

The CHAIRMAN. You are now excused.

Judge BROOMFIELD. Thank you.

The CHAIRMAN. Our next nomination is Claude M. Hilton, of Virginia, if you will come around, Mr. Hilton. Do you have any family or friends here you would like to introduce?

TESTIMONY OF CLAUDE M. HILTON, OF VIRGINIA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Mr. HILTON. Sir, I do, if I may. I have my wife, Joretta; my son, John; and my daughter, Rachel, along with a few friends who I will not try to introduce individually, that I am delighted to have here today.

The CHAIRMAN. After seeing your pretty wife, I can see how you got ahead. [Laughter.]

Mr. HILTON. Thank you.

The CHAIRMAN. Mr. Hilton, you have engaged in litigation on both the State and Federal levels in the State of Virginia, I believe.

Mr. HILTON. Yes, sir.

The CHAIRMAN. Do you believe that litigants in State courts receive the same level of fairness, due process and quality of justice as do litigants in Federal courts?

Mr. HILTON. Yes, sir. Based on my experience, my assessment would be that they do.

The CHAIRMAN. Mr. Hilton, would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. HILTON. Well, with any case that would come before me, I would intend to be aware of the parties involved and what the case was about, and certainly would not hear any case which would affect any financial interest I had in anything or would involve a relative or perhaps even a close friend, and I would give attention to the appearance of a conflict as well as any actual conflict.

I, certainly, would not want to sit and hear anything where it would appear that I had a conflict, much less an actual conflict of interest.

The CHAIRMAN. Mr. Hilton, would you give us your own perspective on the recent trend in the Supreme Court toward stricter standards of standing?

Mr. HILTON. I guess I would generally be in favor, if I understand the trend to be some general tightening of the standing requirements. I suppose it would be somewhat easy for a judge to go beyond the intent of a statute and allow persons to come into court that were never intended, if strict adherence was not applied to a person's standing to bring an action.

The CHAIRMAN. Mr. Hilton, I believe in response to a portion of the committee questionnaire concerning judicial activism, you stated, in part:

> The judiciary should view with reluctance the imposition of continuing oversight responsibilities upon other institutions of government. The judiciary is not the branch of government in our system to administer programs or facilities and it is ill-equipped to do so. Care should be taken to see that administration remains with institutions which are capable of carrying out those duties.

Mr. Hilton, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. HILTON. Senator, I am not sure that I could relate any specific standards other than to say that for the court to get involved in that kind of oversight, I think, is an extreme measure and one that ought to be viewed with some reluctance, as I have already said.

And I think that you would have to look on a case-by-case basis, but be very reluctant to apply that kind of remedy in any situation.

The CHAIRMAN. Mr. Hilton, I think one of the required requisites of a judge, whether State or Federal, is judicial temperament. Some people are brilliant in mind, but they have little patience, they are not courteous always, and they embarrass people sometimes unnecessarily.

I have seen Federal judges embarrass lawyers, jurors and witnesses when there is no excuse for it. How do you feel about that?

Mr. HILTON. Well, I think that a judge ought to be courteous and patient with everyone. I suppose the only job that a judge has is to listen to facts and make a ruling and to make a decision, and there ought to be some patience involved in that and it ought to be done with some courtesy. I hope I have tried to do that in my years in practice and in other things that I have done.

The CHAIRMAN. A Federal judge has all the power in the world; he has got the power of life and death in his hands. I have always felt that the higher a man gets in life, the more power he has, the more carefully he ought to exercise that power and be extremely courteous.

I think the highest position in this whole Government, the President of the United States—I think he ought to be the most courteous man; the same thing with judges. A lot of people do not understand when those in authority flaunt their authority and take steps that are not in keeping with their office.

How do you feel about that?

Mr. HILTON. I concur in what you have just said.

The CHAIRMAN. The Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

I note, Mr. Hilton, that you have been a deputy clerk of the circuit court. You have been a commonwealth attorney. Is there anything in your public record that you think in any way might disqualify you from being a good Federal judge?

Mr. HILTON. No, sir, I am not aware of anything.

Senator SIMON. Have there been any questions asked of you that you think are improper as to how you might rule or what you might do if you are approved?

Mr. HILTON. No, sir.

Senator SIMON. And then finally, the question you heard me ask of the other judge, and that is the canon 2 question of helping the disadvantaged. Do you want to tell us what you have done either as a private citizen or as an attorney or a public official to be of assistance to the less fortunate?

Mr. HILTON. Really, I think starting as a lawyer, I was involved for a number of years in the Legal Aid Program in Arlington County that was set up by the bar association, as were a number of other lawyers, and we all took our turns representing indigent people in civil cases. They needed help.

That continued until such time as I believe there was some Federal funding that came in and it was essentially taken over by Legal Services.

For almost as many years as I have been involved in law practice, I have taken a number of court-appointed cases. I guess I could say that I have taken fewer as time has gone by, but I certainly believe that I have done my share and represented many, many people on that kind of basis.

I have also—in the community, I have been active in the community and I have maintained a general practice, and over the years I have always represented a number of people where I did not charge a full fee; sometimes I did not charge a fee at all.

I have done some work along those lines with the Virginia State Bar. I have tried to be active in the bar over the years and have worked in the area of trying to have adequate fees paid to court-appointed counsel in attempting to see that there was adequate representation.

Those are the things that occur to me at the moment. Maybe with some of my other public service, I have done some acts of charity, but those, I think, are the things that I have done as far as my practice and my professional life have been concerned.

Senator SIMON. I thank you. There is a possibility we may have some additional questions. would you be willing to submit answers to written questions that we provide you?

Mr. HILTON. Yes, sir, surely.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Hilton, I do not think I have any other questions. I want to wish you well on the bench. I hope you will enjoy your service there. I think a Federal district trial judge is an ideal position and I think any lawyer who really loves to try cases enjoys the courtroom, and I certainly hope you enjoy your service on the bench.

Mr. HILTON. Thank you very much, Senator. I am looking forward to it.

The CHAIRMAN. You are now excused.

Our next appointee is Loren A. Smith, of Virginia, a judge for the Court of Claims.

Mr. Smith, you have served approximately 4 years as Chairman of the Administrative Conference of the United States, I believe. The Conference is the Government's expert advisory agency on questions of administrative law and procedure and governmental processes.

Would you tell the committee what your duties have been as chairman, and do you believe this experience will be beneficial to you as a U.S. Claims Court judge?

TESTIMONY OF LOREN A. SMITH, OF VIRGINIA, TO BE A JUDGE OF THE U.S. CLAIMS COURT

Mr. SMITH. Yes, I do. Thank you, Senator. My duties as Chairman of the Conference have been to manage the affairs of the Conference. The Conference is a kind of unique entity in Government. It is both a classic research organization and it is also a quasi-legislative body where the Conference brings together experts on administrative law and procedure to make Government really more fair and more efficient.

That is our dual mandate, and I think two consistent goals. We do this by doing studies on problems in administrative procedure and voting on these studies in the form of recommendations.

The Conference is a diverse group. It has representatives from most of the major agencies; general counsels; public members, whom I, as Chairman, appoint, with the advice and consent of my council. And then I testify before the committees of the Congress on these recommendations and try to persuade, under our statutory mandate, the agencies to adopt those recommendations.

Most of the recommendations have dealt with areas of administrative procedure that have relevance to some of the issues before and jurisdictions of the Claims Court. For example, we have worked on the Contract Disputes Act and made a recommendation to the Senate and to the House and to the agencies that the Contract Disputes Act be modified to make certification nonjurisdictional.

We have also done work in the area of employees' constitutional tort claims and the administrative processes of many agencies. We have done studies on administrative law judge issues. The Conference has published a manual for administrative law judges.

The Conference experience has qualified me also because our role is to be—I guess maybe nonpartisan, to look at issues not only as policy issues—but to look at what works, what is fair, what is just, what is efficient, and develop a consensus rather than just voting as a majority.

And the Conference, I believe, has been very successful in doing that over the years, and I think that experience—that and the presiding and working with the members—is the kind of experience that is very useful in the judicial area.

The CHAIRMAN. Mr. Smith, the interlocutory jurisdiction of the court of appeals for the Federal circuit does not permit review of Claims Court decisions on liability before the quantum of damages has been determined in the case.

Do you believe that this has adversely affected the productivity of the Claims Court?

Mr. SMITH. No, Senator I think the effect has been the reverse. Originally, before the Court Improvements Act of 1982, the U.S. Court of Claims had a dual structure. There was a trial division and an appellate division, and under that system virtually any action the trial commissioner took was immediately appealable to the appellate division.

That tended to, I think, delay proceedings. When the separate Claims Court was created, the procedure was brought into line with the relationship between Federal district courts and circuit courts of appeals. And I think the current system is working fine and is effective in processing cases.

The CHAIRMAN. Mr. Smith, rule 77 of the Claims Court rules requires random assignment of cases by the clerk. Would you feel that a court rule is sufficient to avoid specialization within the court or that legislation similar to the Federal Courts Improvement Act pertaining to the court of appeals for the Federal circuit should be mandated for the Claims Court?

Mr. SMITH. I do not believe that at this time, Senator. I should add with respect to this question and the last one that the thing I have learned from administrative procedure is, it is often not useful to write things permanently into concrete when you pass a statute that tends to add more permanence to administrative arrangements.

In some cases, that is good, but with newer procedures it is better to allow more flexibility. In addition, there are certain areas where random assignment does not work and is inappropriate. I guess the simplest example is in an Internal Revenue case where someone is suing for a particular year's income tax refund. You would want the same judge who is handling 1979 to handle 1980. Otherwise, it would be a waste of judicial resources.

And in addition to that, there are cases where a judge recuses himself for one reason or another. There is not a necessarily random assignment in those situations. I think the system is working well from everything I have learned, not yet being on the court, and would think it should be allowed to continue unless a problem emerges.

The CHAIRMAN. Mr. Smith, would you tell the committee how you will resolve any potential conflicts of interest, including the procedure you will follow in determining these areas of concern?

Mr. SMITH. Yes, Mr. Chairman; I think that is one of the things that a judge has to be particularly sensitive to. I know at the Administrative Conference, which is an advisory body, we have a conflict of interest disclosure form for all public members because even though we, as the Administrative Conference, are only making advisory decisions that do not directly affect the rights of any individuals, it is important that people have confidence in their Government and they know what interests are behind decisionmakers.

I think the key is that a judge, while not a hermit or a recluse or a monastic, is also just not one of the regular fellows. The judge has to exercise a particular amount of discretion.

I must say Judge Merritt Ruhlen, who wrote our manual for administrative law judges, had a very useful section on that and suggested that the balance was between not cutting our judges off, on the other hand not being like everyone else. They have got to be particularly sensitive.

Currently, my stock ownership is virtually nil, as my disclosure shows. I think the total shares were something like $300 worth of stock, so there is no immediate likelihood of that kind of financial interest.

The Administrative Conference has no formal regulatory or significant contracting responsibility. So on the Claims Court, those would not be likely sources of conflicts. Any stocks that I did own or happen to own in the future would be programmed onto some kind of system where if a case came up, relating to one of them I would recuse myself.

I think also it is important that if you have close associates involved in a case the need to recuse oneself may be important to avoid the appearance of impropriety.

The CHAIRMAN. Mr. Smith, would you like to introduce your family or friends that you have here today?

Mr. SMITH. Thank you very much, Mr. Chairman. I would like to introduce my family, if they could stand. This is my wife, Kitty Smith, Katherine Smith, and next to her is my 5-year-old son, Adam Smith, in the boots, Virginia boots; and next to him is Loren Allan Smith, Jr., my 8-year-old son.

Next to him is almost a member of the family, my uncle, Frank Whetstone—uncle by friendship—and a number of friends I have in the audience who are members of the Administrative Conference, and good friends. I will not introduce them all, but——

The CHAIRMAN. Do they all endorse you? [Laughter.]

Mr. SMITH. Well, I guess so.

The CHAIRMAN. I do not hear any dissent.

Well, I wish you successful service on the bench.

The distinguished Senator from Illinois.

Senator SIMON. Do you have anything in your public record that would, in your opinion, disqualify you from service on the bench or make it difficult for you to perform effectively on the bench?

Mr. SMITH. Senator, I do not believe so.

Senator SIMON. And let me just add, as I mentioned to the others, that we may be submitting some additional questions and we would appreciate having those questions returned in writing.

Mr. SMITH. Certainly.

Senator SIMON. Has anyone asked you questions that you felt were improper or that should not be asked of someone who is going to be serving on the—now, your jurisdiction is a little more unusual in the Court of Claims. But, nevertheless, has anyone asked you questions that you think may be improper?

Mr. SMITH. No, Senator, I do not believe we have had—as I think the last nominee indicated, most of the questions have just been the questionnaires that I have received from the Justice Department and the committee; I do not think anything else.

Senator SIMON. And then the final question you heard me ask the other two about canon 2 of the Code of Ethics, helping the disadvantaged in our society; can you cite anything you have done either as an attorney or as an individual citizen to respond?

Mr. SMITH. Well, I guess there are two roles that I would hope have helped people who are disadvantaged—one, I served as special assistant U.S. attorney for a 4-month appointment in D.C., and one of the more satisfying things was working at the citizen's complaint center, which is an area where citizens who have problems—and most of them are in the disadvantaged area that either impinge on the criminal justice system are for some reason shunted aside by the criminal justice system—come to seek fairness or justice.

In that experience, I think I was able to do a little good. Many of them were interfamily disputes, trying to resolve those and do a little counseling and spending some evenings, late evenings, at that center was gratifying to me and helpful and hope, to those individuals.

The bulk of my career has been with Government—and fairly little of it in private trial practice, in fact; very little of it. And I think in Government one of the mandates is to make Government work better for every citizen.

And that is particularly important for those people who are less fortunate than the average, since they are the ones who in some ways depend on it most. The person who is able to afford a large law firm for estate planning or whatever generally may not need the system as much as the person who is homeless or the person who does not have access to lawyers.

Senator SIMON. I thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I think that completes the hearing. We will now stand adjourned.

[Whereupon, at 3:17 p. m., the committee was adjourned.]

BIOGRAPHIES

JUDGE ROBERT C. BROOMFIELD

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ARIZONA

Birth: June 18, 1933, Detroit, MI.

Legal Residence: Arizona.

Marital Status: Married to Cuma Cecil Broomfield, 3 children.

Education: 1951-1955—Pennsylvania State University, B.S. degree. 1958-1961—University of Arizona, LL.B. degree.

Bar: 1961—Arizona.

Military Service: 1955-1958—United States Air Force.

Experience: 1961-1962—Law Clerk-Bailiff, Hon. Jack D. H. Hays, Superior Court of Arizona, Maricopa County. 1962-1971—Carson, Messinger, Elliott, Laughlin & Ragan, Associate (1962-1967), Partner (1967-1971). 1965-1971—Volunteer Referee, Superior Court, Juvenile Division. 1971-present—Judge, Superior Court of Arizona, Maricopa County.

CLAUDE M. HILTON

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA

Birth: December 8, 1940, Scott County, VA.

Legal Residence: Virginia.

Marital Status: Married to Joretta Cabaniss Hilton, 2 children.

Education: 1959-1963—Ohio State University, B.S. degree. 1963-1966—American University Law School, J.D. degree.

Bar: 1966—Virginia.

Experience: 1965-1966—Deputy Clerk, Circuit Court of Arlington County. 1967-1968—Assistant Commonwealth Attorney, Arlington County. 1968-1974—Varoutsos, Koutoulakos, Arthur and Hilton, Partner. 1974--Commonwealth Attorney, Arlington County. 1975-present—Private practice, Arlington, VA.

LOREN A. SMITH

NOMINEE, JUDGE, U.S. CLAIMS COURT

Birth: December 22, 1944, Chicago, IL.

Legal Residence: Virginia.

Marital Status: Married to Catherine Mary Yore, 2 children.

Education: 1962-1966—Northwestern University, B.A. degree. 1966-1969—Northwestern University School of Law, J.D. degree.

Bar: 1970—Illinois.

Experience: 8/69-11/69—Unemployed. 1969-1970—Republican Candidate for State Representative, 1st Legislative District of Illinois. 1970—Mason Upper Grade Center, Chicago Board of Education, Substitute Teacher. 1970—Winston Prouty for Senate, Campaign Worker. 1970-1971—Kimberly-Churchill, Inc. and Dental Institute of the United States, General Counsel & Secretary-Treasurer. 1971-1973—Robert Suggs, Inc., General Counsel & Corporate Director. 1972-1973—Sidney & Austin, Consultant. 1973—FCC, General Attorney. 1973-1974—George Mason University Law School, Adjunct Professor. 1973-1974—Assistant to the Special Counsel to the President, The White House. 1974-1975—Special Asst. U.S. Attorney, District of Columbia. 1975-1977—Citizens for Reagan, General Counsel. 1976-1980—Delaware Law School, Associate Professor. 1976-1979—Legal Consultant: Department of Civil Defense, State of Delaware, National Right to Work Legal Defense Foundation, Senator William Roth, Lincoln Institute for Research & Education. 1977-1979—Citizens for the Republic, Secretary & Washington Counsel. 1979-1980 and Feb./Mar. 1981—Reagan for President, Reagan-Bush Committee and Reagan-Bush Compliance Fund Chief Counsel. 1980-1981—Office of Executive Branch Management, Presidential Transition, Deputy Director. 1981-present—Administrative Conference of the United States, Chairman.

CONFIRMATION HEARING ON: WAYNE E. ALLEY, JAMES D. TODD, AND DONALD E. WALTER

WEDNESDAY, JUNE 19, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Simon.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The meeting will come to order.

The House has a vote on and we are going to hear from the Congressmen first so they can go and vote. If you will come around the table and just tell us whom you are speaking for, and you can put it in the record or part of it in the record, any way you want to handle it.

STATEMENT OF HON. DON SUNDQUIST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. SUNDQUIST. Thank you, Mr. Chairman.

Don Sundquist, Tennessee, 7th Congressional District.

I join my distinguished colleagues, Senator Gore and Senator Sasser, today here on behalf of an outstanding jurist, Judge Jim Todd from Jackson who is here with his family. I have heard only the highest praise from people in this community. I wanted to be here on this occasion to urge his approval and thank you for letting me speak today, Mr. Chairman.

The CHAIRMAN. Thank you very much. We are pleased to have you, and I can understand you have got to go vote, so you are excused.

Mr. SUNDQUIST. I appreciate you letting us go out of turn.

The CHAIRMAN. Congressman Livingston.

STATEMENT OF HON. BOB LIVINGSTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. LIVINGSTON. Thank you very much, Mr. Chairman.

I am Bob Livingston, Congressman from the First District of Louisiana, and I am here on behalf of an old friend of mine, Don Walter, who is a graduate from Louisiana State University and who has served admirably throughout his many, many years in the practice of law, but primarily who distinguished himself as a U. S. attorney for the Western District of Louisiana for 7½ years. He has been nominated to serve as judge for the U.S. District Court for the Western District of Louisiana. I certainly would endorse that nomination and urge the panel to approve and consent to his nomination. I think he will make an outstanding jurist, and I hope that his nomination will be acted on expeditiously; and I appreciate also the opportunity to speak to you out of order like this. I apologize to the committee for the fact that we have to make that vote.

The CHAIRMAN. We are very pleased to have you, and I can understand the urgency of your vote and thank you for appearing.

Mr. LIVINGSTON. Thank you, Mr. Chairman.

The CHAIRMAN. Now, first on the agenda is Wayne E. Alley of Oklahoma to be United States District Judge for the Western District of Oklahoma.

Senator Nickles is here and, Senator, we will be glad to hear from you.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Thank you, Mr. Chairman.

It is a pleasure for me to appear before this committee to recommend to you and to the President that he appoint Wayne Alley as a Federal judge for the Western District of Oklahoma. I also would like to note that Senator Boren would be here had he not become ill and is still in Oklahoma. He supports this nomination as well.

The CHAIRMAN. Senator, you might have the nominee come up by you, if you care to.

Senator NICKLES. Mr. Alley is currently serving as dean of the University of Oklahoma College of Law, and he has served in that position since 1981. He is also director of the University's Law Center. Wayne is a retired Army brigadier general and was the top military judge for the Army in Europe from 1978 to 1981.

From 1975 to 1978 he was the chief of the Army's Criminal Law Division in the United States. He is also a member of the Oklahoma and American Bar Associations.

Wayne Alley, Mr. Chairman, was recommended to me by a bipartisan judicial nominating committee after many months of review. I believe the people of Oklahoma would be well served with the appointment of Wayne Alley. He has devoted his entire adult life to the legal profession, and I believe he will be a tremendous asset to the Federal bench. He is well respected within the legal community of Oklahoma.

On behalf of Senator Boren and myself, we give strong recommendation to Wayne Alley becoming confirmed by the full Senate and being appointed as Federal judge for the Western District of Oklahoma.

The CHAIRMAN. Is Senator Boren going to appear? Does he want to put a statement in?

Senator NICKLES. Senator Boren had planned to be here.

The CHAIRMAN. He authorized you to speak for him?

Senator NICKLES. Yes. He is ill and still in the State.

The **Chairman**. I want to thank you for coming, and I want to say to the nominee that you are fortunate to have been recommended here by Senator Nickles, who is a close friend of the President and who will carry greater weight with you in the Senate. The other Senator is also a fine man, and I am glad he endorsed you too. With both of them in back of you, I think we can get you through pretty quick. [Laughter.]

Next we have Judge James D. Todd of Tennessee.

Is Senator Sasser here?

Senator **Sasser**. Yes, Mr. Chairman.

The **Chairman**. Senator Sasser, we will be glad to hear you on behalf of the nominee.

STATEMENT OF HON. JIM SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator **Sasser**. I might add that Senator Gore from Tennessee is also here today.

The **Chairman**. Where is he?

Senator **Sasser**. He just joined us here at the table, Mr. Chairman.

The **Chairman**. Oh, yes. I did not see you. You may proceed.

Senator **Sasser**. Thank you, sir.

Mr. Chairman and distinguished members of the committee, it is a genuine pleasure for me to appear today to endorse the nomination of Jim Todd to be U. S. District Judge for the Western District of Tennessee. Mr. Chairman, those who have had the opportunity to watch Jim Todd preside as a state circuit judge in Jackson, TN, have been very impressed with his mature judgment and his splendid judicial temperament. The attorneys who practice in Jim Todd's court uniformly remark on his fairness and his accessibility. The jurors and witnesses who appear in his court uniformly say that he is a superb jurist.

When Judge Todd renders a decision, both sides know that he has carefully considered the evidence and the applicable law; and, Mr. Chairman, I think we are fortunate today to be considering the nomination of one who is already a distinguished jurist on the State level, one who will bring that experience to the Federal bench.

Mr. Todd's legal judgment has been appreciated by the appellate courts in the State of Tennessee as well. Those familiar with his record tell me that over the years he has never been reversed by an appellate court, and that is something that very few trial judges can say, as the distinguished chairman knows.

A further measure of the respect that he commands in the legal profession is that when needed he sits as a special judge on the Western Division of the Court of Appeals in Tennessee. In addition, he has taken steps to ensure that cases are handled expeditiously. He has demonstrated by example that he knows justice delayed is justice denied.

In our State of Tennessee the normal criminal court sessions run for about 6 weeks, but Judge Todd's sessions run closer to 8 or 9 weeks, and that is one way he has made such great headway in cleaning up a very substantial backlog of cases that he inherited when he took the state bench. When Judge Todd was appointed, he faced a tremendous backlog of cases and he served notice that this backlog would be reduced, and it has been by lengthening the time that he sits on the bench. He has held court as late as midnight to clear cases from his docket.

He is the perfect example, Mr. Chairman, of a hard working, dedicated jurist and the type we need to handle the ever-increasing caseload that we have at the Federal level. I might say that his service to the legal profession has carried over into other areas as well. He has served as a past president of the Jackson Bar Association, which I think is indicative of the esteem in which he is held by his fellow practitioners. He served on the Board of Professional Responsibility Hearing Committee. He has also been chairman of the Tennessee Bar Committee on Federal Practice and Procedure and the Committee of Local Rules of Court.

He has proven his commitment to ensuring that our legal system works efficiently and that it works fairly for all of our citizens. I might add that despite his very heavy professional schedule, he has found time to be active in community affairs. He served on the board of his alma mater, Lambuth College, and is presently on Lambuth's President's Advisory Council. He is a past president of the Lambuth College Alumni Association. He has also worked with our young people as a past president of the Jackson Boys 'Club.

Mr. Chairman, I believe that Jim Todd is the type of individual that we need on the Federal bench. He is a hard working professional with a firm grasp of the law, who has a realization that fairness is the essence of a judge's job, and he is a dedicated citizen of his community. So I come here today to endorse enthusiastically his nomination, and I thank you, Mr. Chairman, and the members of the Committee for the opportunity to appear here and testify, and I would urge the swift approval of Judge Todd's nomination.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR JIM SASSER

Mr. Chairman, and members of the committee. It is a pleasure to be here today to speak on behalf of the nomination of Jim Todd to be U.S. District Judge for the Western District of Tennessee.

Those of us who have had the opportunity to watch him preside as a circuit judge in Jackson, Tennessee have been continually impressed by his extremely mature judgment and his fine judicial temperament. Attorneys who practice in Judge Todd's court remark on his fairness and accessibility.

When he renders a decision both sides know that he has carefully considered the evidence and the applicable law. Moreover, his legal judgment is appreciated by the higher courts as well. Those familiar with the details of his record tell me that he has never been overturned on appeal. A further measure of the respect he commands in the legal profession is that, when needed, he sits as a special judge on the West Tennessee Division of the Court of Appeals.

In addition, he has taken the steps necessary to ensure that cases are handled expeditiously. In my State of Tennessee, the normal criminal session runs about six weeks. Judge Todd's sessions last closer to eight or nine weeks.

The Senate, and especially the Judiciary Committee, has been watching with concern the growing number of cases coming before the Federal bench. We have considered numerous measures to eliminate frivolous cases and ensure that the courts have the time to devote to cases which raise significant legal issues. Despite our efforts, district courts are still under considerable pressure from the sheer volume of cases they must hear. Judge Todd has coped with that problem with dedication and hard work.

When Jim Todd was appointed to the 26th district court, he faced a tremendous backlog of cases. He served notice the backlog would be reduced and it has been. In fact, Judge Todd has held court as late as midnight to clear cases from the docket. He is a perfect example of the kind of hard-working, dedicated judge we need to handle the ever increasing caseload of the Federal judiciary.

Jim Todd's service to the legal profession has carried over into other areas as well. In addition to being a past president of the Jackson Bar Association, he has served on the board of Professional Responsibilities Hearing Committee. He has also been chairman of the Tennessee Bar Committee on Federal Practice and Procedure and the Committee of Local Rules of Court. He has proven his commitment to ensuring that our legal system works efficiently and that it works fairly for all.

Despite his heavy schedule, Judge Todd has found time to be very active in his local community. He has served on the board of directors of his alma mater, Lambuth College and is presently on Lambuth's president's advisory council. He is a past president of the Lambuth College Alumni Association. He has also worked with our young people as a past president of the Jackson Boys Club.

Mr. Chairman, I believe Jim Todd is the type of individual we need on the Federal bench. He is a hard-working professional with a firm grasp of the law and he is a dedicated citizen in his community.

I would like to thank the committee for the opportuntiy to be here today and I urge the committee to move swiftly on Judge Todd's nomination.

The CHAIRMAN. Thank you, Senator.

Senator Gore.

STATEMENT OF HON. ALBERT GORE, JR., A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator GORE. Mr. Chairman, Senator Simon, I want to enthusiastically support this nomination. I want to echo the words spoken by my senior colleague, Senator Sasser.

With your permission, I will put a more lengthy statement in the record, but on this occasion I would like to add only one personal note. My uncle, my mother's brother, is a practicing attorney in the jurisdiction of Judge Jim Todd, and he has known Judge Todd not only as a friend but as a lawyer and as a jurist for a long time; and at my request he provided a very lengthy analysis of how Judge Todd is viewed in the legal community in Tennessee, and everything Senator Sasser has said is absolutely true.

This is a hard working, excellent jurist who will bring great credit to the Federal bench. I wish to urge his approval in the strongest possible terms because I believe he will do an excellent job and serve this community well.

[Statement follows:].

PREPARED STATEMENT OF SENATOR ALBERT GORE, JR.

Mr. President, I strongly support the nomination of Judge James Todd to the new federal district court judgeship in the Western District of Tennessee. Judge Todd has compiled an outstanding record as a circuit court judge in Tennessee. Rarely have I seen an individual who commands such broad, nonpartisan support and respect.

I believe that we must give thoughtful consideration to each individual nominated to be a federal judge. Judge Todd and I met personally recently and discussed his views of the federal judiciary and the rule that judges should play in dispute resolution. I was impressed with what I heard. And I have been equally impressed by the strong recommendation that he has received from many individuals in Tennessee.

In order to preserve the principle of separation of constitutional powers and insulate judges from improper attempts to exert political influence, the Constitution provides that they shall have life tenure and no salary reduction during their time in office. Throughout our history, judges have exerted an enormous influence on the course of events.

We must therefore give special attention to nominees selected by the President to serve as federal judges. We must ensure that they are committed to fairness and impartiality in decision-making, that they will strive to serve the ends of justice in every case, and that they are steadfast in allegiance to the Constitution and fundamental tenets of our form of government. Judge James Todd not only meets these requirements, but also exemplifies the best qualities of members of the federal judiciary.

Mr. President, I support the nomination of Judge James Todd to the federal district court bench wholehartedly and without reservation. I urge my colleagues to give prompt approval to his nomination.

The CHAIRMAN. Thank you, Senator.

Judge Todd, I want to congratulate you upon being nominated by the President to this position, and it is a position of great importance. I was a trial judge in South Carolina in the highest trial circuit court, and about 98 percent of the cases will be ended right with your court in the Federal court. Only a few are appealed. So it is a tremendous responsibility to administer justice as a trial judge has to in the Federal or State courts.

Also I want to congratulate you upon having both your able Senators come here and testify on your behalf and also Representative Sundquist who came and testified for you, and from all we have heard about you, know about you, we feel that you might get through [laughter] and that you will be confirmed pretty quickly, we think.

Thank you very much, Senators, for coming and you are excused or you can stay if you want to; and as soon as we hear from all the Senators and House members, then we will begin to swear the witnesses and ask some questions.

Senator SIMON. Mr. Chairman, before you swear the witnesses in, I am going to have to head on to some other appointments but I simply want to offer the minority point of view there is no objection to any of these three judges; and let me just add my own appreciation for these good nominations. I do not suggest that everyone who becomes a Federal judge ought to have some bench experience, but I think in general it is a wise idea. I note that all three nominees today have served on the bench and that they have been good judges. It is very likely that someone who has been a good judge at one level will continue to be a good judge at another one.

Thank you.

The CHAIRMAN. Thank you very much.

Now, we have had Representative Livingston who has already been here and testified on behalf of Mr. Walter of Louisiana. Senator Boren wanted to come but was unable to be here.

Now we will ask all three nominees to stand up and be sworn.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. ALLEY. I do.

Mr. TODD. I do.

Mr. WALTER. I do.

TESTIMONY OF WAYNE E. ALLEY, OF OKLAHOMA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA

The CHAIRMAN. I believe Dean Alley was first on the agenda. If you will come around, Dean, and have a seat.

Do you have family or friends here you would like to introduce to us?

Mr. ALLEY. I am sorry that my family could not be present. I would like to introduce friends from the extended family, the U.S. Army with which I served for so long. Col. Kenneth Crawford, who after his retirement now serves as chief of education and training with the Federal Judicial Center and who has promised to educate us; Col. Thomas G. Jones, who after a lengthy service with the U.S. Army Court of Military Review, serves with the administrative office of the U.S. courts; Miss Rachel Jones, who is on the staff of Senator Durenberger and has been very hospitable while I have been in the building and who I have known, I believe, since 2 days after her birth.

The CHAIRMAN. Thank you very much. We are very glad to have them with us.

Incidentally, did you join the Reserves or the regular Army first?

Mr. ALLEY. I joined the Reserves through an ROTC commission in 1952, but very soon thereafter was called to active duty for 2 years during the Korean war, left active duty for attendance at law school and a brief period of private practice, returned to active duty in 1959 and served in the regular Army until retiring in 1981.

The CHAIRMAN. So you had about how many years in the Army?

Mr. ALLEY. Twenty-nine total, in about twenty-five of which I was on active duty.

The CHAIRMAN. I guess you know Gen. Emory Sneeden?

Mr. ALLEY. Very well as a long-time friend and as a boss.

The CHAIRMAN. And General Overholt?

Mr. ALLEY. Very close friend of many years.

The CHAIRMAN. Very glad to have you with us. I will just have a few questions to propound to you.

Dean Alley, you have an impressive record in both the military and legal service. You are presently dean of the college of law at the University of Oklahoma, I believe, and from 1959 to 1981 you served in the U.S. Army, Judge Advocate General Corps. In fact, from 1978 to 1981 you were the Judge Advocate of the United States Army-Europe. Is that correct?

Mr. ALLEY. That is correct, sir.

The CHAIRMAN. In 1981 after 29 years of military service you retired from the Army with a rank of brigadier general.

Dean, do you believe these experiences will be beneficial to you as a Federal judge, as a Federal district court judge, and if so, why?

Mr. ALLEY. Yes, sir; I believe they will be beneficial. First, within my service in the Army I spent many years in court prosecuting and defending cases, criminal cases exclusively, but the litigation process was common to all trials. I had 5 years experience as a military judge and completed that period as chief trial judge of the Army with administrative and docket control responsibilities worldwide. All that service, of course, permitted a view of the Federal Government, and I think it is helpful to know how a bureaucracy works.

As dean of the law school, probably my most pertinent experience is presiding over faculty meetings, which develops a lot of patience, sir.

The CHAIRMAN. Especially with some professors.

Mr. ALLEY. That is right, and prudence precludes my naming them, but they know who they are. [Laughter.]

The CHAIRMAN. How does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as due process or the equal protection clause?

Mr. ALLEY. Well, each of the clauses, sir, has an historical origin and a purpose. In addition to historical studies, which illuminate those purposes, we have the march of cases through many years, which cases instruct a trial court judge as to the meaning and application of those very broad phrases. I do not believe there is too much room for a judge simply to rattle around because the Supreme Court and the court of appeals have circumscribed the meaning of those terms.

The CHAIRMAN. Dean, would you tell the committee how you would handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator and not prepared to adequately represent the interests of his or her client?

Mr. ALLEY. Senator, I believe there is a very significant difference between a criminal case and a civil case in that respect. In a criminal case very frequently, for example, the attorney appearing for the defendant is appointed for him and he has had very little or no say in the selection of the individual. Given constitutional entitlements to the effective assistance of counsel, I believe a judge might be somewhat more paternal in the management of a trial in which he perceives less effective performance by counsel. I do not believe that the judge should admonish or excoriate the second level performer in open court but should be tactful and helpful by speaking with that counsel at sidebar conferences and in chambers to do what he can to assure that the sixth amendment right is fully observed.

In a civil case, I think a judge should be detached in just about every case. There is always something in a case, I suppose, that could tilt your emotions one way or another, including a sense of unfairness in the relative performance of counsel. But overall I think a judge should not engage in the active management of a trial. That is the counsel's responsibility. After a civil trial was over, I would welcome an opportunity to speak candidly and in private with a counsel about his performance, but only in the hope of assisting him or her in future education, but not punitively.

The CHAIRMAN. Dean, Thomas Jefferson remarked shortly after the ratification of the Constitution in these words:

> Our nation's particular security is the possession of a written constitution. Let us not make it a blank paper by construction.

What do you think he meant by that warning? "Let us not make it a blank paper by construction."

Mr. ALLEY. Well, if I could express——

The CHAIRMAN. Was he trying to say that the Constitution says what it means and it means what it says?

Mr. ALLEY. Yes.

The CHAIRMAN. And the judges ought not to distort and warp it and try to make it think what they want it to?

Mr. ALLEY. Yes, because the Constitution has a text. I believe it is a bit presumptuous to enter into the mind of that great genius, but I think what he meant was that in explication of the Constitution, one should read the words and apply the words of the Constitution.

The CHAIRMAN. I think that is all the questions I have. I hope you enjoy your service on the bench, and I am anxious to get these nominations on the agenda tomorrow when we will have an executive session. Unless somebody objects, we can act at that time. If they do, it will be carried over a week. Thank you very much. You may now retire if you wish.

Judge Todd, if you will come around.

TESTIMONY OF JAMES D. TODD, OF TENNESSEE, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE

The CHAIRMAN. Judge Todd, would you like to introduce your family or friends who are here?

Mr. TODD. Yes, sir; I am pleased to have with me today, Senator, my mother and father, Mr. and Mrs. James P. Todd, from Lexington, TN; my daughter Julie and my wife Jeanie, who is a lawyer from Jackson. I have another son Michael who is not here because he had to be away and could not make the trip.

Thank you, sir.

The CHAIRMAN. Thank you very much. We are glad to have all of you.

Judge Todd, I believe you presently serve as a circuit judge of the 26th Judicial District of Tennessee.

Mr. TODD. Yes, sir.

The CHAIRMAN. Are they districts or circuits?

Mr. TODD. They were circuit courts, but recently they have been changed to districts. But they are still called circuit courts.

The CHAIRMAN. This court, I believe, is a trial court of general jurisdiction which shares both criminal and civil cases?

Mr. TODD. Yes, sir.

The CHAIRMAN. It has the power of life and death in criminal matters?

Mr. TODD. Yes, sir.

The CHAIRMAN. Do you foresee any difficulty in the transition from the State court to the Federal district court?

Mr. TODD. No, sir, I do not. I know there will be some adjustments that will need to be made, but I am prepared to work as hard as I need to work to make those adjustments. The big adjustment was from lawyer to judge and from State judge to Federal judge would not be as great an adjustment as from lawyer to judge.

The CHAIRMAN. You say your wife is a lawyer?

Mr. TODD. Yes, sir.

The CHAIRMAN. Is your father a lawyer?

Mr. TODD. No, sir. He is a retired county sheriff.

The CHAIRMAN. I see. He looks like a sheriff, looks like a good, tough man. Maybe a lawyer wife can help train you.

Mr. TODD. She has already.

The CHAIRMAN. Get you better prepared for the Federal bench.

Judge Todd, article V of the Constitution establishes procedures by which the Constitution is to be amended, altered. Do you believe that article V specifies the only means by which this Constitution should be amended?

Mr. TODD. Yes, sir, I do. I think article V by its terms clearly describes the only way to amend the Constitution. I do.

The CHAIRMAN. Do you believe in a strict construction of the Constitution?

Mr. TODD. Yes, sir, I do. I believe that the Constitution means what it says.

The CHAIRMAN. And in some cases judges have taken over school districts, mental institutions, hospitals, and other things and most people who are familiar with the law feel they have gone beyond their jurisdiction and ought to let the States handle their own institutions unless there is some question deriving from the Constitution as to the constitutional rights in some way.

Judge, in recent years Congress has given a great deal of consideration to reform of the Federal habeas corpus procedures. What are your views on the needs for reform in this area?

Mr. TODD. I agree, Senator, that there needs to be revision to the habeas corpus statutes. Habeas corpus has a long and valid history in our legal history and tradition, but of recent years the courts have become inundated with prisoner petitions and post-conviction relief. The problem with that is that meritorious claims get lost in the avalanche of frivolous claims.

I would support changes that would allow more screening of the habeas corpus petitions to see that the meritorious claims get prompt attention and the frivolous claims get less attention. I would support any change that would require a strict exhaustion of the State remedies before the Federal courts are asked to intervene. Yes, sir, I do support——

The CHAIRMAN. A bill has gone through the Senate, out of the committee and through the Senate, went to the House and they never did act on it, a bill to limit the time of these appeals in State courts, I believe, after the State courts all got through with it to 1 year, and the Federal court to 2 years. I will give you an example of what I mean. There were several men who raped and killed a young girl in my State 7 years ago. Only a few months ago one of them was electrocuted. They were given death sentences, two of them were. The other one has not been executed yet. Seven years has passed. People lose faith in the courts when such as that happens. I think justice should be expedited. There is no sense in carrying on these appeals without end, year after year after year.

How do you feel about it?

Mr. TODD. I agree, Senator. I think, as was stated earlier, justice delayed is justice denied. The problem some of us have is that we have more cases than we can do in a rapid fashion, and to remedy that we have to start earlier, work later and work harder.

The CHAIRMAN. One Federal judge told me that 25 percent of his time was taken up with these appeals, habeas corpus matters, and he is very anxious to get some relief from that.

Judge Todd, in response to a portion of the committee's questionnaire, saying judicial enactment, as I previously stated, enactment of social policy and the institution of change in that policy are the proper functions of the legislative branch of Government and the judiciary should not be involved in the making or changing of broad social policy; rather the courts should interpret and enforce the Constitution and statutes in a manner which will carry out the intent the authors of those sources of policy.

Judge, are there ever any circumstances where you consider it appropriate to decide a case on some basis other than one where the intent of the Framers of the constitutional provisions can be detected either through the test of a provision or its surrounding legislative history?

Mr. TODD. No, sir. I think the proper role of a court is to give effect to the legislative intent or the intent of the Framers of the Constitution. Only in those instances where the intent cannot be ascertained from a clear reading or an unstrained construction of the document, in those cases the court will have to just decide what he thinks the Framers meant or what they meant, but it should not be a strained construction. But you should give plain meaning to the plain intent of the words.

The CHAIRMAN. I think that is all the questions I have. I want to wish you a happy and successful tenure on the bench.

Mr. TODD. Thank you very much, Senator.

The CHAIRMAN. You are excused now.

Mr. Donald E. Walter, if you will come around.

Mr. WALTER. Yes, sir.

TESTIMONY OF DONALD E. WALTER, OF LOUISIANA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

The CHAIRMAN. Would you like to introduce your family or friends that are present?

Mr. WALTER. Yes, Mr Chairman.

I would like to introduce my wife Charlotte.

The CHAIRMAN. Thank you. I believe you graduated from LSU with a BA degree and also a law degree.

Mr. WALTER. Yes, sir, Senator

The CHAIRMAN. You were in the Army 2 years?

Mr. WALTER. Yes, Senator. I was an enlisted man, stayed most of the time down in Fort Bliss.

The CHAIRMAN. Fort Bliss?

Mr. WALTER. Yes, Senator.

The CHAIRMAN. Now, you have been in private practice and you served as U. S. attorney, I believe, from 1969 to 1977, about 8 years. Is that correct?

Mr. WALTER. That is correct, Mr. Chairman.

The CHAIRMAN. Who appointed you first?

Mr. WALTER. President Nixon appointed me both times, Mr. Chairman.

The CHAIRMAN. I have a few questions I wanted to ask you.

Mr. Walter, I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on this subject?

Mr. WALTER. Mr. Chairman, I agree. I hope I have always treated everyone with courtesy, and I certainly see no reason to ever change that and I suspect if I ever did my wife would correct me on it. But courtesy, I think, is the factor that I hope would guide me.

The CHAIRMAN. The reason I ask is in the practice of law I have seen some Federal judges yell at lawyers or jurors or witnesses or embarrass them in some other way, which I just thought was completely uncalled for, and it struck me here is a man that should not be a Federal judge. There is no excuse for being inconsiderate or discourteous to anybody.

Mr. WALTER. I think not.

The CHAIRMAN. The more power a man has the more normal he ought to be.

Mr. WALTER. I could not agree more, Mr. Chairman.

The CHAIRMAN. Mr. Walter, it seems many drug dealers when arrested are able to pay bond money easily and in some cases leave the country to resume their illegal activities elsewhere. What changes, if any, in bail reform do you feel should be implemented in order to deter this type of activity?

Mr. WALTER. Mr. Chairman, I think serious inquiry under the new Bail Reform Act, particularly the (e) section of 3142, ought to take care of that. I do not know what the experience of the new act is across the country. I am going to look forward to looking at that, but I think serious inquiry ought to be able to deny bail to those types.

The CHAIRMAN. In the omnibus crime package which I authored and we got through the Congress, we had a provision on bail in there. Have you had a chance to study that yet?

Mr. WALTER. I looked at it, yes, sir.

The CHAIRMAN. That should be an improvement over the old one, do you not think?

Mr. WALTER. Yes, sir. I think that will give the judiciary the power to stop exactly what you are talking about, Senator.

The CHAIRMAN. The Justice Department made a good analysis of that law. If you have not gotten a copy, I think it will be very helpful to you.

Mr. WALTER. Thank you, sir.

The CHAIRMAN. Mr. Walter, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Mr. WALTER. Mr. Chairman, if successful, if confirmed, I would swear to uphold the law and the Constitution. I should hope that no such conflict would ever arise, but in that unlikely event I see I would either have to follow the law, recuse myself, or resign the office.

The CHAIRMAN. Mr. Walter, what are the standards that you will use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. WALTER. Mr. Chairman, I assume that all orders of a court are followed, and I think in that expectation there ought to be minimum interference with the operation of institutions or individuals where subject to a particular court order.

The CHAIRMAN. I think that is all the questions I have.

Now, I have received a letter from W.W. McDougall, and it reads as follows:

> Dear Sir: This is to request I be scheduled as a witness in opposition to the appointment of Donald Walter as a Federal district judge when the Senate Judiciary Committee holds its hearing on the nomination on June 19, 1985.

Now, I will ask a staff member if he notified Mr. McDougall about this hearing.

Mr. SHORT. We have been in touch with Senator Long's office on this matter. Mr. McDougall contacted Senator Long's office originally. I checked with them a few moments ago and they have not heard back from him. So as of this time we do not anticipate his presence. We contacted Senator Long's office, yesterday and they indicated that he is not going to appear. We doublechecked with them just a few minutes ago before the hearing, and he has made no contact with Senator Long's office either. The hearing was postponed in order to accommodate Mr. McDougall if he wanted to testify.

The CHAIRMAN. He had a right to testify and we would give him that opportunity, but he evidently has changed his mind as he is not here. That is the only opposition that we have received to you, and we hope to get all three of these nominations on the agenda tomorrow and I hope you have a successful and happy career on the bench.

Mr. WALTER. Thank you very much, Mr. Chairman.

The CHAIRMAN. That completes our hearing today. Stand adjourned.

[Whereupon, at 2:40 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

DEAN WAYNE E. ALLEY

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF OKLAHOMA

Birth: May 16, 1932, Portland, OR.

Legal Residence: Oklahoma.

Marital Status: Married to Marie-Luise Dommer Alley.

Education: 1946-1952—Stanford University, A.B. degree. 1954-1956—Stanford Law School, LL.B. degree.

Bar: 1957—California. 1957—Oregon.

Military Service: 1952-1954—United States Army, 1959-1981—Brigadier General, Retired.

Experience: 1957—Hon. George Rossman, Supreme Court of Oregon, Law Clerk. 1957-1959—Williams and Alley, Associate. 1959-1981—United States Army, Judge Advocate General Corps: (1978-81) The Judge Advocate, Europe; (1975-78) Chief, Criminal Law Division; (1975) Chief Trial Judge; (1974-75 and 1972-73) Judge, US Ct. of Military Review; (1970-72 and 1968-69) Military Judge, Trial Judiciary; (1965-68) Faculty, JAG's School; (1959-64) Asst. Staff Judge Advocate. 1981-present—University of Oklahoma, Dean of the College of Law.

JUDGE JAMES D. TODD

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TENNESSEE

Birth: May 20, 1943, Scotts Hill, TN.

Legal Residence: Tennessee.

Marital Status: Married to Evelyn McGee Todd, 2 children.

Eduation: 1961-1965—Lambuth College, B.S. degree. 1965—University of Tennessee, College of Dentistry. 1966, 1967 and 1968—University of Mississippi, Master of Combined Sciences. 1968-1972—Memphis State University, College of Law, J.D. degree.

Bar: 1972—Tennessee.

Experience: 1972-1980—Waldrop, Hall, Tomlin & Farmer, Associate (1972-1975), Partner (1975-1980). 1980-1983—Waldrop, Farmer, Todd & Breen, P.A. 1983-present—Circuit Judge, 26th Judicial District of Tennessee.

DONALD E. WALTER

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF LOUISIANA

Birth: March 15, 1936, Jennings, LA.

Legal Residence: Louisiana.

Marital Status: Married to Charlotte Siever Donald, 3 children.

Eduation: 1954-1956—Tulane University. 1956-1957—Louisiana State University, 1959-1961—B.A. degree. 1961-1964—Louisiana State University Law School, J.D. degree.

Bar: 1964—Louisiana.

Military Service: 1957-1958—United States Army.

Experience: 1964-1966—Cavanaugh, Brame, Holt & Woodley, Associate. 1966-1969—Holt & Woodley, Associate. 1969-1977—United States Attorney, Western District of Louisiana. 1978-present—Hargrove, Guyton, Ramey & Barlow, Associate (1978-1980), Partner (1980-present).

CONFIRMATION HEARING ON LOUIS L. STANTON

WEDNESDAY, JUNE 26, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch and Simon.

Staff present: Duke Short, chief investigator and Frank Klonoski, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. Today, we are meeting to consider the nomination of Louis L. Stanton, of New York, to be the U.S. district judge for the southern district of New York.

I believe I see both Senators here, and we would be very pleased to hear from them at this time.

The senior Senator and distinguished former Ambassador, we are glad to hear from you.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator Moynihan. Thank you, Mr. Chairman. We have the honor, my distinguished colleague and I, to introduce Mr. Stanton to this honorable committee. Mr. Stanton is an accomplished attorney in the city of New York, in the jurisdiction of the U.S. district court for the southern district to which he has been nominated by Senator D'Amato.

You will find from his record that it is one of accomplished and diligent practice of the law in two of the most distinguished firms of the district. He comes to us with the great regard of his peers, and in the aftermath of having been chosen and recommended to Senator D'Amato for the position.

He is one of the most well thought of and admired members of our bar of which we are, I think, justifiably proud and we are proud to present him to this committee. Senator D'Amato, I think, ought to have the opportunity to speak to his qualities at length, and I am here to associate myself with the nomination.

The Chairman. Thank you very much, Senator.

Senator D'Amato.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Thank you, Mr. Chairman.

Mr. Chairman, it is a great privilege for me to be here with Senator Moynihan and to introduce to you Louis Stanton, who has been nominated by our President for the prestigious position of Federal judge in the southern district of New York, which is one of the great courts of our land, and handles some of the most complex litigation.

Louis Stanton is especially equipped by his training, as a graduate of the University of Virginia Law School, a member of the law review. Mr. Stanton has a distinguished record in the practice of law in two of New York's finest law firms, and has given great service to his community, to the bar, to this country, Mr. Chairman.

Not only was he in the merchant marine but when he graduated from Yale University and the Korean war broke out, he was commissioned a second lieutenant in the U.S. Marine Corps, and after his release from active service, he attained the rank of captain.

More importantly, among his peers he is known as a man of great intellect and great integrity, of great human compassion. And so it was easy for our committee, a very distinguished committee on which former Secretary of State Bill Rogers served, with Mike Armstrong of Knapp Commission fame and others, to recommend Mr. Stanton. We were delighted and privileged to be able to forward Mr. Stanton's name on to our President for his consideration, and we are delighted to be able to make a presentation of Mr. Stanton to you today, Mr. Chairman.

He will be, in my opinion, one of the great judges in our Federal System.

The CHAIRMAN. Thank you very much, Senator.

TESTIMONY OF LOUIS L. STANTON, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

The CHAIRMAN. Mr. Stanton, I want to congratulate you first upon your appointment by the President. I next congratulate you upon being selected for this judgeship by my good friend Senator D'Amato, who is a comparably new Senator here, but who has gained the esteem of his colleagues, and also congratulate you for the endorsement of Senator Moynihan, a distinguished Member of this body who has been here for sometime. Both your Senators are highly respected and we are very pleased to have them to endorse you and that means a great deal.

If you will stand up and be sworn, Mr. Stanton.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth so help you God?

Mr. STANTON. Yes, sir.

The CHAIRMAN. Mr. Stanton, you might introduce your family and any friends you may have at this hearing.

Mr. STANTON. This is my family. My wife, Mrs. Stanton, Berit Stanton, and my son, our son, Fredrik Stanton.

The CHAIRMAN. We are glad to have them with us.

Did you go to Yale 1 year and then go in the merchant marine?

Mr. STANTON. One summer; yes, sir.

The CHAIRMAN. I notice you have 1945 to 1947 in the merchant marine.

Mr. STANTON. Yes, sir.

The CHAIRMAN. You were in the merchant marine 2 years?

Mr. STANTON. Almost 2 years.

The CHAIRMAN. Was that the Reserve or the main active merchant marine?

Mr. STANTON. That was active duty, sir. Some at school and some at sea.

The CHAIRMAN. 1945 to 1947. I notice you got 1945, Yale University.

Mr. STANTON. I returned to the university in 1947, yes.

The CHAIRMAN. You returned. I am trying to reconcile how you were at Yale University and also in the merchant marine.

Mr. STANTON. I attended Yale from June to October 1945, and I was in the merchant marine from October, possibly September 1945 until the early summer, probably June of 1947, and I then immediately returned to college to make up for the lost time.

The CHAIRMAN. In other words, you went to Yale a year and went in the merchant marine and came back and then finished at Yale?

Mr. STANTON. Yes, sir.

The CHAIRMAN. And then you attended the University of Virginia Law School?

Mr. STANTON. Yes, sir, I had some time out in-between.

The CHAIRMAN. That is a very fine law school, of course. Excellent reputation.

Now, I have a few questions here I would like to propound to you. You have been a practicing attorney, I believe, for about 30 years, have you?

Mr. STANTON. Yes, sir.

The CHAIRMAN. During this time your litigation experience has been exclusively civil in nature.

Mr. STANTON. I would say so, sir.

The CHAIRMAN. Now, do you feel that your lack of criminal trial experience will, in any way, hinder you in the performance of your duties as a Federal judge?

Mr. STANTON. I do not think so, Senator. Of course, I have a general familiarity with court procedures and the rules of evidence. As they apply to criminal cases, I will have to study up on them and study up on the Comprehensive Crime Control Act of 1984 and the special hearings that apply in criminal cases, and I am now studying everything I can get my hands on in that area.

The CHAIRMAN. Mr. Stanton, would you tell the Committee what arrangements you have made to dissolve your financial interest in your law firm, particularly what the time period involved is and what arrangements have been made to compensate you for your work on pending litigation?

Mr. STANTON. Normally, under our partnership articles, upon my retirement, I would be paid the equivalent of one year's earnings over a period of 10 years. By arrangement with my firm, I have abbreviated that period of payout to 3 years, and that will fully compensate me for my interest in any pending matters whether litigated or otherwise in the office.

The CHAIRMAN. You will not receive any interest from any cases in the future?

Mr. STANTON. No, sir.

The CHAIRMAN. What you will get will be for your past service?

Mr. STANTON. Excuse me, sir?

The CHAIRMAN. The compensation you will get will be for your past service but not for any cases arising in the future?

Mr. STANTON. That is right, sir.

The CHAIRMAN. Mr. Stanton, I consider judicial temperment to be a prerequisite for a Federal judge. Would you please give me your thoughts on this subject?

Mr. STANTON. I think it is an absolute prerequisite for any judge, Senator Thurmond. The ability to run a case in a calm and friendly way is essential to the conduct of the case and to the respect of the bar and the public.

The CHAIRMAN. Now, I have seen some judges that seem to want to go into controling State institutions and they are so-called judicial activists.

My opinion is that the Constitution clearly defines the separate branches of Government. It also defines the division of powers between the Federal Government and the States. I presume you believe strongly in the Constitution and chose to abide by the Constitution in handing down your decisions?

Mr. STANTON. Yes, sir, absolutely. I believe the duty of the Federal bench is to decide the cases or controversies brought before it.

The CHAIRMAN. In the matter of civil rights, I believe Justice John Harlan referred to our Constitution as a color blind Constitution, and that means no favoritism any way, treat all people equally.

I presume that you agree with that characterization?

Mr. STANTON. I do, sir, whether one color or another or rich or poor.

The CHAIRMAN. That is all the questions I have. The distinguished Senator from Illinios is here. Maybe he has some questions.

Senator SIMON. Thank you very much, Mr. Chairman.

Mr. Stanton, has anyone in an official position asked you questions that you felt were improper as to how you might rule on any matter as a Federal judge?

Mr. STANTON. Absolutely not, Senator Simon, and in view of what has been in the press, I think I would have been quite sensitive to that had it occurred, but it never occurred in any respect whatsoever.

Senator SIMON. The American Bar Association's Code of Professional Responsibility for lawyers says, and I am quoting, "Every lawyer, regardless of professional prominence or professional workload should find time to participate in serving the disadvantaged."

Could you tell me what you might have done just briefly to fulfill that particular responsibility?

Mr. STANTON. Gladly, sir; I think I should preface it by saying that I received as much from the service I did, in terms of experience, as anybody I was serving. I am referring particularly to 13 or

12 or so years serving at night as an arbitrator in the small claims court for the city of New York, which was a volunteer program to assist the court and to assist the public, because the volume of cases there is heavy.

I went into that to make a public contribution and also, as an advocate, to have the experience of seeing cases from the middle instead of from one side, and I think that I accomplished both of those objectives.

Senator SIMON. I thank you. In general what I read and hear about you is very favorable. According to the FBI files, you are a member of the Union Club and the Downtown Club, is that correct?

Mr. STANTON. It was correct, sir. I resigned from the Downtown Association. I am a member of the Union Club in New York City.

Senator SIMON. The Union Club, according to the records I have, does discriminate against women. The American Bar Association's model rules of professional conduct and code of judicial conduct says among other things, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

Are you aware that the Union Club does discriminate against women?

Mr. STANTON. Yes, sir; well, discriminate against women. The Union Club was organized in 1836 when circumstances were rather different than they are now, and its constitution says that adult males may become members.

I would say that up until a generation or so ago that was enforced to an extraordinary degree. Women would hardly enter the door of the club. It was a very old-fashioned type of place.

In recent years, it has been moving very much in the direction of being a family club, not only, I think, from a sense that this is the way the country is moving but also because a building located in that area will not survive as a club unless it has broad family usage, and so it has been increasingly open to women, who now bring their friends there for lunch and who use the athletic facilities and who are in and out of the clubhouse much, I may say, to the advantage of everybody concerned.

The memberships are held in the men's names only. That is correct.

Senator SIMON. I guess I am still a little troubled simply because there does seem to be a conflict between what the American Bar Association suggests and where your club is in the membership.

The women who attend, they are then the spouses of members, is that correct?

Mr. STANTON. Spouses or widows. Widows have independent use of the club in their own name which, again, is, of course, relatively recent.

Senator SIMON. But if someone were an outstanding accountant or lawyer or some other profession, a woman could not become a member on her own?

Mr. STANTON. Not under the present charter, Senator Simon, that is correct. I might point out that in that particular area of New York, there are many—this may not detract from the point you are making, but there are many clubs which are open to women only, and it is quite typical that a husband would belong to one and the wife belong to the other.

So I think that the portion of the judicial conference material that you read me which refers to invidious discrimination, I think in that area of New York this may not be felt to be invidious discrimination for that reason.

As I say, it may not detract from the point that you are making.

Senator SIMON. If, after consultation, with my colleagues they felt that it was important that you not be a member of an organization that did, in its charter, discriminate, would you be willing to step aside from your membership, from your membership in the Union Club?

Mr. STANTON. Absolutely, of course.

Senator SIMON. I have no further questions, Mr. Chairman.

The CHAIRMAN. I want to say personally I do not see the necessity for a man if he is a judge or whatnot having to refrain from joining a private club. I do not believe in discrimination, but you may have a women's needle club. I doubt if men would be interested in joining that and would not the women feel more at home maybe with the needle and such as that?

In other words, if the men wanted a club purely men I do not see why they cannot have it where it has nothing to do with government, purely private, and this question has come up before, and the question has been raised and so far the Senate has gone along where people were members of private clubs and approved as judges.

That is a question that the Senator from Illinios had a right to ask and at the same time, I just wanted to—I am not asking you to make any statement about it, but I just wanted to say I think in this free country people have a right to form their own clubs if they want to, whether it is men or women or who, where the Government is not involved where the public is not involved, and anything that is supported by the public. That is a different thing.

We do not believe in discrimination, and we think women ought to have every right that men have. At the same time, men are men and women are women, and they may not want to be together all the time in everything.

I just want to make that statement for the record.

Senator SIMON. Mr. Chairman, I do not want to get into a debate with you here but let me just point out that the American Bar Association in determining their Code of Conduct for judges says, and let me just read three sentences, "A judge must avoid all impropriety and appearance of impropriety. It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others that the judge's impartiality is impaired."

I think the American Bar Association probably reached that conclusion after very careful thought, and it is, candidly, something, and I do not mean this disrespectfully to you, Mr. Stanton, but it is something that I think we have to weigh as we make determinations here.

The CHAIRMAN. Well, if there is discrimination, that is one thing, but just to say a man cannot have a private club or women cannot have a private club or young girls cannot have a private club or young boys, I mean, it seems to me that we are invading on the private rights of individuals.

Now, I think if I were a judge, I would probably refrain from joining any organization where it might be perceived in any way that it is discrimination, but frankly, these private clubs, I do not see where there is discrimination, but you have expressed yourself so that clears that part.

Now, Senator Hatch, do you have anything?

Senator HATCH. I do not. I am happy to welcome you to the committee, Mr. Stanton, and appreciate your willingness to serve. We look forward to confirming you.

Mr. STANTON. Thank you very much.

The CHAIRMAN. I wish you a happy and successful tenure on the bench.

Mr. STANTON. Thank you, Senator.

The CHAIRMAN. We now stand adjourned.

[Whereupon, at 2:29 p. m., the committee adjourned at the call of the chair.]

BIOGRAPHY

LOUIS L. STANTON

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

Birth: October 1, 1927, New York, N.Y.

Legal Residence: New York.

Marital Status: Married to Berit E. Rask, 4 children.

Education: 1945, 1947-1950—Yale University, B.A. degree. 1952-1955—University of Virginia Law School, LL.B. degree.

Bar: 1955—Virginia; 1956—New York.

Military Service Corps: 1945-1947—U.S. Merchant Marine.

Experience: 1955-1966—Davis, Polk & Wardwell, Associate. 1966-present--Carter, Ledyard & Milburn, Associate (1966-1967), Partner (1967-present).

CONFIRMATION HEARING ON: JOSEPH J. FARNAN, JR., STANLEY MARCUS, JAMES M. ROSENBAUM, THOMAS E. SCOTT, AND JOHN C. LAWN

WEDNESDAY, JULY 10, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden and Specter.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Senator Biden is on his way, and he wanted to be here when the judge from his State came up, so we will go ahead with Senator Hawkins of Florida. Senator, will you come around. Oh, you have two judges there? You can come and bring them around.

We are very pleased to have you, Senator Hawkins, and you may proceed now.

STATEMENT OF HON. PAULA HAWKINS, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator HAWKINS. Thank you, Mr. Chairman.

It is a great pleasure for me to appear before this committee. To introduce to you, and to the U.S. Senate, two outstanding individuals who have been nominated by President Reagan to serve on the Federal bench in Florida. Both are outstanding citizens and a credit to the State of Florida and to our Nation.

Tom Scott, at age 37, is one of the most experienced criminal court judges in Florida. Tom presided over countless criminal cases, and tried numerous jury cases, including over 90 murder trials, and some of the most publicized public corruption cases in recent Florida history.

As a member of the judiciary, Tom Scott was rated in the bar association polls as one of Florida's most highly qualified Judges.

He received the Dade County Bar Association's Outstanding Jurist Award in 1983, and was nominated for Outstanding Jurist in the entire State of Florida.

Knowing Tom Scott's philosophy, his dedication to his family, the American judicial system, and to this country, I am confident that he will make an outstanding contribution to our Federal judiciary. I would next like to introduce to you Stanley Marcus, who is no stranger to this committee. Anyone who has followed the war on crime and drugs in Florida understands my enthusiasm for Stanley Marcus. He has proven to be one of the most able, and toughest Federal prosecutors in the entire Nation.

His career from the classroom to the courtroom is a record of success. Mr. Marcus is a graduate of Queens College of the City University of New York and Harvard Law School.

After law school, Mr. Marcus embarked on a career of public service that continues to this day. After graduation, Mr. Marcus was law clerk to Judge John R. Bartels in the U.S. District Court for the Eastern District of New York, and after working for a short period of time as a private practitioner in New York City, he was appointed as Assistant U. S. Attorney in the Eastern District of New York.

He distinguished himself as Chief of the Detroit Strike Force of the Department of Justice Organized Crime and Racketeering Section, and in 1981, when south Florida was reeling under the most vicious crime wave in our history. I had the opportunity, as part of a comprehensive crackdown on crime and drugs, to search for and find an outstanding individual for the position of U.S. Attorney for the Southern District of Florida.

Mr. Stanley Marcus responded to our call for help, and to President Reagan's call to aid us in the war against crime that we still face to this day. He has responded with a dedication and a drive that is truly an outstanding example to all others. His leadership has made the U.S. Attorney's Office for the Southern District of Florida perhaps the finest in the United States.

During the past 3 years, I have worked closely with Mr. Marcus to combat the enormous problems facing south Florida and I am convinced that this same dedication, hard work, and striving for justice, will make Stanley Marcus one of the most outstanding judges ever to serve. I wholeheartedly recommend him also to the Judiciary Committee for your consideration.

Mr. Chairman, and other members of the committee, it is with a great deal of personal pride that I recommend to you for the Federal Judiciary, Mr. Tom Scott and Mr. Stanley Marcus.

The CHAIRMAN. Senator Hawkins, we are very pleased to have you with us, and I want to congratulate Mr. Marcus and also Judge Scott, being so highly endorsed by Mrs. Hawkins. She is a very prominent Member of this Senate, highly respected, some of them call her the "sweetheart of the Senate" but she knows what she is doing. She is smart, she is dedicated, and does a fine job.

Now we will come back to you all in a few minutes. I want to take all the Members of the Senate because they are so busy, I need to release them. Is Senator Biden here yet?

Senator Roth is here with Mr. Farnan. Senator Roth, do you want to wait a few minutes, or go ahead now?

Senator ROTH. If you have another Senator, why don't you go ahead.

The **Chairman**. Yes, we have Senator Warner here. Senator Warner, come around.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. Thank you, Mr. Chairman.

The **Chairman**. Senator Warner, we are glad to have you with us.

Senator **Warner**. Thank you very much. It is always a pleasure to appear before the distinguished chairman and members of the committee today, on behalf of an outstanding law enforcement official who has been nominated as Administrator of the Drug Enforcement Administration.

I understand that Jack Lawn has previously testified before this committee, and I trust the committee will again agree that his many accomplishments make him an excellent candidate to lead this valuable agency.

I would also like to ask the chairman to recognize the nominee's lovely wife, Virginia, and four fine children. I believe they are all here. They are all here, Mr. Chairman.

Mr. Chairman, Mr. Lawn's Federal service began with the FBI where he gained a broad base of experience in four regional offices, including the Washington Field Office, before being assigned to the FBI Headquarters as Chief of the Civil Rights Special Inquiry Section of the Criminal Investigative Division.

Since 1982, Mr. Lawn has served admirably as Deputy Administrator of the Drug Enforcement Administration. His confirmation as Administrator of DEA will provide a stable transition of leadership within the Agency. Throughout his law enforcement career, in and out of Washington, Mr. Lawn has made northern Virginia his home. I am confident that he possesses the qualities necessary to serve as Administrator, to lead this agency in our war against drug trafficking.

Mr. Chairman, I respectfully request the committee favorably recommend John C. Lawn as Administrator of the Drug Enforcement Administration.

I thank the Chairman.

The **Chairman**. Thank you very much, Senator. We appreciate your being here, and I want to congratulate Mr. Lawn on having such an able and prominent Senator here to endorse you so highly, and that will go a long way with this committee. Senator Warner, it is a pleasure to have you here. When the Senators are excused, there is no use for them to wait, unless they want to. They are welcome to wait.

Now Senator Durenberger I understand is here with James M. Rosenbaum. Senator Durenberger, do you want to come around. Senator Boschwitz wanted to speak, too, and we will take him when he arrives.

STATEMENT OF HON. DAVID DURENBERGER, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator **Durenberger**. Thank you, Mr. Chairman, very much.

I know what a busy day the chairman has had, since I have not seen you since 8:45 this morning as you went off to a whole series of coincident meetings, but at the same time, it would have been a special delight for both the Minnesota Twins who have been here today, with one of our prouder protegees, Jim Rosenbaum, and so I am not going to try to detail Jim's résumé, in order to predict for you, Mr. Chairman, or our colleagues, the contributions that he has yet to make to our country.

I have known Jim since about 1967, 1968, something like that. I knew him as a young lawyer, as a person that I came to know through the political process, and a person of whom I have been a secret admirer for many, many years.

I admire not only his approach to the law but his approach to his role as a person, as a husband, and as a father, which I think is extremely important to the bench in this country, in particular, the Federal judiciary.

As a young lawyer, I used to think that only the experts in the law made good judges. The more time I spent practicing before the bench, and now, the time that I have spent practicing making public policy, I have come to believe, as I know you do, Mr. Chairman, that it is the best people that make the best judges, not just the so-called best lawyers, and while I have a statement in full that details his activities as the U.S. District Attorney for the District of Minnesota, it details his contributions to his community, both as a lawyer, and both in a pro bono and in a paid sense, I would just summarize, with deference also to our colleagues who are waiting to testify on behalf of other well-qualified candidates, that rarely does a Member of the Senate have an occasion for the kind of pride that I feel in recommending to the people of this country, as I recommended to the President of this country, the name and the person of James Rosenbaum, and his wife, and his three daughters.

Rudy and I have a particular loving relationship with them because we both have raised four sons, and our inability to raise daughters, we have a particular admiration for the Rosenbaum's ability to raise three daughters. And for all those reasons, and because Rudy will be along to make a more colorful introduction of Jim later on, as soon as he gets off some CBS program, I will conclude with my recommendation to you, Mr. Chairman, that we be given the opportunity to ratify this wonderful person as a member of the Federal bench.

The CHAIRMAN. Thank you very much, Senator. I appreciate your being here. I want to congratulate Mr. Rosenbaum on having you present to so highly endorse him, and also congratulate him on having the endorsement of the other distinguished Senator, Senator Boschwitz, and with the endorsement of both these Senators, he should have no trouble I think getting through.

Thank you very much and you are excused. You may stay, if you wish to.

Senator DURENBERGER. Thank you, Mr. Chairman, very much.

The CHAIRMAN. Senator Biden is here now, so we will take up the judge for Delaware. Senator Roth, if you will come around, and we will be very pleased to hear from you.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Thank you very much, Mr. Chairman.

I am very happy to be here today to endorse the President's nomination of Delaware's U.S. attorney, Joseph J. Farnan, Jr., to the position of Federal District Judge for the District of Delaware.

Joe is respected as a lawyer, he is admired as a family man, and he is known as an individual that has served both his community and profession very well.

Like my colleagues who preceded me, I am not going to detail all the reasons as to why this man is so eminently qualified. But I would like to point out, Mr. Chairman, that he has served in many capacities, first, as a county attorney for New Castle County, DE; then as chief deputy attorney general for the State of Delaware; and finally, through his 4 years of service as Delaware's U.S. attorney.

In each of these cases, Joe has exemplified the true meaning of the word public service, and I am confident that the knowledge and sensitivity he has gained in these positions will well serve the district court.

I might point out that as Delaware's U.S. attorney, Joe Farnan has been in the forefront of criminal prosecution in the area of motorcycle gangs and narcotics dealers. His investigation of the outlawed Pagan motorcycle club gained national attention and led to the indictment and conviction of numerous club leaders and members. Under his leadership, his office coordinated the efforts of the FBI, DEA, and local authorities in the investigation and prosecution of a Colombia drug smuggling ring operating off the coast of Delaware.

Joe is a devout family man. He has five children, who I would like to introduce, if I may. We have Candy, his wife here, and three children. If they would just stand. A very handsome family, indeed. I know this is a proud moment in a distinguished career.

Mr. Chairman, I am proud to be here, and urge you and this committee to give favorable consideration to this nomination today.

The CHAIRMAN. Senator Roth, we are glad to have you here, and I want to congratulate Mr. Farnan for having your recommendation, your strong endorsement, and I appreciate your presence here, too.

Senator Roth is chairman of one of the important committees in the Senate, is held in high esteem, and we have another Senator here from Delaware, who is a member of this committee, is the ranking member here, and he exerts a lot of influence here. We will now hear from Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman. Welcome, Joe, and Senator Roth. I would like to thank you, Mr. Chairman, for two things. No. 1, for holding off Mr. Farnan until I could be here. This will probably be my last opportunity to ever hold up Joe Farnan. Once they become judges, you know how it is, Mr. Chairman; it is all over. We cannot even get an elevator in our building.

I have one real serious question for you, Joe. If we go ahead and confirm you, I want to know whether or not we will be able to use the judge's elevator, Senator Roth and I, the one in the back; it is only for you all in our building. But you do not have to answer that now. Think about it. I do not want you to have to make any hasty judgments.

And the second thing that I would like to thank you for, Mr. Chairman: The only reason Joe Farnan and Bill Roth are sitting there is because you agreed to the overwhelming need that Delaware had to have an extra district court judge, and so, Joe——

The CHAIRMAN. You squeezed it out of me.

Senator BIDEN. And so I want to thank you on those two scores. I have several questions for Mr. Farnan, but I will submit them for the record.

Let me say only this: There are a number of people who have come before this distinguished committee over the years, and many of whom have been extremely qualified in a number of specific respects, and most of whom who have been qualified in all respects. But the one quality that I think Joe Farnan possesses, that I think will make him an outstanding judge, is a very simple, basic one. I think he has a deepseated sense of fair play. I think he is a man whose common sense and good judgment were exercised in what I would characterize, and have publicly characterized, as the "most dangerous position in America." And I mean that seriously.

A U.S. attorney, an irresponsible U.S. attorney, can do more damage and more harm to the lives of people in a community than any Senator, any judge, and Congressperson, because of the ability to act in a cavalier disrespect for people's privacy or people's legitimate rights, and Joe Farnan has made tough calls.

Not only has he made the tough calls of being willing to take on the Pagan motorcycle gang, which cost him the sale of his motorcycle, but also, even the tougber calls, politically, and that is sometimes deciding not to move forward on somebody, because it was not, although politically expedient, although it may very well have made textbook sense, it may not have made—it was not the best law, it was not the fairest way to move.

And Joe I think you have, and truly do, think you have a fine judicial temperament. I think you are qualified in every other respect also; but that is, I think, the uniqueness of your choice, Bill, and I applaud Senator Roth for the choice that he has made, and also would say to the committee, that although I can take no credit for Joe's choice, I want to publicly thank Senator Roth for being kind enough to contact me beforehand, to ask what I thought about it.

That is the way we work in Delaware. I look forward to you being on the bench, Joe, and I look forward to calling you judge, and I most of all look forward to getting a ride in that special elevator you judges have in the back building that cost us the extra elevator we do not have in the rest of the building.

The CHAIRMAN. I have an urgent call and will ask Senator Biden if he will go ahead. Senator Chiles of Florida is here. Would you go ahead until I get back, Senator Biden.

Senator BIDEN [presiding]. Surely. Thank you. Good luck, Joe, and good luck to your family.

Senator Chiles, welcome.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Mr. Chairman, Senator Hawkins has already presented Judge Scott and Stanley Marcus. But I wanted this opportunity to say a few words on their behalf.

I am like you in this regard: I cannot claim any credit for the selection, and do not. But I think both of these men will be outstanding judges, and I think they are fine appointments.

Judge Scott has served ably as a trial judge in the State of Florida, and also, as a practicing attorney. He is held in high respect by the bar, and by his fellow citizens. With his previous judicial experience as a State judge, I think that he will be an excellent appointment.

Stanley Marcus has also had the experience that you just described as a U.S. attorney in the busiest circuit, for a U.S. attorney, in the State and in the country. He has prosecuted more cases dealing with narcotics and organized crime, than we have anywhere in the country, and he has handled that job in an outstanding manner. He had a long and valuable experience with the Justice Department before that.

I think both of these men will be outstanding judges, and we need them desperately in South Florida at this time, and so I am delighted to be here to speak for each of them.

Senator BIDEN. Well, Senator Chiles, I will say only this: That if you think both these fellows are good, they must be pretty good because you are the biggest pain in the neck in the world, when it comes to this body, in terms of reminding us that we need to do more about prosecution of international drug traffickers, organized crime figures.

I mean, you are supposed to leave that to the Judiciary Committee, but you insist, from your position of continuing to take the lead on——

Senator CHILES. I only compete with you in that regard.

Senator BIDEN. Now, seriously, if you are here, and make the—judge, and Mr. Marcus, let me put it to you very bluntly. Lots of times, when we have appointments that are made, which are always made by the Senator of the party that happens to be the party of the President, there will be quiet acquiescence by the Senator of the opposite party, but it will not mean much to you, but to us it means a lot.

We understand the fact that Senator Chiles came over after the fact, that it means that he is trying to tell us something that he did not have to tell us, and that is very helpful.

I only have one serious problem with Mr. Marcus. He had as his chief assistant a fellow I went to law school with named Jerry Hoolihan, which means his judgment must be somewhat warped. Hoolihan is, as his name might suggest, somewhat of a crazy Irishman, but it was tempered by his Italian background from a little town named Courtland, NY, and I knew from the beginning there was a problem to have an Irish Catholic like Hoolihan who was a Republican. He has been always a Republican his whole life, which has always been dangerous, so I am going to have to look awfully closely at your nomination, Mr. Marcus, but judge, I can assure you you will have no problem with me at all.

If I can be assured Hoolihan will not be your successor, then I will have no problem. I appreciate you taking the time, Laughton, to come over, and, gentlemen, thank you very much.

Now that we have gotten the preliminaries out of the way, I would like to ask Mr. Farnan to come back up to the microphone and explain to Mr. Farnan, and the rest of the gentlemen this morning, that there are questions which we are going to ask, and the chairman has a series of questions that he would like to ask.

And by way of brief explanation, the reason why we did it the way we did is, all of our colleagues are very busy and have other committee meetings, and we would like to accomodate them without keeping anyone waiting while we have to go through the entire process. Mr. Farnan, will you please stand and be sworn. Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Farnan**. I do, Senator.

TESTIMONY OF JOSEPH J. FARNAN, JR., OF DELAWARE, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE

Senator **Biden**. Mr. Farnan, I am sure you recall that in December 1983 you testified before Chairman Thurmond and myself in a hearing in Dover, DE in the Mid-Atlantic Region Organized Crime and Drug Enforcement Task Force.

One of the issues we discussed at those hearings was the forfeiture of the proceeds of drug trafficking. At the time, the so-called crime package, which Chairman Thurmond and I dealt with here in the Senate, and eventually became law, had not yet become law.

The legislation was signed into law back in October 1984, and as you know, one of its major components was a package of improvements in the criminal forfeiture laws, the major improvements being a much greater authority to the courts to issue restraining orders on forfeitable property before and after indictment, and making it easier to accomplish forfeiture of proceeds in the same proceedings with the prosecution of the defendants, and making the quicker administrative forfeiture procedure available in more cases.

And lastly, creating a forfeiture fund so that forfeited profits can be used to pay the costs of other forfeitures.

At the Dover hearing, you told us that the task force concept and the resources provided had turned around what had been a paralysis in the prosecution of drug cases, and I agree with you, but I am reluctant to say we are ever say we are doing as well as we can.

As an outgoing U.S. attorney, do you have any recommendations on the improvements that could be made in the task force?

Mr. **Farnan**. In the drug task force concept, Senator?

Senator **Biden**. Yes.

Mr. **Farnan**. My experience with the Mid-Atlantic Drug Task Force is that operationally, it functions very, very smoothly. I think that the Congress passage of the Crime Package has been of great assistance, and I think the only area I recognize that we have some shortcomings, is the area of cooperation.

I think both among some Federal agencies and among the State and local officials. I was a State prosecutor for a number of years. I think we have come a long way from the days when I was on the State side, but I don't think that legislation is needed, just a more rigid effort toward cooperation.

Senator BIDEN. What about resources? Do you think there are sufficient resources?

Mr. FARNAN. No, Senator. When you deal with—I am sure Mr. Marcus could speak more to it than I can in Delaware, but with organizations that have 10, 20, 100 times the amount of resources we have, I think it is a very serious problem. We have Government agents out there, to some extent, lacking resources, trying to infiltrate and ferret out the wrongdoers, and then prosecute them.

But again, we have come a long way in providing resources to law enforcement, but I think that we have not met the burden yet that exists for law enforcement with regard to resources.

Senator BIDEN. I really do not have many more questions, so I was going to wait for the chairman, but I would ask these questions on behalf of the chairman.

In reviewing your committee questionnaire, the chairman noted that you were the founding director of the Police Athletic League of Delaware and presently served on its board of directors.

Mr. Farnan, will you tell the committee the purpose of this organization and what prompted its creation.

Mr. FARNAN. Senator, you are familiar with Colonel Simpson and Colonel McCarnan of our two major police departments, and former Chief Reagan. They approached me about 2 years ago with the idea that all we saw was what got spitted out of the criminal justice system after investigation and prosecution, and that we as law enforcement people should make some effort to combat, and get involved with juvenile crime, sort of a wholesale view of crime prevention in the juvenile area. And through the good offices of those three Chiefs of Police, the Law Enforcement Coordinating Committee in Delaware, we formulated and became nationally recognized by the P.A.L. Association, and have begun a program in the Edgemoore Community Center, which we plan to expand. I will not be involved in the future, I suppose. They intend to expand out to other areas where we have deprived youngsters, to try and direct them in an area other than crime, and also, to provide role models for them by bringing in people who are responsible in the community so that these young people get an opportunity to see there is another side of the street.

Senator BIDEN. Is there anything that would prevent you, in your view, from continuing to be involved in that organization in the same way you have been as a Federal judge?

Mr. FARNAN. Not in the sense of a conflict of interest, but in terms of a time commitment, I actually now go out to the community center and work with the police officers, not as regularly as the officers do, but I think that there may initially be some time constraints. I plan to stay involved as a director.

Senator BIDEN. That is good. I would hope you would, and I would hope you would break the mould, and actually go out there.

I think the more people see that Federal Judges walk and talk, and still are part of the community and are involved—I mean this sincerely—it would be very beneficial, although it certainly is no prerequisite to your confirmation.

I would urge you to stay as involved in the community on matters of the nature that you have just described, as you have been in the past, and some wags might suggest you might have more time as a Federal Judge than you did as a U.S. attorney. I do not know that but you will find that out, shortly.

Another question the chairman has formulated is: The chairman considers judicial temperament to be a prerequisite for a Federal judge. Would you please give us your thoughts on this subject, judicial temperament.

Mr. FARNAN. Senator, I have appeared in almost, I think every court in the State of Delaware, and I think that judicial temperament is very important, not only for the attorneys that appear in front of you, but for the litigants, and temperament, to me, is embodied in someone like Collin Seitz, a person who hears parties fairly, has a reputation of being an impartial arbiter with his decision, and gives clear communication of the result in the case.

We have people who have I think exemplified the finest judicial temperament in Delaware, and I would just plan to continue in that tradition, just being fair and impartial.

Senator BIDEN. Another essay question the chairman likes to ask is—and you will be marked on this: The criticism of the Federal judiciary concerning its judicial activism is both justified and unjustified. That was the answer you gave to the question about whether or not judicial activism, the criticism of being judicially active was a justified criticism.

Would you give us an example of what particular criticism you feel to be unjustified.

Mr. FARNAN. I think that, there are certainly, areas to criticize the judiciary, both Federal and State, for overreacting to issues presented to them.

I think you react to the four squares of the case that are presented to you, but I think to some extent, there has been a need, in the history of this country, for broad constitutional mandates for clear violations of the Constitution, that no one on either side of the political spectrum disagrees with, and I think that they have been unjustly criticized, not for what they did in those areas, but for what the evolvement of those decisions as they were passed down through the various courts, and eventually into the State courts. So I think that some of that criticism comes not from the original mandate but from the evolvement.

Senator BIDEN. From the fundamental criticism of the law; they have enforced the law and the law has been unpopular?

Mr. FARNAN. That is exactly right.

Senator BIDEN. Mr. Farnan, what are your personal views with regard to the role of the Federal judiciary within the Federal Government and within society, in general? In 20 words, or less.

Mr. FARNAN. The Federal judiciary should decide the issues presented to them.

Senator BIDEN. What about the role of the Federal judiciary within society as a whole?

Mr. **Farnan**. I think it is very important that the Federal judges engender the kind of respect and understanding of the position they serve, which basically means that they take a role in the community, and at the same time, understand the community and what is going on.

Senator **Biden**. All right. Does anyone else have any further questions?

Well, I do not think, quite frankly, Mr. Farnan, there is going to be any real problem. I hope we can expedite the nomination as rapidly as possible. I wish you luck, and I really do want you to take me for a ride in that elevator once, all right? Is that a promise? Can I get a commitment on one ride in the elevator?

Mr. **Farnan**. I will commit to two rides, if it is expeditious, and Senator, let me thank you for your continued support throughout my career. Thank you very much.

Senator **Biden**. Well, it is a good choice. Good luck, Joe.

Mr. Marcus, will you be sworn. Do you swear that the responses to the answers you give will be the whole truth, nothing but the truth, so help you God?

Mr. **Marcus**. I do.

TESTIMONY OF STANLEY MARCUS, OF FLORIDA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Senator **Biden**. Mr. Marcus, you served as U.S. attorney for the Southern District of Florida since March 1982, and I understand from many people you have done a very fine job.

A large percentage of your work involves illegal drug trafficking. Do you have any recommendations on actions that might be taken to stem the flow of illegal drugs into the United States?

Mr. **Marcus**. I think the problem of narcotics addiction is a terribly serious one. In southern Florida we have made a very substantial effort and substantial law enforcement start to address that problem.

I think, briefly, there are just two additional points, that I would make in this regard. From a law enforcement standpoint we always come at the issue from the supply side, if you will, and talk too little about the demand for narcotics in this country.

I think increased efforts are being made now, and I think it is a critical area in which to increase our efforts still further, to focus upon the demand side of this curve, to educate our people about the tremendous dangers that drugs bring in their wake. The third and last observation I would make, again a little different from the supply side, concerns going to the source country and addressing diplomatic efforts where the drugs originally come from.

It seems to me that these two additional areas, these two critical areas beyond the law enforcement efforts, diplomatic efforts to seek cooperation from foreign host governments, and perhaps most important of all, educating our people about the profound dangers of drugs, would be the keys, from my perspective.

Senator **Biden**. Let me ask you how you feel about the need to have efforts on the rehabilitation side, drug rehabilitation?

Mr. Marcus. Again, that is part of the demand side, and I think it is critically important.

Senator Biden. I just came back from Italy, meeting with the high commissioner on the Mafia, and their counterpart to a DEA type apparatus they have set up in Italy, in part modeled after our own efforts, and it surprised me somewhat, as long as I have been involved in this process, it nonetheless surprised me, to hear complaints and concerns about cooperation, the same kind of international cooperation you are suggesting, and that I and others have been seeking, to hear that criticism come from their side.

That is, that there is not enough cooperation of a statutory nature, that allows them—for example, one of the biggest Mafia cases that is about to—well, really, I think will be a linchpin case, is the one Giuliano has up in New York that begins in October, if I am not mistaken, and there is a big dispute, with the Italian Government wanting to place some people over here who will work with our people.

They understand the Mafia equally as well as we do. The difference is, if you were a prosecutor in Palermo, you would probably be dead now. I am not being facetious; I am being serious. Whereas, thank God, although there is a constant concern in your position in south Florida, they have not been as expeditious in their efforts.

And so I would hope that you will continue to make this case from the bench, and among your colleagues on the bench, at the judicial conferences, and in your capacity of trying to influence—which is legitimate, from the bench—influence as part of the bench, the process.

I would also like to ask you another question. What proportion of the docket of a Federal district judge in south Florida would you say is drug-related?

Mr. Marcus. Our best estimate is that of the total pie of criminal cases prosecuted, let us say last year, in the southern district of Florida, better than half, perhaps something approaching 60 percent of the criminal cases pending in the southern district of Florida, are either narcotics cases, or narcotics-related. They may take the form of a currency violation but are basically, narcotics-related.

You are talking about anywhere between 55 and 60 percent.

Senator Biden. How extensively did you implement the forfeiture legislation when you were U.S. attorney?

Mr. Marcus. Extensively. We considered that to be of critical importance to our efforts to increase the costs of doing business in the narcotics area.

The forfeitures have increased substantially between 1982 and 1985, and I would say over the last 3 years, they have increased about 300 percent.

We are totaling now in excess of $20 or $22 million a year in the aggregate in forfeitures basically from narcotics-related cases.

Senator Biden. Do you anticipate with the change in the law, that it will be a more useful implement?

Mr. Marcus. Yes; I think the legislative reform is very important, and from my perspective, perhaps most significant is that it provides an ability to work more closely with State and local authorities, to enable them to seize particular assets throughout the process as opposed to just at the very beginning.

Senator **Biden**. A question from Senator Thurmond. In your capacity as U.S. attorney, you have been the target of a number of freedom of information law suits involving either individuals under criminal investigation, or those that have already been prosecuted by your office.

These individuals, generally speaking, are attempting to obtain their files in defense of their case. Mr. Marcus, have these suits been a problem for your office, and do you have any recommendations on changes in the Freedom of Information Act, that might decrease suits of this nature?

Mr. **Marcus**. Yes. The legislative determination is quite clear. The administrative burden, I think, is a real one, in terms of searching the files for appropriate records.

The southern district of Florida has had, since May 1984, about 120 Freedom of Information Act requests. The one concern that I would express in this regard concerns, maintaining, in appropriate cases, the confidentiality of a confidential informant, perhaps promised confidentiality by an investigative agency, the DEA or the FBI; I think that is one of the principal concerns.

I think the legislative balance is important and difficult to make in this particular area. The administrative expenses of course are also real.

Senator **Biden**. Mr. Marcus, you have previously served as the chief of the organized crime strike force in Detroit. At the present time, you oversee the strike force in Florida.

Do you believe the strike force concept is a viable one, and what should the role of the U.S. attorney be within that strike force? That is a question from the chairman.

Mr. **Marcus**. I think the strike force concept is a viable one, but I also think that it is critically important the U.S. attorney exercise sufficient supervision over the operations of law enforcement and the strike force, in particular in the district. In the southern district of Florida, the cooperative efforts have been real and substantial. The indictments are signed and reviewed by the U.S. attorney and by the chief of the strike force.

That was the practice that I experienced as chief of the strike force in Detroit as well. I think the critical issue, however, is to ensure the appropriate close, direct supervision by the U.S. attorney of the operations of the strike force.

Senator **Biden**. The last question, Mr. Marcus, again from Senator Thurmond. What are your views on criticisms involving judicial activism?

Mr. **Marcus**. I think it is important for judges to remember and to remind themselves, that the position they have is one of extraordinary responsibility, and the power that they exercise is substantial. I believe it has to be exercised with care, with prudence, with discretion. Judges are elected by no one; Federal judges are not up for election at any point.

I think it is critical that district judges resolve specific disputes before them where they are ripe, and they are appropriate for resolution.

Senator **Biden**. I said one last question. That was not accurate. Senator Simon cannot be here today and would like the following question asked. Have you been asked to give any express or implied assurance to anyone involved in the process of selecting you as a judicial nominee regarding your likely position on issues that will come before you as a judge?

Mr. MARCUS. No, sir.

Senator BIDEN. I have been informed by staff, that you have not had the opporutnity to introduce your family.

Mr. MARCUS. I have not.

Senator BIDEN. Probably one they would like to avoid but we would like you to do.

Mr. MARCUS. Thank you very much and I do appreciate the opportunity. I would like to introduce my wife, Judith, my son Jonathan, and my daughter Elizabeth, if they could perhaps stand for a moment.

Senator BIDEN. It is nice to have you all; you must be proud of your dad today. Congratulations, and we will see if we can move this along. Thank you very much. Appreciate it. Judge Scott, please.

Judge, would you stand and be sworn. Do you swear that the response to your questions will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SCOTT. I do, Senator.

TESTIMONY OF HON. THOMAS E. SCOTT, OF FLORIDA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Senator BIDEN. Judge Scott, would you give the committee your views on the purpose—this is a question from the chairman—the primary purpose of the criminal justice system.

Judge SCOTT. I would say that the primary purpose is to do justice, but not only in the individual case, but also from the standpoint of community impact, to ensure to the community that we are doing justice. One of the first things I learned from an old trial judge is that you not only have to do justice but you have to appear to do justice, and I think that is an important aspect of the criminal justice system.

Senator BIDEN. Judge, what kind of guidelines, if any, do you feel a judge should follow in determining the propriety of Federal intervention into State affairs? Again from the chairman, as you might guess.

Judge SCOTT. I am a great believer, I guess as a State trial judge, that the State court does a darn good job, and I was proud to be a member of the State judiciary. I think that the bench over there is real good, at least where I am from, and I am philosophically opposed to Federal intervention in State court action absent a most dire circumstance. It makes for good federalism.

Senator BIDEN. Would you give me an example of a dire circumstance.

Judge SCOTT. Well, I think that there are issues involving constitutional issues where a substantial injustice could have occurred in an election process, or something like that, where a Federal court would have to intervene and review the situation to make sure that it was done properly. Something along that line.

Senator BIDEN. Judge Scott, are there ever circumstances under which a judge should attempt to establish a new judicial precedent, and, if so, what are the criteria that you would consider in order to determine the propriety of revising existing precedents? Again from the chairman.

Judge SCOTT. Senator, I will say two things and then I will make an illustration. I am a great believer in precedent. If there is no precedent on the books—a trial judge's role is basically to follow the law, not make the law, and if there is no precedent on the books, then I use common sense pretty much.

One of the cases that involved me as a State trial judge, that I am particularly proud of, was a case where there was a very difficult motion to suppress, and I followed a rather old case and suppressed the evidence, but I wrote an opinion basically saying why I thought the case was wrong, and I solicited the government to reverse me. The opinion by the court of appeals starts off the following way: "Pursuant to the trial court's request but not his ruling, we reverse him as requested." That is pretty much my philosophy.

Senator BIDEN. Pretty good. I am glad the chairman is not here to hear your answer. You will not tell him, will you Duke? [Laughter.]

I have no further questions for you, Mr. Scott. Would you introduce your family.

Judge SCOTT. I would love to. I have got the major rooting section here. My wife Joyce, my mother Marie, and close family cousins and friends. Dr. Scott and his wife. This whole first two rows belongs to the one judge in the group. Thank you very much.

Senator BIDEN. Well, thank you all for coming up and congratulations.

We are going to skip our next judge on the agenda in deference to Senator Boschwitz, but I would like to call John C. Lawn forward, please.

Will you be sworn, please. Do you swear your responses to the questions will be the whole truth and nothing but the truth, so help you God?

Mr. LAWN. Yes, I do.

TESTIMONY OF JOHN C. LAWN, OF VIRGINIA, NOMINATED TO BE ADMINISTRATOR OF THE DRUG ENFORCEMENT AGENCY

Senator BIDEN. How are you? Are you sure you want this job?

Mr. LAWN. Yes, sir.

Senator BIDEN. I have a number of questions for you myself, but I will ask the chairman's questions, and withhold mine, because I am going to get an awful lot of opportunity to speak with you, I hope, and I would like very much, upon your confirmation, to sit down with you and really take a couple hours of your time.

As I said, I just came back from Europe, and I think that some of the things I have to ask you about and say, you may find of some interest, and you may be able to shed some light for me on some of what I have come across.

Let me ask the chairman's questions.

You have been the Deputy Administrator of DEA since 1982, and you have been Acting Administrator for the last 4 months.

Would you tell the committee what your major contributions have been to the agency, and what you want to take on, and why you want to take on this demanding task of Administrator.

Mr. LAWN. In response to the first part of the question, I participated very heavily in the reorganization which was begun under my predecessor, Francis "Bud" Mullen. This included the restructuring of our field offices. I think I contributed substantially in the past 3 years to the fact that we have had a sizable budget enhancement of some 69 percent over the time prior to my arrival.

I believe that I contributed in the establishment of a career development program for our agent personnel and nonagent personnel, including an office of preference program.

As a former high school teacher and a former high school coach, I had major input into the sports/drug awareness program which DEA has initiated with the high school coaches of the United States, I believe this program addresses the prevention issue raised by my colleague and friend, Stanley Marcus.

We now have, based upon our initiative, 48,000 high school coaches throughout the country involved in a prevention program. These coaches have direct supervision over 5½ million youngsters.

I think that is a critical program and it is an accomplishment in which I take some pride.

Senator BIDEN. Let me ask you one question myself, and obviously the chairman has more questions, but one of the things that concerns me, Jack, is this continued talk about a complete merger of DEA into FBI. What do you think the benefits and the drawbacks of such a merger would be, if it were to occur? Both benefits and drawbacks?

Mr. LAWN. Insofar as a merger is concerned, I singularly would be opposed to a merger. I think that it is critical that there be a single lead law enforcement agency regarding the enforcement of the Controlled Substances Act. DEA is that lead agency.

As far as the working relationship between DEA and the FBI, I think a consolidation of efforts is critical. The FBI has contributed a thousand agents to this war on drugs, supplementing the 2,200 agents of the Drug Enforcement Administration. I think our consolidated efforts are very important in the areas of training, informant development and undercover operations.

Stanley Marcus mentioned his concerns about the informant issue. It is a major concern to both the Drug Enforcement Administration and the Federal Bureau of Investigation.

I think it is critical that we consolidate our work, but I, for one, do not think a merger is the answer.

Senator BIDEN. Well, I happen to agree with you completely. I think there has to be a lead agency on the narcotic problem and with all due respect to Judge Webster, for whom I truly have a great deal of respect, and the FBI, they have a lot on their agenda: White collar crime, terrorism, organized crime, fingerprint records, and so on. You know, I hope that the rumors of a complete merger are nothing more than mergers, and if they turn out to be something beyond that, I can assure you you will at least have one advocate up here who will do all he can to see that that does not occur.

As I said, I have other questions, but I will save them for you. I would like to talk about the training side. I am concerned about the degree of training that a foreign agent receives, and how much, and how much they know and do not know, and I would also like to talk to you about the reciprocal need to bring some folks who are in other agencies, in other countries more on board here, but I will save all of that.

I thank the chairman for his indulgence, I wish you good luck, you will have my full support, and I look forward to working with you.

I still do not know why you want the job but I am glad you do.

Mr. LAWN. Thank you very much, Senator, and we appreciate your continuing support.

The CHAIRMAN [presiding]. Mr. Lawn, the DEA now is under Civil Service?

Mr. LAWN. Yes, sir; that is right.

The CHAIRMAN. Now there has been some discussion about putting them under excepted service. What do you think?

Mr. LAWN. I am very supportive of DEA being put into the excepted service because now, we have a conglomerate. All of our new agents come into the DEA in the excepted service. We also have personnel who are in the competitive service of the Civil Service System. We have four different systems in the Drug Enforcement Administration in which we must deal when it comes to promotions and other personnel actions.

In reference to Senator Biden talking about our working with the Federal Bureau of Investigation, even in the exchange of personnel, when we take a supervisor, let's say, from the Federal Bureau of Investigation, into a position in the Drug Fnforcement Administration, he or she must be detailed, because of the differences in our structures.

We have a critical need throughout the country for support help. It is considerably more difficult for us to fulfill that need under the Civil Service System. It would be substantially easier if we could direct hire which we can do in the excepted service.

The CHAIRMAN. Did you say you have some excepted now?

Mr. LAWN. Yes, sir.

The CHAIRMAN. Are they FBI agents who have transferred to you?

Mr. LAWN. No, sir; all of DEA's new agents come aboard under the excepted service and they remain in the excepted service for a period of 3 years.

The CHAIRMAN. Three years, and then go into civil service?

Mr. LAWN. Yes, sir.

The CHAIRMAN. But you would rather for them to remain in excepted service?

Mr. LAWN. Yes, sir; I would rather have a work force working entirely under one system, rather than the four systems which we currently have.

The CHAIRMAN. Now how about your training schools? I believe you are using the same training schools now, are you not?

Mr. LAWN. Yes, sir. We have a program in which, beginning in October of this year, we will be using the same training facility and that is the FBI Academy at Quantico.

Heretofore, the Drug Enforcement Administration had trained in Glynco, GA, but for any of a number of reasons, we felt it would be preferable for us to move to a new training facility, in view of the fact that fiscal constraint does not allow us to establish our own training facility, and we had requested that Judge Webster consider our moving to Quantico.

Judge Webster has approved this. The Attorney General has approved it, and beginning in October of this year, our first classes will be trained at Quantico.

The CHAIRMAN. Well, you will be using the same training facilities as the FBI?

Mr. LAWN. Yes, sir. We will use the same training facilities.

The CHAIRMAN. And that suits you all right?

Mr. LAWN. Yes, sir; it does.

The CHAIRMAN. Now how has DEA's international operations changed, if at all, since the abduction and murder of Special Agent Camerino, if that is the way you pronounce his name, and would modifying the so-called Mansfield amendment, which restricts DEA's operations overseas, be of benefit to your organization?

Mr. LAWN. Yes, sir. In reference to the first part of your question, due to the abduction and murder of Special Agent "Kiki" Camarena, we had to do some in-house changes in our policy for security purposes in order to enable our personnel, who in many cases serve in hostile environments in source countries, to be more protected than they had been. We enhanced any of a number of security procedures in order to ensure that they were better protected. As far as the Mansfield amendment is concerned, we have proposed a modification of the Mansfield amendment to the Department of Justice.

It is not a major modification but it is a modification to clarify the role of U.S. persons, not solely personnel of the Drug Enforcement Administration, and what their roles should be in a foreign environment when working with host country law enforcement personnel.

The CHAIRMAN. Mr. Lawn, would you tell the committee what your experiences have been, to date, with use of the emergency scheduling authorities provided by the Comprehensive Crime Control Act of 1984, and whether as I suspect, the problems with designer drugs such as ecstacy, are serious enough to warrant this action?

Mr. LAWN. I believe the authority we received for emergency scheduling was critically necessary.

I have used that emergency scheduling authority on three separate occasions, the first being in March 1985 for 3-methlyfentanyl, the second I used in May 1985 for MDMA, the so-called ecstacy, and as recently as today, I signed an order scheduling two analogs of the schedule II narcotic, meperidine. These analogs were MPPP and PEPAP. Coincidentally, the Attorney General this morning announced proposed legislation will be coming forward on the designer drug issue.

The CHAIRMAN. Mr. Lawn, our drug problems appear to have reached epidemic proportions. What will you do as Administrator of DEA to combat the insidious effect illegal drugs have on our Nation?

Mr. LAWN. Certainly I think that the Drug Enforcement Administration will play a critical role and in that regard, I intend to put additional DEA personnel overseas.

I think that an agent working in an overseas environment can get considerably more accomplished than can be accomplished by many more agents in the domestic environment.

I also anticipate our taking a more participatory role in prevention in the United States.

I mentioned earlier the Drug Awareness Program. I think that is very critical. Although it is not our primary function, I think that agents of the Drug Enforcement Administration are role models and can have a significant impact in that area as well.

The CHAIRMAN. Mr. Lawn, will you respond to a request to appear and testify before any duly constituted committee of the Senate?

Mr. LAWN. Yes, sir. I will.

The CHAIRMAN. That is a question we generally ask. The minority leader was especially interested in that. Do you have your family with you here today? Would you care to introduce them, have them stand up?

Mr. LAWN. Yes, sir, Mr. Chairman. My wife, Virginia. Holding my 6-year-old twin Kathleen, who is apparently not terribly excited about my appearance here. My daughter Kerry. My son, Kevin, And my son, John.

The CHAIRMAN. We are glad to have you with us.

I understand Mr. John Thomas, Assistant Secretary of State for International Narcotics was going to be here and speak on your behalf. Is he here?

Mr. LAWN. Yes, sir; he is.

The CHAIRMAN. Mr. Thomas, as I understand, you know this gentleman?

Mr. THOMAS. I know this gentleman; yes, sir.

The CHAIRMAN. Do you recommend him, or not?

Mr. THOMAS. I would strongly recommend him.

The CHAIRMAN. Well, that is all that is necessary. Thank you very much.

Thank you, Mr. Lawn. I know you will do a good job.

Mr. LAWN. Thank you, sir.

The CHAIRMAN. Senator Boschwitz, will you come around, please. Senator Boschwitz, we are glad to have you with us. Senator Durenberger has already spoken on behalf of James M. Rosenbaum of Minnesota to be a U.S. district judge. I understand that you wanted to speak in his behalf, too.

STATEMENT OF HON. RUDY BOSCHWITZ, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator BOSCHWITZ. Thank you, Mr. Chairman.

I do indeed want to speak on behalf of my friend Jim Rosenbaum, with whom I have been associated in various ways for about a dozen years.

He has a very rich legal background, and he was started in the law as an attorney for VISTA, and indeed did some very innovative things that I know this committee would be pleased with, when he served with VISTA in Chicago.

I should stop at this point and say that while there, he met his wife, Marilyn, who is with him this morning, together with his three daughters, Alexandra, Catherine, and Victoria, and there they all are, and indeed, one of this nominee's great strengths is his strong devotion and consideration of his family, and I know that you, Mr Chairman, have those same feelings.

I might say that one of his qualifications, Mr. Chairman is, that he is a great baker. He bakes bread and bakes other things, and I do not know exactly how that applies to the judiciary but I am sure it does. It shows a certain degree of patience, and that perhaps is not an unreasonable thing to require.

The CHAIRMAN. It is nice he can help his wife out that way.

Senator BOSCHWITZ. Oh, that makes a happy wife. Are you also a baker, Mr. Chairman?

The CHAIRMAN. I am not a baker. I could not cook anything.

Senator BOSCHWITZ. You seem to have a similar situation, though. In any case, for the last few years, Mr. Chairman, Jim Rosenbaum has been the U. S. attorney in Minnesota, a job which he received with my very enthusiastic backing, and there, of course, had the same wide-ranging legal experience that one would expect him to get, and he has conducted himself in that job in a way that has brought great credit to the Department of Justice, just as I am sure he will conduct himself as a Federal judge.

His experience is very broad, his experience starting with VISTA, as I mentioned in Chicago, when he did many innovative things for people who were unable to obtain legal representation except through the VISTA Program.

He has made quite a name for himself, Mr. Chairman, in Minnesota, as the U. S. attorney in the past few years, and prior to that in his career, as an attorney, was principally a trial lawyer.

So he is indeed a young man who brings the possibility of good long service to the judiciary, who brings a great deal of experience, and who brings the kind of values that I know that you, myself, and other members of the committee treasure, and I am here with great honor and great pleasure to present Jim Rosenbaum to the committee as a candidate for the Federal judiciary in the District of Minnesota.

The CHAIRMAN. Thank you very much, Senator.

Mr. Rosenbaum is very fortunate to have the high endorsement of you and Senator Durenberger. Both of you gentlemen are held in such high esteem in the Senate and I am sure he will have no trouble getting through the Senate with the endorsement of these two fine gentlemen. Thank you very much.

Senator BOSCHWITZ. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Rosenbaum, you have not been sworn yet, have you? Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Mr. ROSENBAUM. It will, Senator.

TESTIMONY OF JAMES M. ROSENBAUM, OF MINNESOTA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MINNESOTA

The **CHAIRMAN.** Senator, you are welcome to stay, or if you feel the need, you are free to leave.

Senator **BOSCHWITZ.** Thank you very much, Mr. Chairman. I think I will stay for a while.

The **CHAIRMAN.** Mr. Rosenbaum, would you give the committee your perspective on the recent trend in the Supreme Court toward stricter requirements of standing.

Mr. **ROSENBAUM.** Senator, I am strongly supportive of efforts to maintain a strict stance on standing. I believe that extension of the concept of standing, the erosion of the whole ripeness-type aspect, tends to bring interested but not involved litigants into court, and permits a kind of adventuristic position from time to time on the part of courts. I applaud a strict approach and I believe that it is an appropriate recognition of the Constitution's requirements of standing.

The **CHAIRMAN.** Mr. Rosenbaum, do you feel that a judge should assume direct control over complex issues in cases in order to avoid delays and to effectively manage such cases?

Mr. **ROSENBAUM.** I think a judge should choose to take the position that he will try and deal with the needs of the litigants before him; to the extent and to the speed with which he does that, while maintaining a respect for their legal positions, I think he serves the court and he serves the Government well.

The **CHAIRMAN.** Mr. Rosenbaum, you informed the committee that as a U.S. attorney, you personally handle the civil rights matters in your office.

What prompted your decision to become personally involved in this area?

Mr. **ROSENBAUM.** In the district of Minnesota, Senator, it has been a tradition that those files and those matters are the direct province of the U.S. attorney. It was an area where I had had some experience but primarily, it reflected the way the office has been run over time.

The **CHAIRMAN.** Mr. Rosenbaum, do you believe changes in the law should be reserved to the legislative, whose members can be altered by the voters if the elected officials fail to reflect the values of society?

We have the three branches of Government. We have the Congress, the legislative branch to make the laws; the executive branch headed by the President to administer the law; and the judicial branch to interpret the law. But in many cases it seems that judges have gotten off to running schools and running State institutions, and practically taking over some of these affairs, to the discontent of the Governors and State officials.

How do you feel about this?

Mr. **ROSENBAUM.** Senator, I am very pleased that Senator Boschwitz and you and your colleagues have been elected, and I am quite content to let you pass the laws as you choose.

If you are kind enough to permit me to be a judge, I will follow those, and I am more than content to let the policymaking be done by the elected officials in this country.

The **Chairman**. Do you believe in the strict construction of a division of powers? Now your separation of powers are the three branches I mentioned.

Now your division of powers between the Federal Government and the States. The 10th amendment provides that all matters not specifically delegated to the Federal Government are reserved to the States and the people.

Do you believe that that is a sound principle?

Mr. **Rosenbaum**. I believe it is an extremely sound principle, Senator, and I would support it.

The **Chairman**. The idea in the 10th amendment was to keep the Federal Government from plunging itself into everything, that it would only go into activities where it has specific authority to do so. In the last 34 years of course Congress has gone into many fields where it did not have authority, and that is one reason we have the big deficit we do, because we are in too many fields that the Constitution has never delegated to the Federal Government.

I think that is all the questons I have and I wish you well on the bench, and I am sure you will make an excellent judge with the fine recommendation here of Senator Boschwitz and Senator Durenberger.

Mr. **Rosenbaum**. Thank you, Senator. It has been an honor for me and an honor for my family. I thank you.

The **Chairman**. Those are all the nominations we have. We now stand adjourned.

[Whereupon, at 3:24 p. m., the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

JOSEPH J. FARNAN, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF DELAWARE

Birth: June 15, 1945, Philadelphia, PA.

Legal Residence: Delaware.

Marital Status: Married to Patricia Winner Farnan, 5 children.

Education: 1963-1967—King's College, A.B. degree. 1967-1970—University of Toledo, College of Law, J.D. degree.

Bar: 1970—New Jersey. 1972—Delaware.

Experience: 1970-1972—Criminal Justice Program, Wilmington College, Director. 1972-1975—Lawrence M. Sullivan, Esq., Associate. 1972-1976—Office of the Public Defender, State of Delaware, Assistant Public Defender. 1975-1976—Sullivan, Hurley, Farnan & Falasca, Partner. 1976-1979—County Attorney for New Castle County, DE. 1979-1981—Department of Justice, State of Delaware, Chief Deputy Attorney General. 1981-present—U.S. Department of Justice, United States Attorney, District of Delaware.

STANLEY MARCUS

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTHERN DISTRICT OF FLORIDA

Birth: March 27, 1946, New York, NY.

Legal Residence: Florida.

Marital Status: Married to Judith Rosenbaum Marcus, 2 children.

Education: 1963-1967—Queens College of the City University of New York, B.A. degree. 1967-1968—Harvard Law School. 1969-1971—J.D. degree.

Bar: 1972—New York. 1985—Florida.

Military Service: 3/1969-7/1969—United States Army.

Experience: 1971-1973—Law Clerk to Hon. John R. Bartels, U.S. District Court, Eastern District of New York. 1974-1975—Botein, Hays, Sklar & Herzberg, Associate. 1975-1978—U.S. Attorney's Office, Eastern District of New York, Assistant U.S. Attorney. 1978-1982—U.S. Department of Justice, Organized Crime and Racketerring Section, Detroit Strike Force, Special Attorney, Deputy Chief and Chief (1980-1982). 1982-present—United States Attorney, Southern District of Florida.

JAMES M. ROSENBAUM

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MINNESOTA

Birth: October 12, 1944, Fort Snelling, MN.

Legal Residence: Minnesota.

Marital Status: Married—Marilyn Brown Rosebaum, 3 children.

Education: 1962-1966—University of Minnesota, B.A. degree. 1966-1969—University of Minnesota, J.D. degree.

Bar: 1969—Minnesota. 1970—Illinois.

Experience: 1969-1970—VISTA, Attorney. 1970-1972—Leadership Council for Metropolitan Open Communities, Staff Attorney. 1973-1977—Katz, Taube, Lange & Frommelt, Associate. 1977-1979—Private Practice. 1979-1981—Gainsley, Squier & Korsh, Partner. 1981-present—United States Attorney, District of Minnesota.

JUDGE THOMAS E. SCOTT

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF FLORIDA

Birth: April 27, 1948, Pittsburgh, PA.

Legal Residence: Florida.

Marital Status: Married to Joyce Newman Scott.

Education: 1965-1969—University of Miami, B.A. degree, cum laude. 1969-1972—University of Miami Law School LL.B. degree.

Bar: 1972—Florida.

Experience: 1970-1971—Hon. James W. Kehoe, Circuit Court, Eleventh Judicial District, Law Clerk & Baliff. 1971-1972—Kimbrell, Hamann, Jennings, Womack, Carlson & Kniskern, Law Clerk. 1972-1976—Bradford, William, McKay, Kimbrell, Hamann & Jennings, P.A., Associate. 1976-1977—Huebner, Shaw and Bunnell, Associate. 1977-1979—Bradford, Williams, McKay, Kimbrell, Hamann & Jennings, P.A., Partner. 1979-1984—Judge, Circuit Court, Eleventh Judicial Circuit, State of Florida. 1984-present—Kimbrell, Hamann, Jennings, Womack Carlson & Kniskern, P.A., Member.

JOHN C. LAWN

NOMINEE, ADMINISTRATOR OF DRUG ENFORCEMENT

Birth: June 2, 1935, Brooklyn, N.Y.

Legal Residence: Virginia.

Marital Status: Married—Virginia Kelly, 4 children.

Education: 1955-1957—Cathedral College of the Immaculate Conception. 1955-1957—St. Francis College of Brooklyn, B.A. 1960-1964—St. John's University, M.A.

Military Service: 1956-1957—U.S. Marine Corps Reserve. 1957-1960—Active Duty.

Experience: 1967-1969—FBI, Savannah Field Division. 1969-1970—Defensive Language Institute (FBI), California. 1970-1973—Washington, Field Office, FBI. 1973-1977—FBI Headquarters, Supervisor. 1977-1979—FBI, Kansas City, Mo, Assistant Special Agent in Charge. 1979-1980—FBI Headquarters, Section Chief. 1980-1982—FBI, San Antonio, Special Agent in Charge. 1982-present—Drug Enforcement Agency, Deputy Administrator.

CONFIRMATION HEARING ON: ROGER J. MINER, ROGER L. WOLLMAN, ALEX KOZINSKI, RICHARD H. MILLS, ROGER G. STRAND, AND JOHN M. WALKER, JR.

WEDNESDAY, JULY 17, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon and DeConcini.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. We meet today to hold hearings on a number of judges. Our first is Judge Roger J. Miner of New York to be U.S. circuit judge for the second circuit. I believe that Senator Moynihan, and Senator D'Amato as well as Representatives Fish, Gilman, and Solomon are here as well.

We also have Mr. John Walker of New York to be U.S. district judge for the southern district of New York.

Senator D'Amato, we would be very pleased to hear from you at this time. I believe that you are here to endorse both of these gentlemen?

Senator D'AMATO. Mr. Chairman, I am.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. In the interests of brevity, in as much as so many of my distinguished colleagues, including the ranking member of the Judiciary Committee in the House of Representatives, Congressman Fish is here, to join in support of these two outstanding nominees, I would like to ask that my complete testimony be submitted in the record, as if read in its entirety and attempt to summarize just briefly why I am supportive of these recommendations that the President has made.

Mr. Chairman, Judge Miner has served with great distinction as both an attorney in the private and public service, of our State, and as an outstanding Federal judge for 30 years. As a U.S. district court judge for the northern district of New York since 1981, he has skillfully handled the most difficult cases in many areas of the law.

The committee has before it a list of 76 written opinions and several of his scholarly articles that demonstrate the broad range and great depth of Judge Miner's knowledge and ability.

He has served with great distinction on the Supreme Court of our State of New York; is a graduate of Columbia University and New York Law School; he was an editor of the Law Review; served in the Army for 3 years with the Judge Advocate General's Corps; worked as an attorney in private practice for 16 years; was corporation counsel for the city of Hudson as an assistant district attorney; and then district attorney for Columbia County.

I am confident that he will make a great Federal circuit court judge and it is a great honor to be able to introduce him to this committee.

In addition, Mr. Chairman, I am privileged also to appear here on behalf of John Walker, who is a candidate for the southern district of New York as a district court judge. John Walker is another excellent nominee.

He has been a dynamic and innnovative Assistant Secretary of the Treasury since 1981. And at the Treasury Department he has handled many complex legal issues with great distinction. Some of these have not only been difficult, they have been without precedent, such as the financial settlement between the United States and Iran after the hostage crisis. John Walker has developed the areas of money laundering and financial investigations into the effective law enforcement tools that they are today.

In a very real sense, Mr. Chairman, John Walker has helped bring law enforcement into the 20th century. So I am delighted, Mr. Chairman, to have this occasion to introduce these two fine distinguished gentlemen, before this committee, one who is already serving as a district court judge, and will make an excellent circuit court judge, and the other, John Walker, who will be a distinguished district court judge.

The CHAIRMAN. Thank you, Senator.

[Statement follows:]

PREPARED STATEMENT OF SENATOR ALFONSE D'AMATO

Mr. Chairman, it is a great pleasure to introduce to you and the Senate Judiciary Committee two truly outstanding judicial nominees: Federal district court judge Roger Miner, who is here as a nominee to be a United States circuit court judge for the second circuit; and Assistant Secretary of the Treasury for Enforcement, John Walker, who is here as a nominee to be a United States District Court judge for the Southern District of New York.

1. Judge Miner has served with great distinction as an attorney in both private and public service, and as a State and a Federal judge, for 30 years. As a United States District Court judge for the Northern District of New York since 1981, he has skillfully handled the most difficult cases in many areas of the law. The committee has before it a list of 76 written opinions and several of his scholarly articles that demonstrate the broad range and the great depth of Judge Miner's knowledge and ability.

From 1975 to 1981, Roger Miner was a distinguished justice of the New York Supreme Court. He is a graduate of Columbia University and New York Law School, where he was an editor of the law review. He served in the Army for 3 years with the Judge Adjutant General's Corps from 1956 to 1959. After the Army, he worked as an attorney in private practice for 16 years, as corporation counsel for the city of

Hudson, New York for 3 years, and as assistant district attorney and district attorney for Columbia County, New York for 10 years.

Judge Miner, I confidently predict, will make a great Federal circuit court judge, and it is a great honor to be able to introduce him to this committee.

2. John Walker, who appears here today as a nominee for the United States District Court for the Southern District of New York, is another excellent nominee. He has been a dynamic and innovative Assistant Secretary of the Treasury since 1981. At the Treasury Department, he has handled many complex legal issues with great distinction. Some of these have not only been difficult, they have been without precedent, such as the financial settlement between the United States and Iran after the hostage crisis.

John Walker has developed the areas of money laundering and financial investigations into the effective law enforcement tools they are today. In a very real sense, Mr. Chairman, John Walker has helped bring law enforcement into the twentieth century.

From 1977 to 1981, John Walker was a partner in the New York law firm of Carter, Ledyard & Milburn. He was an associate with that firm from 1975 to 1977.

His Federal practice has been extensive and varied, and he has been an outstanding trial attorney, not only at Carter, Ledyard and Milburn, but as an assistant U.S. attorney for the Southern District of New York for 5 years, and as an associate attorney with another great New York law firm, Davis, Polk & Wardwell.

John Walker is a graduate of Yale University and the University of Michigan Law School. He was a member of the U.S. Marine Corps Reserve from 1963 to 1967.

Mr. Chairman, it is a pleasure to introduce to you and to the Senate Judiciary Committee, Judge Roger Miner and John Walker. They represent the best this Nation has to offer, and I know their service in the positions for which they have been nominated by the President will meet the highest standards of fairness, learning, intelligence, and humanity.

The CHAIRMAN. I want to congratulate Judge Miner and also to congratulate Mr. Walker upon their appointment by the President. And to congratulate them for having such an able advocate as Senator D'Amato, here, to endorse them.

Senator D'Amato is in his first term, here in the Senate, where he has made a lot of friends and he is held in high esteem.

I see our other distinguished Senator from New York has come. Senator Moynihan we would be glad to hear from you at this time, too.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Mr. Chairman, you are most generous and I could not help to further embellish the remarks of my friend and distinguished colleague, Senator D'Amato, and I see that a number of our friends from the House of Representatives are here as well, and I do not want to keep them from speaking.

We are very proud of Judge Miner. In a relatively short service as a district court judge from New York State, he was chosen by the President to the very distinguished position of a member of the court of appeals, the Second District Court of Appeals. That choice bespeaks his merits, sir.

As for Mr. Walker, his service in the Treasury Department has genuinely been distinguished and it is particularly pleasing to us to see that kind of hard and difficult work recognized by the President and I am sure, the Senate, in this nomination to the Bench and I commend both of these gentlemen to this committee.

The CHAIRMAN. I want to congratulate them for having the support of the distinguished Senator from New York, Senator Moynihan.

That gives you the endorsement of both Senators and that is very important, they are both held in high esteem.

And I am sure that that will be of great benefit to you.

Now, we have some distinguished Congressmen from New York here. Representative Fish, I believe that you were going to speak on behalf of one or both of these nominees.

Mr. FISH. Judge Miner, sir.

The CHAIRMAN. All right, we will hear from you now.

STATEMENT OF HON. HAMILTON FISH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. FISH. Thank you, Mr. Chairman.

It is my distinct honor to appear before the Senate Committee on the Judiciary on behalf of a very dear and old friend, Judge Roger J. Miner, of New York.

I have known Roger, a native of Hudson, NY and his wife, Jackie, for over 20 years, as a good friend and as an admired professional colleague.

As you were told, after receiving his law degree, Roger started a long and dedicated career of service to his country, first in the U.S. Army, serving with distinction in the Judge Advocate General's Corps; returning to private practice in the city of Hudson. In 1964 he got into the district attorney's office, first as assistant district attorney for Columbia County and subsequently elected to serve several years as the district attorney for Columbia County.

He was then elected Justice of the New York State Supreme Court Third Judicial District. And following service on the State's Trial Court, he was appointed in 1981 to the U.S. district court judge for the northern district of New York.

Mr. Chairman, I think that his private practice, his terms as a district attorney and his judicial service equip Roger Miner as an outstanding choice to fill this vacancy in the Second Circuit Court of Appeals. On the basis of his strong legal credentials and dedicated and wide judicial experience, I give the highest recommendation to this committee that Judge Miner be confirmed to fill this vacancy.

On a personal basis, I know that Roger Miner possesses the important qualifications; that of a strong moral character, a keen intellect, and a dedicated and fair sense of fairness.

I admire his sense of humanity and his loyalty to the Constitution of the United States. I am most grateful for this opportunity to appear on behalf of an old and dear friend and it is my hope that the nomination of Roger Miner be passed on favorably to the Senate for his confirmation. Thank you.

The CHAIRMAN. Thank you very much.

We are pleased to have you here, Congressman Fish and we have two other Congressmen here and we would be pleased to hear from them now.

Congressman Gilman?

STATEMENT OF HON. BENJAMIN A. GILMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Gilman. Thank you, Mr. Chairman. It is a pleasure for me to be able to appear before this distinguished committee and to be able to endorse both candidates who touch on the northern part of my district and the southern part of my district.

I am pleased to be supportive of the candidacy of Roger Miner, who has been serving as a Federal district judge for a number of years in our district and before that as a supreme court judge and before that had the distinction of being a very stringent law enforcer as a district attorney in one of our neighboring counties, in Columbia County.

He has not only demonstrated his capabilities as an outstanding member of the bench and bar, but he was also an outstanding graduate of my law school, the New York Law School, from which he graduated cum laude.

I am pleased to add my voice in support of Senator D'Amato and Senator Moynihan's endorsement and Congressman Fish's endorsement of district court judge, Roger Miner.

I am also pleased to be here today, to be supportive of the nomination of John Walker to the U.S. district court of the southern district, which is also part of my region in New York State. We have ~~known~~ of Mr. Walker's region in New York State. We have known of Mr. Walker's work in law enforcement, and money laundering, his work on some of the Iranian assets and other problems, that he has been involved in in the number of years, in the past 4 years in which he served as assistant secretary and his years in an active law practice in New York City.

It is for that reason that I recommend your favorable consideration. I thank you for the opportunity of appearing before you, Senator.

[Prepared statement follows:]

Prepared Statement of Hon. Benjamin A. Gilman

I welcome this opportunity to appear before this distinguished Committee in support of District Court Judge Roger Miner's nomination for the Second Circuit Court of Appeals in New York State. I thank the esteemed gentleman from South Carolina, Chairman Thurmond, for allowing me to appear on behalf of this outstanding nominee.

Roger Miner's appointment to the Second Circuit Court of Appeals is a logical progression to a noteworthy career in the law—a career exemplified by a lifetime of service to the public and to the laws that govern them. Judge Miner's extensive work in both private practice and public service have affored him the varied exposure to the law and to the community that is so integral to a fair and reasoned application of the law. His vigor, integrity and compassion are qualities we seek in those whom we consider for our highest public offices. Clearly these are qualities that make Roger Miner an outstanding candidate for this appointment to the Circuit Court.

Ever since his graduation in 1956, cum laude from New York Law School, Roger Miner has distinguished himself as a highly capable, compassionate member of the bench and the bar.

After active duty in Japan and Korea with the Army's Judge Advocate General's Corps, Roger began his long career of 24 years of public service, when he was retained as Corporation Counsel for the city of Hudson, N.Y. In 1964 Roger was appointed Assistant District Attorney for the County of Columbia in New York State and thereafter was elected district attorney in 1968. Having served as a New York State Assemblyman from 1967 to 1972, I was aware of District Attorney Miner's reputation throughout New York State as a judicious and caring man who worked diligently to enforce our laws. Judge Miner continued to serve as District Attorney until 1975 when he was again chosen by the people, this time to serve as a justice on the New York State Supreme Court representing the Third Judicial District. Roger Miner is currently a U.S. District Judge for the northern district in ths State of New York, a position he has held for the past four years.

I am pleased to note for this distinguished committee, that Judge Miner continues to command admiration and respect from his community and from his colleagues, both on the bench and at the bar.

The task charged to this Committee is not a simple one. The interpretation and administration of our laws is one of our government's most important responsibilities. Roger Miner's experience, reputation for accuracy and fairness, his dedication to the letter of the law and to the people of New York, all speak of his exemplary ability to meet the many challenges of this appointment. Accordingly, I urge the members of this Committee to act favorably in considering the nomination of Judge Roger Miner for the bench in the Second Circuit of the U.S. Court of Appeals.

The **Chairman**. Thank you very much, Congressman Gilman, we are honored to have you here. We will now hear from Representative Gerald Solomon.

STATEMENT OF HON. GERALD SOLOMON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. **Solomon**. Thank you very much, Mr. Chairman.

And in commending both of these outstanding candidates to you, let me preface my remarks first by offering a letter to the committee from Congressman Sam Stratton, a member of the other political party who rises in support of our good friend, Judge Miner.

I would present this to your committee.

[Information follows:]

SAMUEL S. STRATTON
23D DISTRICT, NEW YORK

COMMITTEE ON
ARMED SERVICES

SUBCOMMITTEE:
CHAIRMAN, PROCUREMENT AND
MILITARY NUCLEAR SYSTEMS
INVESTIGATIONS

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE:
2205 RAYBURN HOUSE OFFICE BUILDING
(202) 225-5076

DISTRICT OFFICES:
ROOM 827
LEO W. O'BRIEN FEDERAL OFFICE BUILDING
ALBANY
(518) 465-0700

U.S. POST OFFICE, SCHENECTADY
(518) 374-4547

U.S. POST OFFICE, AMSTERDAM
(518) 843-3400

U.S. POST OFFICE, TROY
(518) 271-0822

July 17, 1985

Dear Mr. Chairman:

I first met Judge Miner when he was first admitted to the bench of the Federal District Court of the Northern District of New York in Albany.

I have followed Judge Miner's career on the bench, and I know that his fellow judges and associates regard his service on the bench as outstanding.

Sincerely yours,

Hon. Strom Thurmond
Chairman
Committee on the Judiciary
U. S. Senate
Washington, D. C. 20510

Mr. SOLOMON. And second to apologize for Congressman Ben Gilman and I for being late. We know how prompt you are and we certainly would not want to be late, except that we are members of the Foreign Relations Committee in the House who has a bill on the floor and we were tied up on a vote that was taking place.

Senator, I appreciate deeply the opportunity that you have given me to testify before this esteemed panel today, particularly as it would provide me that welcome chance to say a few words on behalf of a personal constituent whom I have known and admired for many, many years.

Today, I am asking that the Senate Judiciary Committee confirm President Reagan's appointment of Judge Roger Miner to the second court, U.S. Court of Appeals, and in doing so, I am reminded somewhat of the words of your former colleague, Senator, the late and beloved Senator Sam Ervin, who served so faithfully as chairman of this prestigious committee.

Senator Ervin always referred to himself as a country lawyer. In a way, that showed how proud he was of his roots in rural North Carolina. In the same way, I am deeply honored to speak on behalf of another country lawyer, Roger Miner, who has been true to his roots in rural Columbia County in upstate New York. He has remained true to his roots, true to his family and to himself, throughout his career as a county district attorney, a judge in New York State Supreme Court and since, 1981, as you know, as a Federal judge for the northern district of New York.

Judge Miner's career has been described by a local paper, with justifiable pride, as meteoric. However, you may choose to describe that career, there is virtually unanimous as to the factors that contributed to the rise of Judge Miner as a rural country prosecutor to his appearance today before this Senate Judiciary Committee.

These factors include the judge's sharp intellect, his dedication and his reputation for finely honed and well-balanced judicial decisions so important to you and me and to Americans throughout this country.

I have known Roger and his family for many years now, and I can well imagine what a thrill it must be for him to appear before you today, to share with you, the judicial philosophy that has shaped his decisions and to review some of the highlights of his years as a Federal magistrate.

I know they are going to please you, Senator. But I also know Roger to be a modest gentleman, to recount fully his accomplishments and that is why I am here today, to fill in the missing elements and to give you some sense of the pride that many of us feel to know that a native son from rural Columbia County would be considered for a position on the bench of the second highest court, of our land.

And some would say that a career like that of Judge Miner's can happen only in America and I can only add that it takes an American like Judge Miner, to build a career that would culminate in his being considered for this high honor. I can say that without reservation that he is truly deserving of this honor, he is a great American.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We are very pleased to have these able Congressmen here, all of whom are held in high esteem to endorse Judge Miner and to endorse Mr. Walker. We appreciate your presence and you are welcome to stay longer, or you can remain during the hearings, whichever you prefer.

Mr. SOLOMON. Thank you, Mr. Chairman.

The CHAIRMAN. We have another nominee today to be a circuit judge, Judge Robert L. Wollman of South Dakota.

Senator Pressler and Senator Abdnor are here on his behalf and we are very glad to have them here.

STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Thank you, Mr. Chairman.

Mr. Chairman, I am very honored to come before this committee and I thank you very much. I wish to present to the Senate Judiciary Committee and recommend and introduce a South Dakotan who has been nominated by the President of the United States to be the U.S. circuit judge for the eighth judicial circuit.

Let me say that I am particularly honored because South Dakota has not had a representation on this court since 1960.

It is an honor and a privilege to introduce to you, South Dakota Supreme Justice, Roger L. Wollman, a life-long resident of South Dakota.

Justice Wollman has served as a State supreme court justice since 1971. Justice Wollman has established himself as a fair and respected justice. During the 4 years he was chief justice of the State supreme court he served on the executive committee of the Conference of Chief Justices. Prior to coming to the State supreme court, Justice Wollman was engaged in the private practice of law and served as Brown County's State's attorney. He served in the U.S. Army before law school. He received his juris doctorate from the University of South Dakota School of Law in 1962, and LLM from Harvard Law School in 1964.

Justice Wollman has been involved in community and civic affairs and is held in high esteem by members of the bar. His nomination has been received very favorably not only by the legal profession but also by the citizens of our State at large.

Indeed, the only regret that has been expressed about this appointment is that Judge Wollman will be leaving South Dakota in order to assume his duties on the circuit bench.

I would also like to introduce to the committee, Roger's wife, Diane, who is here with us today. We are very glad to have you here, Diane.

I am pleased that the President has submitted Roger's name to this committee and to the Senate. I am confident that he will serve upon the circuit court with distinction and I urge this committee to recommend his confirmation to the full Senate.

The CHAIRMAN. We are very pleased to have you here, Senator. And I will now hear from Senator Abdnor.

STATEMENT OF HON. JAMES ABDNOR, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator ABDNOR. Thank you, Mr. Chairman. I, too, am very appreciative of this opportunity to join with my distinguished colleague, Senator Pressler, in presenting to the committee, Justice

Roger Wollman, who has been nominated by the President to serve on the U.S. Court of Appeals for the eighth district.

It is indeed a pleasure, not only because Justice Wollman is exceptionally well qualified for the appointment, because we anticipate his becoming the first South Dakotan in 24 years to get a seat on this prestigious bench. And for a long time we endeavored to have a South Dakotan appointed to the eighth district and I am, of course, delighted and grateful that the President has seen fit to make the nomination at this time.

This is a real opportunity and an honor for me because I have known Roger Wollman for a long, long time and his brother and family.

He is an outstanding individual and has been so throughout his entire life. He and his wife, Diane, and their three sons are a great family and a great credit to the State of South Dakota.

Justice Wollman, as Senator Pressler said, is currently an associate justice of the Supreme Court of South Dakota, where he has served since January 5, 1971. And from September of 1978, to September of 1982, he served as chief justice of the court.

Justice Wollman grew up on a farm in South Dakota and he graduated magna cum laude from the University of South Dakota School of Law. And he went on to obtain his master's of law at Harvard Law School. And after serving as a law clerk to the U. S. district judge, George Milelson, he practiced law in Aberdeen, SD, from 1964 to 1971, during which time, he served for 4 years as Brown County's State's attorney.

So prior to his going on the bench, he had broad experience in both civil and criminal trial work. From 1971 until the present, Justice Wollman served with great distinction on the South Dakota Supreme Court. During those past 14 years, he has earned the reputation of not only being a fair and a very hardworking judge but also a very learned judge.

As a leading member of the South Dakota Bar said, "Wollman is a tremendous good appointment."

He went on to say that the only regret that I have, is that I hate to lose him from the South Dakota Supreme Court. A fellow associate justice on the bench, describes Justice Wollman as a very fine student of the law, who is first and foremost an intellect.

Administration spokesmen have clearly indicated that they want known quality and making recommendations for appointments to serve on the Federal bench. Well, let me tell you, in Justice Wollman, they certainly have someone who more than passes the test.

During his 14 years of experience as a public judge he has authored 335 majority opinions together with numerous specially concurring and dissenting opinions. They reflect a jurist with outstanding legal knowledge and a judicial temperment.

Mr. Chairman, I am satisfied that Justice Wollman possesses the necessary legal skills, the experience, and the integrity to be an outstanding addition to the Eighth Circuit Court of Appeals. I am confident that he will distinguish himself on the appellate bench and bring great credit to the State of South Dakota.

Mr. Chairman, we are extremely proud of Justice Wollman and it is most fitting that he should be appointed to this position.

Thank you.

The Chairman. I want to congratulate Judge Wollman upon his appointment by the President and also for having both of your able and distinguished Senators here to endorse you.

They have both come here in person, in addition to having sent in their cards approving you. And we would be pleased to have them remain, if they would, although I know how busy they are, and you may be excused if you wish that.

Senator Pressler. Mr. Chairman, may I thank you, personally, and your staff for the wonderful job that you and the Judiciary Committee have done in assisting us with this appointment.

The Chairman. It is a pleasure to do it. We have heard so many very nice things about Roger Wollman and his fine recommendation by you, Senators, and we are pleased to cooperate.

We will now have next on the agenda, Alex Kozinski of California, and for him, will be Senator Cranston and Senator Wilson.

We will be glad to hear from you.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator Wilson. Thank you very much, Mr. Chairman.

Mr. Chairman, and Senator Simon, I appreciate the opportunity to appear before the committee today, to introduce Judge Alex Kozinski, who has been nominated by the President to serve on the Ninth Circuit Court of Appeals. It is a great pleasure for me to do so.

Mr. Chairman, as Mr. Kozinski's résumé is before the committee and in the interest of time, I will not go through it at length, let me simply comment on the highlights.

He began his legal career with an outstanding academic record, at the UCLA Law School graduating first in his class, achieving the Outstanding Achievement Award at graduation, and serving as managing editor of the UCLA Law Review. And he was order of the Cloyth, clerk for the Honorable Tony Kennedy, in the very court to which he now aspires. Also he served as clerk to Chief Justice Berger. He has been an attorney in private practice, assistant counsel to the President of the United States and chief judge of the U.S. Claims Court.

In addition, he has served as special counsel to the Merit System Protection Board. Let me note, though that our backgrounds do have some things in common. As I have indicated, we have both received our legal education at a school of law in the University of California system; he at UCLA and I at Bolt Hall. We both have some affection for Yale; I received my undergraduate degree there, and he has a better reason, he has a son named, Yale.

When Alex Kozinski was nominated by President Reagan, I was, to be frank, struck by his youth. The question that I had, was what made him, at his young age, qualified to serve on our Nation's largest court of appeals?

This is a court that has historically been looked to for its wisdom on a great variety of subjects, and for this reason, demands a great deal from those who are chosen to serve on it.

Well, Mr. Chairman, I spoke with people who know the nominee both personally and professionally and each person; told me of Mr.

Kozinski's determination, his great knowledge of the law, his willingness to listen and his eminent fairness. They told me of the job that he has done in the many different capacities that he has held as lawyer and judge.

Mr. Chairman, most importantly, I met with the nominee and we talked for some time about the role of the Federal judiciary in our tripartite system of government, one with intended limitations on each branch, and in the event of a failure of one branch to recognize its limitations, one with systematic checks and balances.

We talked about judicial activism and the need for restraint. We discussed the fact that policies are to be made by the political branches, subject only to the constraints of the Constitution. We talked of the very important role of precedents in our legal system and we spoke of the meaning of freedom, something which is not taken for granted, either by the nominee, nor most of those who have experienced quite a different condition in the country of his birth.

Mr. Chairman, I now understand the wisdom of Mr. Kozinski's nomination. He has condensed in a very few years both a great deal of knowledge, and a great appreciation for the role that he will assume upon confirmation by the Senate.

For these reasons I am confident that he will serve with distinction, the interest of justice on the ninth circuit and enthusiastically urge the committee to favorably report his nomination to the full Senate.

Thank you.

The CHAIRMAN. Thank you very much, Senator.

I want to congratulate Judge Kozinski upon his appointment by the President and upon having the endorsement of Senator Wilson, who has come in person here to testify.

Senator Cranston was here, but he must have had to leave to go to some engagement, but he has approved him, too.

And that is very commendable that you have the approval of both Senators.

Senator Wilson, we thank you for your appearance here, and for the high endorsement and since he has been approved by Senator Cranston, I feel that he has a good chance to get through.

Senator WILSON. Thank you, Mr. Chairman.

The CHAIRMAN. I know how busy you are and that you have got to get back to your duties. And you can tell the Armed Services Committee that I will be back at 3 p.m.

Senator WILSON. I will relay that message, thank you.

[Prepared statement of Senator Alan Cranston follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman, I am delighted to introduce Alex Kozinski of California, who has been nominated to serve as a U.S. Circuit Judge for the Ninth Circuit.

I know that Alex, who is Republican, has outstanding credentials to serve on the Ninth Circuit bench. He comes highly recommended to me by a number of friends of mine in California, including Democratic attorneys whose views I respect highly. As the senior Senator from California, I am pleased to give Alex Kozinski my support on his appointment. I know he'll do an excellent job.

Born in Bucharest, Rumania, Alex became an American citizen in 1968. He entered UCLA that year for his undergraduate education, and his career since then has been very remarkable—in fact it's been amazing. First, he went on to earn a law degree at UCLA, graduating first in his class and editing the review. He clerked with Supreme Court Justice Warren Burger, worked at prestigious law firms in Los Angeles and here in Washington, then served in the Reagan Administration after his activist volunteer work in Lawyers for Reagan (1979–1980). He is now a Chief Judge at the U.S. Claims Court. A member of the key bar associations in California, Washington, DC, and nationwide, Alex has published extensively and is conversant in five languages, including his native Rumanian.

Clearly, Alex Kozinski is a promising young man. He has already contributed much to public service and has the potential to do even more on the Ninth Circuit bench. I commend him to you and urge the Committee to confirm his nomination with full confidence in its decision.

The CHAIRMAN. Our next judge to be heard is Judge Richard H. Mills of Illinois.

I believe that Senator Dixon is here and Senator Simon is a member of this committee, and so, we would be pleased to hear from those Senators.

Senator Dixon, you may proceed.

STATEMENT OF HON. ALAN DIXON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DIXON. Mr. Chairman, and my distinguished friend and colleague from Illinois, Senator Simon, I am truly honored to introduce Judge Richard H. Mills, who has been nominated to be a U.S. District Court Judge for the Central District of Illinois. Judge Mills appears before this committee with a long record of public service. He served in the U.S. Army and the Army Reserve. In the late 1950's he served as a youth adviser to the Illinois Youth Commission.

Then Richard Mills became the State's Attorney for Cass County, IL. Judge Mills' tenure on the bench began in 1966 when he became judge for the Eighth Judicial Circuit of Illinois. From 1976 to the present, Judge Mills has served with distinction as a judge in the Fourth Judicial District of the Appellate Court of Illinois.

Judge Mills is also a noted author in the legal field, having written more than 15 articles in publications ranging from the American Bar Association Journal to the University of Illinois Forum, to the Judge's Journal to the Illinois Bar Journal.

In 1974, Judge Mills was awarded the American Bar Association's Judge Edward Finch Award, given annually for the best Law Day Speech in the United States. In less than 20 years on the bench, Judge Mills has offered more than 1,100 opinions, almost 400 of which have been published. Judge Mills is highly regarded and respected in his community. He is a distinguished member of the legal community in my State.

I strongly support Judge Mills' nomination to be U.S. district judge for the Central District of Illinois and I urge the Judiciary Committee to favorably report his nomination to the full Senate expeditiously. And may I say, Mr. Chairman, in conclusion that in my service in the Illinois Legislature, along with my colleague, Senator Simon, I had the honor and privilege of being the chairman of the Judiciary Committee in the Illinois House for two terms and then to serve as the chairman of the Judicial Advisory Council, made up of members of the house and the senate and the public at large, in my State, which was responsible for the new judicial article to our constitution, and all of the supporting legislation, over 500 pieces of legislation that were passed, supporting of the new constitutional judicial article.

Throughout that time I knew Judge Mills who was a very active member of the Illinois judiciary, may I say to the chairman, and who was always a leader in that group, in Springfield on a regular basis, advancing the interests, not only of the Illinois judiciary and the Illinois bar, but the public generally in our State. And so I am personally pleased Mr. Chairman, to have this opportunity in the presence of my distinguished friend and colleague, Senator Simon, to recommend in the highest form, Judge Mills to this committee and to the Honorable Chairman.

The CHAIRMAN. We will now hear from Senator Simon, a distinguished member of this committee.

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman, I am pleased to join my distinguished colleague, as I refer to him, Mr. Chairman, as the very senior Senator from Illinois, in behalf of Judge Mills.

Let me just add one general note, I am pleased particularly, to have Judge Mills here, and I do not mean this disrespectfully to any of the other nominees. I think that we need more nominees who are judges, because we do not have to guess whether they are going to make good judges or not. We know that they are going to make good judges.

Judge Mills has been a quality judge in the State of Illinois and he will grace the Federal bench with honor and distinction. I am very pleased to be here and offer my endorsement, and I can assure you, Mr. Chairman, that I am not going to put a hold on this nominee.

The CHAIRMAN. Well, thank you.

I want to congratulate you, Judge Mills, on your appointment and the high endorsement, and they have been high endorsements of both of your Senators. And that is a splendid compliment to you.

And with their fine support, there should not be too much trouble getting you confirmed.

We are very pleased to have you here, Senator Dixon. I know that you are busy and if you wish to leave, you may do so, and if you do not, you may stay around.

Now, we will take the next, Senator DeConcini, I observe a member of this committee.

You may come around.

And Senator Goldwater is on the Armed Services Committee and tied up there, but he endorses this appointee too, Judge Roger G. Strand of Arizona.

Senator DeConcini, I will be glad to hear from you.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Chairman Thurmond, Senator Simon, I am especially pleased to be here, to recommend and support the nomination of Roger Strand to the Federal district bench in Arizona. I believe that Judge Strand will be a fine addition to what is considered an excellent district court.

Judge Strand presently sits on the Superior Court of Maracopa County, his experience as a trial judge provides him with a solid basis for the Federal bench. He has shown excellent demeanor, ability on the superior court. I have heard only good things about this ability as a judge from the bar and from other members that sit with him.

I am sure that he will bring these characteristics and abilities to the District Court of Arizona. Judge Strand graduated from Hamilton College in New York in 1955 and he received a bachelor of law degree from Cornell Law School in New York in 1961 and came to Phoenix, after receiving his law degree and joined the distinguished firm of Finnemore, Craig, Allen & McClennen. In 1967, he became a superior court judge in Maracopa County and has served there with great distinction for the last 18 years.

As Senator Simon has said, this man is tested, and we know the kind of judge that he will be and he is going to be excellent.

He has been very active in both the American Bar and the Arizona Bar and he has also been very active in various organizations of trial judges, including serving as president of the Arizona Judges' Association.

He has also been involved in various civic and service groups in Arizona. I would say again, Mr. Chairman, that I am pleased to be here and I am pleased to see this fine nomination be submitted from the White House, and it is certainly a credit to the President of the United States of his awareness of the importance of the district courts and certainly to Judge Strand that he was personally called by the President and asked to take this appointment.

I highly recommend him and hope that we can have an expeditious and speedy confirmation process in the committee and I want to thank you, Mr. Chairman, again, and the staff of this committee that I know so well, for the excellent way that they have handled this nominee and I know they do all the rest.

The CHAIRMAN. Senator DeConcini, it is a great pleasure to serve with you on this committee and we appreciate your high endorsement of this appointee. And we congratulate him upon being appointed by the President. I appreciate Senator DeConcini coming here in person.

If you would like to come up here and join us, we would be pleased to have you.

Now, we will go back and take the witnesses according to the way that they are on the agenda.

First, Judge Miner.

Judge Miner, if you will come around, and if all judges will stand up; Judge Miner, Judge Wollman, Judge Kosinski, Judge Mills, Judge Strand, and Mr. Walker, if you will all stand and raise your hand to be sworn? Will the testimony that you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

[Whereupon, the witnesses answered in the affirmative.]

The CHAIRMAN. Have a seat please.

Senator DECONCINI. Mr. Chairman, may I interrupt? I was not here when Mr. Walker was introduced here. I just want the record to show that I have had an experience with Mr. Walker that has been outstanding in the area of law enforcement with the Treasury Department and it gives me great pleasure to see him presented to us today and I wanted to be here to say a word for him, so without objection, if the chairman would let those remarks appear at the appropriate place in the record, I would be most indebted.

The CHAIRMAN. Without objection, it will be done. Mr. Walker has done a fine job down there and we are all proud of him.

Now, Judge Miner, we will take you first.

We have a few questions.

Would you like to introduce your family?

TESTIMONY OF JUDGE ROGER L. MINER, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Judge MINER. Yes, I would like to introduce my family.

I would like to introduce my wife, Jacqueline, who is here with me today. She has made many sacrifices for me, over the years, and it is because of her that I am here.

Of our four sons, none is here; three are in school this summer and one is working on the coast. I have my brother, Lance, who is here, and he is an attorney; my sister-in-law, Maryellen; and my niece and nephew, Annie and Aaron.

The CHAIRMAN. Judge Miner, I understand that you have recently written an article for the New York State Bar Journal, entitled, "A Judges' Advice to Today's Law Graduates."

Would you be able to tell the committee what you consider the single most important suggestion that you could give to today's young attorneys?

Judge MINER. Well, that article was based on a graduation speech that I gave at New York Law School, and the thrust of the speech and of the article, is that the young law graduates have an obligation which they should take seriously, an ethical obligation, to work for the betterment of society, not only for the advancement of their own careers, and of the interests of their clients, but in the interest of the community at large.

And I tried to impress upon them how important it was, insofar as they were the ones, the young men and the young women coming out of law school, they were the ones to whom the public would look for suggestions and recommendations for improvement of the administration of justice.

The CHAIRMAN. Judge, you have probably noticed an increase in the work loads of the Federal courts, since 1981, I imagine?

What, in your opinion, is needed to speed up the disposition of Federal cases? Would it be more judges, magistrates or changing the criminal procedures?

Judge MINER. Well, that is a serious question that I have been thinking about as my case load has grown over the years to the point where now I carry almost 900 cases as an individual judge.

I think that the ever increasing expansion of the Federal judiciary is probably not the answer. I think that maybe what we ought to do is to address some of the jurisdiction conferred upon the Federal courts and I know that this committee has been concerned with some of the matters over the years in the field of diversity of citizenship jurisdiction, the question with prisoner's cases, habeas corpus, conditions of confinement; a lot of these types of cases, I think, can be handled in different ways and through different means. And maybe we ought to cut back a little bit on what the Federal courts are expected to do.

The CHAIRMAN. Judge, the phrase, judicial activism, is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

You informed the committee that judicial activism as defined in the committee questionnaire poses a threat to the doctrine of separation of powers.

Judge Miner, do you have a definition of judicial activism, that would not, in your opinion, pose such a threat?

Judge MINER. Well, the way that I defined it in that questionnaire, I think that it is a threat and I do not know of any answer to make judicial activism within that definition not a threat.

I think that the job of the courts is to interpret the law and not make the law.

The CHAIRMAN. I think that is all the questions that I have.

Excuse me, Senators, do you have any questions?

Senator DECONCINI. We have no questions of the nominee at this time.

The CHAIRMAN. You are now excused. Thank you very much.

Judge MINER. Thank you.

The CHAIRMAN. Judge Wollman, would you come around please?

TESTIMONY OF JUDGE ROGER L. WOLLMAN, OF SOUTH DAKOTA, TO BE U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

The CHAIRMAN. Judge Wollman, would you like to introduce your family?

Judge WOLLMAN. Thank you, Senator.

Although Senator Pressler has already introduced my wife, I would like to have her stand again, my wife Diane. Our three sons cannot be here, the oldest is at officer's training at Fort Lewis, WA our second son is completing his basic training down at Fort Jackson, SC; and our youngest son is home working on my brother's farm.

I am happy that several of our friends from South Dakota are able to be here, Mr. and Mrs. Bill Martin are here, and their two children, Laura and Stuart. They happen to be vacationing with their family on the Eastern Shore of Maryland.

Another South Dakotan is present, Ms. Michelle Kasse, who is from Aberdeen and who will be a third year student here at George Washington Law School.

The CHAIRMAN. You are from South Dakota, and I am from South Carolina, the South is right on.

Judge WOLLMAN. Right.

The CHAIRMAN. Judge Wollman, in response to the committee questionnaire concerning judicial activism, you stated:

> I believe that judges should never lose sight of the fact that courts should not speak until spoken to. A judge is not a legislative representative. One of the greatest temptations that a judge is faced with, is the urge to reach out and correct, or amplify, through judicial interpretation that legislation which one believes to be unwise and inadequate.

Now, I agree with your statement. How does a judge though resist this temptation and know where to draw the line between judicial decisionmaking and legislative decisionmaking?

Judge WOLLMAN. First, Senator, as far as resisting the temptation, it is the same as resisting all temptations in life, one must be aware of it, be conscious of it, and constantly maintain an attitude of proper respect toward the other two branches of Government, and constantly remember that we do have a tripartite form of Government, and to have respect for that.

Second, with respect to drawing the line, I have been on the bench now, this is my 15th year, and as with all other areas of the law, there are no clear, hard and fast, black and white lines, but one must consciously be aware of the fact that we must, we who are on the bench, have a healthy respect for the other branches of Government. That is the single best answer as to how to draw the line.

The CHAIRMAN. Judge, how does a responsible judge go about the process of interpreting such seemingly old time constitutional provisions as due process or equal protection clauses?

Judge WOLLMAN. The due process clause especially is a growing concept. In other words, it has growth in the law, as all law must grow. Again, if the judge consciously recalls that the principal policy making determinations are made by the legislative branch and that the judge should not give free rein to his or her own personal predelictions, then I think that the judge can draw the proper line between interpreting that which the legislature has said in accordance with the Constitution and going out and beyond that and imposing his or her own values. I think that the judge should consciously strive not to do the latter.

The CHAIRMAN. Judge, to what extent do you see the American system of federalism or division of responsibilities between the National and State governments as an institution for checking the abuse of governmental powers?

Judge WOLLMAN. Well, Mr. Chairman, as a long-time State court judge, I am naturally jealous, in the best sense of that word, of the prerogatives of State governments. I do not like to see the complete erosion of the distinctions inherent in our federalism between the Federal Government and the State governments. Much, of course, depends on you Members of Congress to recognize the proper allocation of authority there and on those of us in the State courts and on the Federal courts to interpret Federal law in such a way as to give proper respect to the federalism that is inherent in our constitutional system of government.

The CHAIRMAN. Senator DeConcini?

Senator DECONCINI. Mr. Chairman, I have no questions.

The CHAIRMAN. Thank you very much.

We wish you successful tenure of service on the bench.

Judge WOLLMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Our next judge is Judge Richard H. Mills of Illinois.

Judge Mills if you would come around?

I have got to leave to go to chair a Committee on Armed Services on the Conference Committee and I am going to ask Senator DeConcini to be the Chair here.

Senator Grassley, I am sorry, would you take the chair?

TESTIMONY OF JUDGE RICHARD H. MILLS, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF ILLINOIS

Judge **Mills**. Thank you, Mr. Chairman.

Senator **Grassley** [presiding]. I am Senator Grassley from Iowa and I am serving for our chairman who has to be some place else.

I have been told that your family has not been introduced to this committee yet and we would like to have you do that.

Judge **Mills**. Senator, I appreciate the opportunity but none of my family are present. My two sons are working at their summer jobs, and my wife is painting the house.

Senator **Grassley**. Judge Mills, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own.

How do you respond to this defense of an activist judiciary?

Judge **Mills**. I cannot justify it. It seems to me that it is the Constitution of this country that gives each one of the branches of Government its own responsibilities, its duties and its authorities. It also seems to me that the Judiciary is not in the legislating business and that the courts should stay out of that area and leave it to legislatures of the States and to the Congress of the United States.

Senator **Grassley**. Judge Mills, would you give the committee your views on penalties that should be imposed for second- and third-time drug violators?

Judge **Mills**. Mr. Chairman, it seems apparent to me that repeat offenders, particularly in this area of drug use, abuse, sale, and manufacture, strikes at one of the most insidious problems that we have in this country; it has gone rampant.

And the repeat offenders, clearly and obviously have not learned their lesson from the first sanction imposed. And it is clear to me that there is very little else that can be done except to give very stiff, very long sentences for these repeat offenders.

Of course, this will depend entirely upon the circumstances and the mitigating and aggravating factors involved in the individual case; but if it comes down to nothing but a warehousing problem, then it is a problem that this country has to face and we have simply got to get them out of society.

Senator **Grassley**. I would like to quote a statement that you furnished the committee and then ask you a question about it.

I quote:

> Matters of administration are better left to the legislative and executive. The judge's primary function is to decide cases. He has neither the time nor the resources to act as an administrator. Where circumstances, however, require the judge to temporarily step into such a role, the judge should endeavor to obtain the completion of the administration as soon as practical.

So my question is, under what circumstances would you feel it appropriate to temporarily assume the role of an administrator?

Judge **Mills**. The context of my answer was in thinking that this would be an extremely rare, if ever, occasion that would arise. But my thinking was in this context: let us suppose that either Congress or a State legislature, by act and by its exercise of its proper authority, has enacted certain law and that the law becomes effective but the machinery of the government has not yet been able to properly put it into action. Then it might be necessary for the bench to step in and to do it in the context of that situation within the guidelines that the legislative branch has laid down, and simply get it going until the regular machinery can take over and implement that legislation. And then get out of the picture just as quickly as it is possible.

Senator GRASSLEY. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, Senator Simon had to step out to go to a conference committee and he regrets that he cannot be here to ask you some questions.

But the question of judicial activism, always comes to most nominees here, and you answer it in the first instance that you cannot justify it, and then, your past quoted answer here is that there are sometimes when it has to happen and I think that I understand what you are saying.

But in essence, do you have any reservations about enacting and enforcing the Federal laws, if, in fact, the State legislature has failed to do them, say, in a prison situation, where the laws or the Supreme Court decisions may be very clear that there is supposed to be so many square foot per prisoner and so many different rights being granted and indeed, they are not, would you hesitate to exercise the judicial authority that is vested in you to take over that institution until something was done to correct it?

Judge MILLS. I would feel obligated, Senator, to absolutely follow the directions of the Supreme Court of the United States, which is the court of last resort and which I must follow, in a situation which——

Senator DECONCINI. Even if that was determined judicial activism by some?

Judge MILLS. If it were, that is true.

Senator DECONCINI. Fine, I just wanted to make that clarification because I think that your answer is well understood there, that it is out of absolute necessity, not to put words in your mind——

Judge MILLS. That is correct.

Senator DECONCINI. That a Judge has to take control administratively of part of a government that is not constitutionally under their jurisdiction, but by court decision they have no choice, would you agree?

Judge MILLS. I do, Senator.

Senator DECONCINI. Thank you, Judge, I have no further questions.

Mr. Chairman.

Senator GRASSLEY. Judge Mills we compliment you again and say thank you for coming and say that if there are any Members who are not here who have questions, you may expect some in writing. I doubt if that is the case too often but we would expect their response in writing and thank you.

We will call the next nominee.

Judge MILLS. Thank you, Mr. Chairman.

Senator GRASSLEY. Judge Strand, Roger G. Strand of Arizona, and he is nominated to be the U. S. district judge for the district of Arizona.

TESTIMONY OF JUDGE ROGER G. STRAND, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Judge **Strand**. Thank you very much, Mr. Chairman.

Senator **Grassley**. Would you please introduce your family, friends, and everyone that you want to introduce?

Judge **Strand**. I would be very happy to, Senator.

I would like to introduce my wife, Joan, who is here with me. We have been vacationing here in the area, after the bar association convention.

Senator **Grassley**. Welcome, and congratulations to your entire family.

Judge Strand, you have been a trial judge at the State level for 18 years. Would you tell the committee what you consider to be the prerequisite for a just and fair judge?

Judge **Strand**. Well, there, of course, would be a number of characteristics of such a judge, but I think that it would be clear that at any level, whether it be Federal, State, or local, and on any court that the first characteristic that every judge must have, of course, is the highest degree of honesty and integrity.

In addition, of course, the judge should be industrious, the judge should be well trained in the law. The judge should have good common sense, and bring that common sense to his or her everyday assignments. A good sense of humor will hold a judge in good stead as well.

In terms of the actual disposition of matters before the judge, it is important that he or she give each litigant who comes before the court a full and fair opportunity to be heard.

Having done so, the responsibility then of this hypothetically fine judge, should be to promptly dispose of the issue in as fair and just a manner as possible.

Senator **Grassley**. Your court instituted a program of guideline sentencing with the proposed goal of significantly reducing inappropriate disparity in sentencing.

Were you able to accomplish this task and in the process of answering that, I would like to have you state whether you feel that the U.S. Sentencing Commission as it was established by the Comprehensive Crime Control Act of the last Congress will be of value to you as a Federal district court judge?

Judge **Strand**. Well, the guideline sentencing that we had in Arizona, I think, was beginning to work well. We are a 50-judge court, one of the largest in the country, and you can well imagine that individuals with essentially the same personal background and with essentially the same criminal conduct would come before 50 different judges and you would have virtually 50 different sentences, perhaps, imposed. The theory of guideline sentencing was to isolate significant factors concerning both the offense and the offender and then give some guidance to the court as to what an appropriate sentence might be. If a judge were to deviate from that, he or she would be compelled to articulate the reasons for either mitigating or aggravating the sentence, and this compels greater thought, perhaps, than might otherwise be given to a sentencing decision.

In Arizona, the program was interrrupted by new legislation which imposed a new criminal code. In reviewing the Crime Control Act and the processes which will be brought into effect in the future, it seems as though, it has all the benefits of the program that we had plus some additional ones in that the Commission has been given the responsibility for setting forth guidance and policy with respect to all of these sentencing functions and so, I look to that as being a help to the Federal judiciary and to the criminal justice system.

Senator GRASSLEY. One of the characteristics of judicial activism is said to include a tendancy by the judiciary toward problem solution rather than grievance resolution.

Would you give the committee your views on this criticism?

Judge STRAND. Well, I think that the criticism draws into play different connotations of approaching the matter. For instance, problem solution, it seems to me connotes policy formulation. Policy formulation; that is, the process of saying that what we have before us is a problem that needs resolution is not the function of the judiciary it seems to me. That is, obviously, the function of the legislative branch of Government.

The court's responsibility is to adjudicate specific disputes between specific protagonists, whether they are individuals or institutions of society. And so, I think, that is the difference and I think that the function of the judiciary is to resolve specific disputes and not engage in other activity which is reserved for the other branches of Government.

Senator GRASSLEY. I have no further questions.

Senator DeConcini?

Senator DECONCINI. Thank you, Mr. Chairman.

Judge, along the line that I mentioned to Judge Mills before you, you have no reservation of exercising that judicial authority when it is clearly presented to you that the legislature or the executive branch has failed to act a standing decision or a statute that is on the books before you?

Judge STRAND. No hestitancy to do that, if required to do so by exisiting law and the facts of the case. Part of the aspect and answer to that question, I think is also this: To the extent that a court is able to formulate a resolution of the issue and cast the responsibility for that action back where it more properly belongs, then the judge, perhaps, can go a long way in avoiding the necessity for doing that by having the institutions of local government that properly should be performing those functions undertake them.

Senator DECONCINI. And of course, holding on to that authority for the minimal amount of time, I am sure that you would agree that is important.

Judge STRAND. Right.

Senator DECONCINI. I thank you.

Thank you, Mr. Chairman.

Senator GRASSLEY. OK.

Those are the only questions that we have. You heard what I said to the previous witness. You may receive some questions in writing, and thank you for your time.

Judge STRAND. Thank you.

Senator **Grassley**. We would now call John M. Walker and we would also ask you to introduce family and friends.

TESTIMONY OF JOHN M. WALKER, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. **Walker**. Thank you, very much.

I regret that they could not be here today, but I appreciate the invitation.

Senator **Grassley**. OK, and you have been sworn, so I will immediately go to questions.

You have served as an Assistant Secretary of Treasury for Enforcement and Operations since 1981. You are responsible for the Treasury law enforcement and regulatory policy as well as the management and oversight of the Treasury's law enforcement bureaus.

Do you feel that this experience will be beneficial to you as a Federal district court judge and if you feel that it will be, how will it be helpful?

Mr. **Walker**. Well, Senator, I do feel that it will be beneficial. In the capacity that I have served over the last 4 years, I have had responsibility for managing four law enforcement bureaus, which has necessitated my confrontation of issues, legal issues regarding their powers, their authorities, many of which touch fundamentally the administration of justice. These include issues of police authority, use of force, the appropriate circumstances under which searches and seizures should be executed; matters of that sort.

In addition to that, apart from the administrative and legal responsibilities in law enforcement, this particular job has required some delving into the regulatory functions of the Treasury. In my current job, we regulate various industries; the alcohol industry, the customs brokers and the like, so that regulatory issues and the scope of regulatory authority is constant fare for our office.

In addition to that, we have administered various sanctions. We have gotten into various legal issues that have cropped up in connection with the resolution of the Iranian hostage crisis and the financial settlement that followed that, as well as the Nicaraguan sanctions and various other sanction measures that have preoccupied this office.

So there has been a fair interplay between the executive discretion and legal authority in my job. So that I think that my experience as Assistant Secretary of the Treasury will stand me in good stead and give me a perspective that I think would be very useful to a sitting district judge.

Prior to that, Senator, I was in private practice. I was a partner in a firm in New York and prior to that I was a prosecuting attorney in the southern district of New York. So that I do have some trial experience to add to the equation.

Senator **Grassley**. You may know that I am also on the IRS Oversight Subcommittee and from your position, where you presently are, do you see a need for an increase in special agents for the IRS?

Mr. **Walker**. Well, I did not clear any remarks that I was going to make here today, with the Office of Management and Budget, but if I could speak privately and not in my official capacity, I think that additional special agents for the IRS would be a wise course for this country because I do believe that there is plenty of work to be done, particularly in the area of money laundering, but also in tightening up on the enforcement of our laws to protect the general revenue at a time when we are seeing massive deficits in this country.

I think that a dollar spent on an IRS agent is a dollar well spent because the returns will be manifold to the U.S. Treasury.

Senator GRASSLEY. The next question, I would like to have you comment on what kind of guidelines should a judge follow in determining the propriety of Federal intervention in State affairs?

Mr. WALKER. Well, I think that it is important for a judge to be extremely cautious and wary when asked to render decisions that in effect run counter to the wishes of popularly elected State legislators as enacted in State law. A healthy respect should be maintained and must be maintained by the Federal judiciary for State legislatures. After all, we are talking about popularly elected officials. A district court judge, is, while appointed by and hopefully with the confidence of the President and those who support him, cannot be removed from office, except by impeachment and therefore is not responsive to the popular will. He should move in areas where the popular will is expressed through the legislative will with extreme caution.

Senator GRASSLEY. One of the criticisms of judicial activism and we asked this question of others here, one of the criticisms of it is a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far reaching orders extending to broad classes of individuals.

Do you feel that this criticism is valid, and would you, whatever your answer is, explain it?

Mr. WALKER. Well, I do believe that the tendency of the use of class action suits to remedy broad social problems is a troublesome one, one that does require addressing, not only by the courts but also the legislature. And it is a vehicle for permitting judges to perhaps exercise a degree of discretion and that is not warranted. I am not clear exactly what the remedy is. But I think that the remedy may lie as much with the legislature as with judges in correcting whatever imbalance may exist. I do believe that there is a potential for a tendency toward an improper allocation of power under those circumstances.

Senator GRASSLEY. Senator Simon has returned and he may have some questions to ask and so we now turn to him.

Senator SIMON. I thank you, Mr. Chairman.

Just one question.

The canon 2, the American Bar Association's Code of Professional Responsibility, calls for every lawyer, "regardless of professional prominence or professional workload to find time to participate in serving the disadvantaged."

Can you describe how you have met this canon?

Mr. WALKER. Well, in my career prior to joining the Treasury Department, as an attorney in the southern district of New York, I served on the panel of judicial appointees for indigent defendants. I felt that that was a responsibility at low remuneration that should be undertaken to make sure that the individuals who come before that court have effective counsel and that effective representation is afforded on the defense side as well as the prosecution side, particularly where indigents are involved.

Senator **Simon**. I thank you.

I thank you, Mr. Chairman.

Senator **Grassley**. Mr. Walker, I have no further questions.

Once again, thank you very much.

Mr. **Walker**. Thank you, Senator.

Senator **Grassley**. We will now call Judge Kosinzki, would you come to the table, and would you also start by introducing your family, friends, and other supporters?

TESTIMONY OF CHIEF JUDGE ALEX KOZINSKI, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge **Kozinski**. Thank you, Mr. Chairman, I would like to introduce my wife, Marcy Tiffany, who is a member of the extended family of this committee, having worked for Chairman Thurmond, as antitrust counsel, and a chief economist several years ago.

In addition to that I see so many of my colleagues and employees of the Claims Court, and lawyers who practice before me, personal friends who have come here this afternoon; I am overwhelmed and humbled. I want to thank them all for being here, and I ask the committee to recognize them as a group.

Senator **Grassley**. Well, I would also like to say for Senator Thurmond what a fine counsel your wife was, not only for the committee but also for the staff of the committee, and from that standpoint, we compliment her for her contribution to good government as well.

You have been sworn, so that I will go to questions.

You have served as the first chief judge of the U.S. Claims Court for almost 3 years.

Would you tell the committee what you consider to have been the major problems and accomplishments during your administration of the court?

Judge **Kozinski**. Mr. Chairman, it is a pleasure to report on the Claims Court, now, 3 years after its creation. As the committee is aware, the court faced many challenges when it was first established. There was a new court that inherited not only the jurisdiction of the Court of Claims but new areas of jurisdiction as well.

It inherited a large backlog of cases, to be handled by one-third fewer judges and about one-half of the staff of the Court of Claims. The court was plagued by problems of outdated equipment and practices and procedures not suited for its new responsibilities.

Fortunately, the Claims Court tackled its duties with vigor and now, I can report that the court is in extremely fine shape. The court inherited 1,796 cases from the Court of Claims in its inception and now, at the end of March, there were only 1,562 cases pending. This is a reduction of some 11 percent.

This is despite the fact, that for the past year, and until very recently, the court was short one judge, upon the resignation of Judge Colaianni, in June of last year. Fortunately Loren Smith was confirmed by the Senate last week and we are back at full staff.

The court has handled its new bid protest jurisdiction with full dispatch; 94 percent of the cases in that area, ever filed have been disposed of. There have been more than 800 opinions written and a new U.S. Claims Court reporter has been established. We have established an advisory council for the court to give us input from the bar. We have modernized rules, we have acquired equipment and telephone systems suitable to our responsibility.

I should note, that although I am happy to report on this progress, I cannot claim personal credit for it. Credit is due to my colleagues, judges of the Claims Court, and to the employees of the Claims Court, who are the finest judges and the best staff, that a chief judge could ever hope for.

Senator GRASSLEY. Thank you for that explanation.

And the extent to which you can, we would ask that you keep your answers as brief as you can.

Judge KOZINSKI. I will do my best.

Senator GRASSLEY. On the next point, I would like to ask, I understand that you have been spending a significant amount of your time in the administration of the Claims Court, which maybe ought to be obvious that that would be necessary, but does this mean that you have carried a smaller judicial caseload than other judges?

Judge KOZINSKI. Mr. Chairman, I understand that it is not unusual for chief judges to carry a smaller caseload than other judges. However, I have made it a point not to do so. I carry, as best can be determined, a caseload equal to each of the other judges of the court. During my tenure, I disposed of over 170 cases, held some two dozen trials for 110 trial days. I spent 2 working weeks of each month on the bench. During my tenure, I have published 56 opinions, and I have disposed of many more cases where an unpublished opinion bench ruling has been sufficient. I have tried to take my judicial responsibilities as seriously as my administrative ones, Mr. Chairman.

Senator GRASSLEY. We are going to have two witnesses this afternoon, who have expressed concern over your activities while serving as special counsel for the Merit System Promotion Board.

I would like to have you clarify for the record, some of your actions while serving in that capacity, and would you tell the committee some of the problems that you faced in running that office, as well as some of your major accomplishments?

Judge KOZINSKI. Thank you, Mr. Chairman.

I will try to do so as briefly as I can, because it is a fairly extensive subject.

When I was appointed to the Office, the Office was plagued by very, very serious problems. Although it has been in existence for 2½ years, it had never had a permanent leader appointed. I was the first special counsel confirmed by the Senate for permanent appointment to the Office. There were budgetary, staffing and facility deficiencies which have plagued the office since its inception. More troubling, it was engaged in a dispute with the Merit System Protection Board which led to the virtually unheard of step that there was litigation pending between these two agencies in Federal district court.

Now, this led to widespread criticism of the office, criticism that was very troubling to me because, after all, the office cannot perform its function in serving the Merit System if it is in disrepute. This criticism was reflected in a number of ways. And if I may, I would like to point out to the committee some of these materials.

There was widespread commentary in the newspapers speaking in derogatory terms, almost ridiculing terms of the performance of the Office of the Special Counsel. The General Accounting Office, and I would put all of these exhibits here for the committee staff.

Senator GRASSLEY. Without objection, those will be received and printed in the record.

Judge KOZINSKI. I appreciate that.

Senator GRASSLEY. Let me clarify, they will not be printed in the record, but we will receive them and they will be held in the committee files.

Judge KOZINSKI. Thank you, Mr. Chairman.

In addition to widespread newspaper reports, criticizing the office, the General Accounting Office issued reports highly critical of the activities of the Special Counsel's Office prior to my tenure.

Right about the time that I was appointed, the very prestigious National Academy of Public Administration issued a report that was highly critical of the way that the office was run and I am giving the committee not only that report, but also the widespread publicity that went with it.

Now, this is all very troubling, it was particularly troubling when a no lesser body than the Court of Appeals for the District of Columbia Circuit issued an opinion commenting on the performance of the Special Counsel's Office, and the opinion noted the failure of the special counsel "to perform its statutory duty, to initiate some kind of inquiry into the merits of the allegations of retaliation for whistleblowing."

I will give for the committee's use, a copy of this opinion of *Ward* v. *Merit System Protection Board*, reported at 681 Fed. 2d 687.

Now, the reason that this is troubling is that the Special Counsel's Office must serve its constituency by the confidence that it engenders in the groups associated with the personnel system. The truth of the matter was that I spoke to a number of entities and persons and the criticism was echoed by each of them. I spoke to agency managers, and I spoke to union leaders. I talked to officials of the Merit System Protection Board, and in fact, I talked to each and every employee of the Special Counsel's Office. And almost to a person, there was dissatisfaction with the way that the Office was run.

Now, I do not blame anybody for that disarray. The Office had not had a permanent leader. The people who were running the Office before me had been there on a temporary basis. There were serious budgetary problems. But the fact of the matter is that the Office stood in very bad repute with those whom it was designed to serve.

Now, upon coming in, in June 1982, I took bold steps to bring the office into shape, set standards, decrease the backlog, and generally turn the office into a professional operation.

The first thing that I did was that I had office procedures reviewed by representatives of the investigation community, including the FBI and the Office of the Inspector General. I do not wish to burden this committee with all of the reports that I received, they are approximately a foot high, but I would like to present for the record two of those reports, which are representative of the types of review and suggestions that were presented.

I had a week-long training seminar for investigators and attorneys to hone their skills as lawyers and act as investigators and it was conducted by representatives of the FBI, and by well respected and highly skilled attorneys.

There was a vigorous effort to upgrade the quality of agency staff by rewarding and promoting capable employees and removing or demoting inefficient and ineffective ones.

There was a vigorous and well publicized campaign to promote the first amendment rights of Federal employees. The Office of the Special Counsel under my direction took bold steps to fight gag orders issued by agencies, orders which prohibited employees from communicating with Congress, the press, or with persons outside the agency. I will present to the committee, for its review, four case histories, well documented, not only within the files of the special counsel but also in the press, where the actions of the special counsel caused agencies to rescind unlawful and unconstitutional gag orders.

There was a significant outreach effort to bring the special counsel to the attention of those whom it was designed to serve. While I was special counsel, I initiated—and this was in November of 1981—a program of monitoring Merit System Protection Board appeals for possible intervention by the Special Counsel's Office.

I tender to the committee, my memorandum of November 19, 1981, to assistant special counsels and field office chiefs, advising them to consider the monitoring of MSPB appeals to be an important area for development of the civil service law and instructing them to review each and every case coming in to an MSPB office in the field to make sure that if intervention by the special counsel was required, that we would be there to serve.

We engaged in a new policy of combatting sexual harassment in the workplace. On January 22, 1982, I circulated a memo to all investigators stating that sexual harassment was a very serious problem in the workplace, and it is one that we took incredibly seriously in the central office of the special counsel I requested that no cases involving allegations of sexual harassment be closed, unless and until special approval was received by the assistant special counsel for investigation or by somebody designated by him.

We wanted to make sure there were no sexual harassment cases that somehow fell through the cracks and were not being handled by our staff. That was in my memorandum of January 22, 1982.

Now, we had an increased emphasis on resolving cases through settlement rather than through litigation. We felt that that was an important step in saving resources and making sure that employees were protected. During my tenure, the Special Counsel's Office issued regulations, very strong regulations, strengthening or proposng to strengthen the power of the Special Counsel's Office to conduct investigations. In addition to that, We tightened greatly the rules for responses to special counsel inquiries under section 1206(b) by agencies, requiring that the agency head, be it the Secretary of Defense, the head of SBA, etc. sign those reports himself. This had not been clear before and by regulation instituted under my direction and finalized, that took place.

Now, perhaps the most important step, important single step, that I took as special counsel in giving directions to staff was in a memorandum on how to review allegations in complaints, directing investigators to look at complaints very thoroughly and not to leave any possibilities of prohibited personnel practices uninvestigated.

Now, this memorandum is important and I would like to quote a very brief part of it into the record, because it sets the tone for my administration of the Office of the Special Counsel and reflects what I repeated orally time and again.

Here is the quote, this is from a memorandum of May 11, 1982 to all investigators:

> Unless the complaint reveals that the matter is outside our authority, for example a Postal Service employee, give the Complainant the benefit of the doubt in the initial review, with an eye to finding a basis of action, rather than closing it out. Also remember that the Complaint is only a starting point for your inquiry. As personnelists you may detect Merit System abuses of which the Complainant is not aware. Always consider the possibility of disciplinary action even though corrective action may not be possible. Be expansive in your view of what matters should be submitted to discipline. If you see a wrongdoing, i.e., any tampering with the Merit System, discuss the possibility of a disciplinary action with your supervisor, even if our jurisdiction is questionable.

That was the tone that I set for the office, throughout my tenture. That was the tone that the memorandum and all office communications reflect.

Now, I am aware, Mr. Chairman, as you have noted, that there are criticisms of my running of the Special Counsel's Office.

And I would like to address those just briefly. I have had the privilege of reviewing the statement of Mr. Tobias, and this is now 3 years later. My records on many of these issues, I have no access to these records, because OSC, Office of the Special Counsel, files are personnel files, they are not open to me.

So that, for example, Mr. Tobias makes claims about the number of cases filed, and so on, I have no basis for refuting them. I will accept what he has said as correct. I also want to state for the record, that Mr. Tobias is a very fine lawyer, a man that I respect, one who takes very seriously the responsibilities of the employment relationship in the Federal system.

Senator GRASSLEY. Could I interfere just a minute?

Just for the record, at this point and for everybody's understanding, Mr. Tobias will be having an opportunity to testify later this afternoon, and he will, if he wants to at that time, have an opportunity to explain what the situation is.

Will you proceed?

Judge KOZINSKI. Thank you, Mr. Chairman.

I was referring to Mr. Tobias' written statement of which I have received a copy of before the hearing.

Now, in fact, Mr. Tobias, as I have said, is such a well known figure in this area, that he was one of the people that I consulted when I first became Special Counsel. I talked to him and he had many of the same criticisms of the office as did others who had observed it. I took many of his criticisms to heart and tried to act in accordance with them.

The truth of the matter is, however, that Mr. Tobias had relatively few contacts with the Office of the Special Counsel while I was its leader. I remember no occasion when Mr. Tobias called me or raised any of these concerns at a time when I might have clarified the issues, or indeed, took issue with things that I was doing that could have been changed, where he could have put the input in at the meaningful time. His criticism comes 3 years later but, even now, I note that his statement reflects a misunderstanding of how the Special Counsel's authority works and indeed, of certain aspects of personnel law in general.

For example, at page four of Mr. Tobias' testimony, he states that the Office of the Special Counsel intervened in only six cases before the MSPB and not in all of them were on behalf of the employee. Now, somehow Mr. Tobias suggest's that by intervening in a case against an employee, the Special Counsel is betraying his responsibility. Now, I happen to have, because I happened to have kept the brief, by sheer happenstance, a brief in a case by the name of the *Department of Labor* v. *Flores*. That was a case where the Special Counsel intervened against the employee and I am giving the committee a copy of the Flores brief for the record.

That was a case where the employee was charged with raping a subordinate. And this was a supervisory employee and the agency sought to remove him. Now, in that case, the presiding official overturned the removal and the Special Counsel intervened in that appeal saying that the employee, in this case, a supervisory employee who had committed allegedly an unlawful act, ought to stay fired, if in fact that is what had occurred.

We came in on a very narrow point of law, and what we said was that the fact that sexual misconduct may have occurred, if it did occur, outside the workplace, did not make this nonrelated to work performance.

Now, Mr. Tobias, also does not seem to be aware of some of the other very well documented cases where we intervened on behalf of the Merit System, for example, there was a well publicized case by the name of Gingels very early in my tenure.

It involved the Department of Interior and the claim was that Mr. Gingels was removed because he was a Democrat. And in that case, the Special Counsel intervened, and with a great deal of publicity—I am giving the committee copies of those records—got Mr. Gingels his job back. Shortly after the Special Counsel's Office intervened, the agency caved in and settled the case, and gave Mr. Gingels his job back.

Now, Mr. Tobias' apparent unfamiliarity with practices in cases before the Special Counsel leads to even more odd error in his testimony. For example, at page 6 he makes a statement, "Mr. Kozinski stated the outrageous opinion that RIF's" and for the committee's benefit, these are reductions in force, "are not personnel actions and therefore they did not come within the juridiction of OSC, the Office of the Special Counsel."

Senator GRASSLEY. Could I caution you please? It might be a good idea if we would ask you not to comment on Mr. Tobias' statement until we hear from him.

Judge **Kozinski**. I will do so. If I had understood that was the case, I would have been glad to refrain.

May I simply complete this thought because the statement is now in the record, and I think that I need to address it.

The fact of the matter is that I do not remember making such a statement, but if I did, it is absolutely correct as far as it goes. RIF's are not personnel actions and I do not know anybody who is knowledgeable in the area of personnel law who would claim that they are. Now, to be sure, RIF's then result, or can result or frequently do result in personnel actions which are transfers of employees or dismissals. Those are personnel actions, and in that case, the special counsel gets involved. And the *Gingels* case is a perfect example.

The *Gingels* case was a RIF, a reduction in force. The reduction in force was, in the view of the special counsel, instituted to hide a discrimination on the basis of political party affiliation which is the Democratic Party affiliation and for that reason, Mr. Chairman, the special counsel intervened, and investigated the case.

I will say nothing further about Mr. Tobias' testimony. I will go on with further questions, if indeed the chairman has further questions.

Senator **Grassley**. The Office of Special Counsel is charged, among many other responsibilities, with the enforcement of the Hatch Act. Would you describe the function of the office in this area, as well as the policy that you followed in enforcing the Hatch Act?

Judge **Kozinski**. Mr. Chairman, I will be very brief on this point.

The Office of the Special Counsel is charged with two functions. To give advisory opinions in the Hatch Act area and to prosecute violations of the Hatch Act. I made virtually no changes in the procedure of Hatch Act cases while I was special counsel. I tried to encourage staff to write advisory opinions that are clear and to the point. I tried to make sure that they were responsive to the inquiry. As to prosecutions, they were also made largely on staff recommendations and for the most part, for the greatest part, I deferred to staff. A few occasions I said, no, let us let this person go, the violation was inadvertent or what not. But every time there was a prosecution it was on the basis of staff recommendations. There was certainly never any implication that party affiliation or anything of that sort played a role in the decisionmaking process.

Senator **Grassley**. During your tenure, did the Office of Special Counsel engage in public outreach programs, and if it did, would you briefly describe some of those activities?

Judge **Kozinski**. Yes, Mr. Chairman.

Again, my records are somewhat skimpy on this point, and it has been 3 years. I would note, however, from what I can reconstruct, that there were at least 50 different public outreach activities during my tenure as special counsel.

I, myself, appeared on a panel discussion in December of 1981 on whistleblowers sponsored by the National Academy of Public Administration. And without going through the details, a number of high-ranking officials in the central office, including the deputy, the chief of investigations, the chief of the case of the control branch all participated in public outreach activities that spanned such agencies as Organization of Federal Employed Women, BIG—blacks in government—AFGE and the like.

I am able to say that the same activity took place in my field offices. By sheer happenstance I happened to have found a memoranda from two of my field offices that show a large number of public outreach activities and I would like to present those for the record, to be reviewed by the committee.

They show that, for example, in the southern region, there was attendance by our staff and a publication of activities by our staff of our functions at AFGE meetings, at OPM seminars, at IMAGE State conventions and so on. We were very active in this area.

Now, one of the activities that we were engaged in was a seminar for managers at the Federal Communications Commission and that seminar was designed to teach Federal managers to stay within the law. The Office of the Special Counsel, like any law enforcement agency, is not interested in finding abusers. It is interested in making sure that, in fact, agency managers, those whom it polices, do what they are supposed to do under the law.

It turns out that this is a complicated law and we did much to try to educate those who dealt with us.

Senator Grassley. In regard to that seminar, do you think that that was an appropriate use of office resources consistent with your mission as special counsel?

Judge Kozinski. Absolutely, Mr. Chairman.

It was one of a number of public outreach activities, one of perhaps 50 during the time that I was there, educating those who deal with the merit system and it is an important function of the office, and unlike allegations made by others, anybody who has reviewed the seminar materials or was present at the seminars, will tell you that all we did was to tell what the law is. I was present at the beginning of the seminar, and what I said is, "if you break the law, we will be after you. If you stay within the law, you are OK." Now, that is what a law enforcement office is supposed to do in my view.

Senator Grassley. I would like to have you tell the committee what kind of a working relationship you had with the staff during your tenure as special counsel and something about employee turnover.

Was it particularly high, unusually high?

Judge Kozinski. Well, Mr. Chairman, I believe that during my tenure, I had a very fine working relationship with most of the employees in the Agency. As I stated at the outset, there were problems. There were some problem employees and as the Chief Administrative Officer of the Office, I felt that its resources were limited and those who could not or would not perform, would not be entitled to stay on the Federal payroll.

Now, one of the problems most frequently mentioned by employees when I talked to them, and I talked to each and every one of them when I came to the Office, was that somebody else down the hall, and it was a very limited number of people simply were not pulling their weight, in such a small office. Now, during my tenure I promoted and rewarded a very large number of employees. And I again, by sheer luck, I have run across some memos that documented this.

During May and June, I had 50 awards and promotions and the office had 86 people. I do not think that I was skimpy with treating good staff well. I also happen to have run across a memorandum I wrote to supervisors in March 1982, chastizing them for not giving enough outstanding ratings. There was a kind of tendency that if employees are doing OK, you just give them an average rating. And I said, giving outstanding employees an outstanding rating is just as important as giving a bad rating to bad employees, that is in a memorandum of March 26, 1982. I said, you evaluate a performance and if somebody does real well, you be sure that they hear about it and more important, that I hear about it.

Now, there were problem employees and I believe that we solved those problems and for the most part, I believe that I had an excellent working relationship with my staff.

Now, as far as turnover, there was turnover but I do not believe that it was excessive in light of the budget problems that we suffered during my tenure. The fact that we suffered a 14-percent cut in our budget, a crippling 14 percent cut in our budget, and brought us to the precipice of a furlough. I might note that MSPB, our sister agency did have a furlough during my tenure or shortly thereafter, while we did not during that fiscal year.

Senator **Grassley**. I suppose that this would be somewhat of a summary question, but after all of these questions and all of the questions that have been raised by others, do you feel that you performed your duties as Special Counsel in a conscientious and competent manner?

Judge **Kozinski**. Mr. Chairman, I certainly will not speak to the question of competence. I will speak to the question of being conscientious. I did that job as well and worked as hard at it as I knew how, as I have done every job that I have ever held.

I am not sure that many Federal managers or Presidential appointees can claim that they were there through the night elbow to elbow with their staff meeting a deadline. I can make that claim under oath and I have the employees to prove it.

Senator **Grassley**. If you are confirmed to serve on the U.S. Court of Appeals for the Ninth Circuit, do you leave any unfinished business at the Claims Court and is there any assistance that this committee can offer to your successor?

Judge **Kozinski**. Mr. Chairman, this committee has always been very generous to the court and to me and there is always unfinished business on the court.

I want to thank the committee and this body, the Senate, for having responded to my testimony spring 1 year ago, and enacting legislation in the bankruptcy bill which gives us relief in certain areas. I would commend the committee to my testimony for some unfinished business matters that were not addressed and would, as I am sure is the case, ask the committee to treat my successor with the generosity it has treated me.

And if I may say so, Loren Smith, who was confirmed by this body only last week, should there be any vacancy in the office of the chief judge, he will be my successor. I know that the committee will give him the kind of support and help that it has always given me.

Senator **Grassley**. All right.

I now turn to Senator Simon. I want to tell you, Senator Simon, I am going to be out in the anteroom while you are asking your questions, for another matter.

Senator SIMON. I will not make any decisions while you are gone.

Senator GRASSLEY. I did not in any way want to infer a threat or anything. I just wanted to inform you of where I was going to be. And I could be back in a hurry if you needed me. I am sure that you do not need me.

Senator SIMON. I thank you, Mr. Chairman, and I shall be very brief.

Mr. Kozinski, you are either going to be an exceptionally good or an exceptionally bad Federal judge and I am not sure which.

We have a mutual friend who talked with me the other night—a person whose judgment I respect very highly—who spoke very highly of you. I like your publication. I like the idea of having a scholar on the U. S. court of appeals. I frankly like the idea that you were born in Rumania. I think that it says something about what this country is all about.

That is on the positive.

Now let me give you the negative: What does concern me a little.

Of the four qualifications by the bar association; exceptionally well qualified, well qualified, qualified, and not qualified, the majority gave you qualified, but a minority rated you not qualified. You are one of 7 out of 43 nominees who have received a not qualified.

There are some who suggested to my staff that in the Office of Special Counsel, where one of your major functions is to protect whistleblowers, that in fact, you turned this duty around the other way.

I wonder if you would want to comment on that?

If I may give you one specific case.

Judge KOZINSKI. Of course.

Senator SIMON. Jay Thal, mortgage managing specialist at HUD was told by your office that he was not a whistleblower but merely having a personal disagreement with his superiors, when his allegation of substantial waste at HUD brought him an official reprimand and a loss of promotion. Later a Federal court found that he was correct, HUD had mismanaged $10 million in mortgage loans.

I see you brought an extensive file along and I am sure that you are going to be able to quote.

Judge KOZINSKI. No; I am afraid that I am not going to be able to.

Senator SIMON. I am concerned about this one case, but more to the point, I am concerned about your general policy.

Judge KOZINSKI. I want to answer the question fully.

Senator SIMON. Yes; I am concerned about the general allegation, if you will.

Judge KOZINSKI. Mr. Chairman, Senator Simon, I would like to answer the question fully.

It is 3 years later, and I have files on certain things and I represent to the committee that I have no files on specific cases. Management files, it happens to be that I had those files because I kept them for future reference. I do not remember the Thal case. There were many cases in the office, and I got involved with them at various times.

Sometimes for very little time at all. Let me answer the broader question, the suggestion that I did not protect whistleblowers.

It is not true. We did the very, very best we could with the resources that we had. Directions that I gave to staff consistently said, bend over backward to try to find a basis for protection, a basis for action, a basis for discipline.

Now, I cannot warranty. I did not go out in those investigations myself. We tried to improve the quality of the staff, we tried to have seminars. And I cannot tell where the cases fell through the cracks. I would suggest, however—and this is something that came to my attention only in the last 2 or 3 days—that shortly after I left the office, the new special counsel, Mr. O'Connor, received a letter from the Oversight Committee on the House side from the chairwoman, Pat Schroeder, asking him to reinvestigate 25 or 27 cases that I or my staff handled during my tenure. Although, I do not have that correspondence with me, I understand that Mr. O'Connor's response was that after reinvestigating those cases is that there was no basis for reopening the cases that were closed by me, not in a single instance.

Now, I again, make no warranties about specific cases. We tried hard; I worked hard and I encouraged my staff to work as hard as I knew how. If we failed to protect any whistleblower, I must take responsibility for it, because I was the head of the office. I did not do it knowingly and I did not do it willfully. It was certainly not a policy of the office.

Senator SIMON. I do not want to make too much out of one case, because we are all going to make some misjudgments, but the general allegation that you were not responsive to whistleblowers and protected them, that allegation is not accurate?

Judge KOZINSKI. I deny that allegation 100 percent. We did everything that we could with the tools at our disposal.

Senator SIMON. Then let me ask one other general question.

I have some minutiae here, and I guess what they add up to is a question that is very difficult for a member of the committee to answer, and maybe very difficult for you to answer. Do you have the temperament to be a good judge in the court of appeals?

Judge KOZINSKI. It is difficult to answer yes, as humility prohibits one but I would simply suggest that I have served as a judge now for 3 years. I have handled a variety of cases, I like being in the courtroom, I like being with counsel. I think that some of them are out in the audience today. I would suggest that if there has been a problem with temperament, that it would have come out to the attention of the committee or to the attention of the ABA. I like my lawyers too much, to tell you the truth, to be abusive or be anything but good to them, because we have the finest lawyers that one could hope for and they have been good to me.

I would hope that with more experience on the bench that I would be a better judge, we all grow with age and experience.

Senator SIMON. Before I dismiss you, let me just glance at the notes that have been handed me here.

Representative Pat Schroeder of Colorado, apparently at a press conference cited that your office sought discipline against five employees and at no time sought any discipline against managers.

Perhaps only cases involving employees were brought to your attention. I am not necessarily sure the press conference allegation is correct.

Do you have any response? Do you recall a press conference or anything about that?

Judge **Kozinski**. Well, Senator Simon, I was not invited to the press conference. It is curious to me that allegations of that kind, of that seriousness, were made at a press conference rather than at an oversight hearing where I would have been able to come in with files and documents with my staff, and respond to the allegations.

I can repeat, and repeat again, and I hope that the meager records that I brought with me, that I pulled from my management files, show that every waking minute that I was special counsel that I pushed and I pushed and I pushed for employees, for staff to do their job conscientiously according to the law. There is no one that has ever heard me say or imply anything different.

Now, the results that come out at the other end are very difficult to judge. Cases come along that are not asked for but at random. It was very difficult in my day to bring a disciplinary action, because at that time, and I do not want to get into the esoteric areas of the law, there was a very burdensome standard under the Mount Healthy test applied to disciplinary action. Fortunately the board has matured on that point. And my successor has had to his credit he has been able to turn them around on that point, making the burden for bringing disciplinary actions against supervisory employees much easier and that activity has increased.

I can only represent to you that we brought every case that we had. I did not want to bring bad cases. I did not want to bring cases that would be burdensome to the employee, the agency, and would make bad law. Every case that I thought could be brought, was brought. No one has suggested different. They said that there were not enough cases, again, I brought everything that I had.

Senator **Simon**. I thank you very much. Mr. Kozinski, thank you for being here. And we wish you the best.

Judge **Kozinski**. Thank you so much, Mr. Chairman.

Mr. **Short**. We have two witnesses, Mr. Tobias and Mr. Devine, if they could come up?

Senator **Simon**. If we could hear both witnesses and then we will ask questions after their testimony.

If the two of you can raise your right hands.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Tobias**. I do.

Mr. **Devine**. I do.

Senator **Simon**. We will enter your full statements in the record, and then if you can briefly summarize them, we will proceed from there.

TESTIMONY OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, THE NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you very much.

My name is Robert Tobias, and I am president of the National Treasury Employees Union.

I am grateful for this opportunity to testify for you today concerning the nomination of Alex Kozinski as judge to the U.S. Court of Appeals for the Ninth Circuit.

NTEU has an extensive practice in the Federal courts, and we are vitally concerned with both the attitudes and the qualifications of those seeking judgeships. The National Treasury Employees Union opposes this nomination, and I urge this committee to reject it. It is our opinion that Mr. Kozinski's lack of any meaningful or relevant judicial experience makes him unfit to assume so great an important responsibility as a judgeship on the U.S. Court of Appeals.

Moreover, Mr. Kozinski's record as special counsel of the Merit Systems Protection Board, when compared with his sworn testimony in connection with his nomination to that office, suggests a degree of disingenuity so profound, in our opinion, as to adversely reflect on his character and fitness for this judicial office.

With respect to Mr. Kozinski's lack of experience, it should be pointed out that the U.S. Claims Court on which Mr. Kozinski has now served for less than 3 years as the chief judge is in an article 1, not an article 3 court, created by Congress. As such, the Claims Court does not exercise article 3 power, and its judges are more akin to administrative judges and magistrates than Federal judges. Mr. Kozinski has never been a U.S. district court judge, and apart from his short tenure on the Claims Court, he has never held a judicial office of any kind whatsoever.

Furthermore, Mr. Kozinski has by his own admission had virtually no experience practice before any Federal court. The materials Mr. Kozinski submitted in support of his nomination demonstrate that he has no practice experience which would qualify him for an appellate judgeship. He apparently has never tried a case by himself. He has been before the U.S. Court of Appeals only once. The remainder of his Federal court litigation experience consists of a few appearances in preliminary matters. Overall he has practiced law for only 3 years.

NTEU's own attorneys go routinely to Federal court, and most have substantially more litigation experience than Mr. Kozinski. In fact, Mr. Kozinski's litigation experience appears to be scarcely greater than NTEU's litigation law clerk who is an attorney and has worked for NTEU's litigation department for 3 years.

The importance of practical experience cannot be overemphasized in consideration of a candidate for a seat on an appellate bench. One hopes for appellate judges, whatever their philosophy, who possess wisdom born of experience. An appellate judge must make determinations which require more than a review of general principles of law. Without experience at the bar, one cannot hope to be distinguished at the bench.

Mr. Kozinski lacks minimal background as a legal practitioner, and I reiterate that this is an area where an appellate judge simply cannot afford to be deficient. Therefore, I urge this committee to recognize that Mr. Kozinski is not qualified to serve as a judge in the U.S. court of appeals due to his lack of legal experience.

I note that all of the judges who have testified and all of the testimony that this committee has heard today shows that Mr. Kozinski ranks far below the acquired experience of any other nominee that this committee has considered. And I also suggest that Mr. Kozinski is 35 years old and, believe me, I do not have anything against young men, but at the same time I think it is important to keep in mind that we are asking this person to serve on the second highest court in the land. And I think it is important for someone to have some living experience, some experience with life, some experience with dealing with the kinds of issues and problems that will be presented to Mr. Kozinski should he be confirmed on the ninth circuit. And I do not think he has had that experience. I do not think that an excellent legal scholar is enough, which certainly Mr. Kozinski is. I think life experience is necessary and he lacks that.

And I also note that when you asked the question, Senator Simon, about temperament. Mr. Kozinski responded solely on the issue of how he deals with lawyers, not with respect to his own philosophy and his own attitudes with respect to the kinds of issues that are presented, and I think that is an important part of temperament that Mr. Kozinski neglected to comment on, and I think quite rightfully so because those are kinds of issues that he has not been confronted with during his lifetime.

Our second objection to this nomination rests upon the vast discrepancies between the rhetoric and the reality of Mr. Kozinski's reign as special counsel to the Merit Systems Protection Board. For example, at a Senate confirmation hearing on May 14, 1981, Mr. Kozinski promised, quote, "an aggressive and possibly expanded role in investigating and acting on whistle-blower complaints," close quotes, and to take, quote, "extraordinary steps," close quotes, to protect whistle-blowers. A week after his confirmation hearings, Mr. Kozinski again asserted that he planned several administrative initiatives to improve the Office of Special Counsel's credibility among Federal workers as a protector of the conscientious employee who steps forward to identify fraud, waste, and abuse. His 1-year tenure as special counsel, however, belied the noble statements made to the Senate in May of 1981. For the year ending May 1982, OSC's own figures show the following: Stays of personnel actions had been sought in only four cases between June 1981 and May 1982, and in one of these cases the request was dropped.

No corrective action orders were sent to agencies from Kozinski in that year. Five disciplinary cases were brought in that year; not a single one against a management official for commission of a prohibited personnel practice.

Only four allegations of wrongdoing were sent to agency for investigation, and not once did Kozinski use his statutory authority to say the report of an agency was inadequate.

The Office of Special Counsel intervened in only six cases before the MSPB, and not all of them were on behalf of the employee.

And I would say that when we look at these numbers we have to keep in mind that we are dealing with 2.3 million Federal employees. And the office was created for the purpose of encouraging employees to come forward and that the Office of Special Counsel was to create an umbrella of protection; and yet, even though that was the intent of Congress, I think these numbers alone show that it did not work.

At the end of Kozinski's brief term as special counsel, Congressional critics as well as the respected Government accountability project were calling for the abolition of the OSC for its failure to follow through on and a willful inattention to well-documented whistle-blower cases. One of the major reasons why Congress considered abolishing the Office of Special Counsel was Kozinski's focus on management interest to the detriment of the Federal employees whose interests the Office of Special Counsel had been designed to protect.

The most glaring example: Mr. Kozinski's departure from the protection of Federal employee interest were the seminars he conducted to teach Federal managers how to beat the system and rid themselves of disfavorite employees without being charged with prohibited personnel practices. The thrust of these seminars was not to explain the law; rather, they were designed to inform Federal managers what criteria the Office of Special Counsel used in determining prohibited personnel practices. Federal managers then can go out armed with this knowledge and violate rights with impunity upon advice of the special counsel. Mr. Kozinski's decision to conduct these management seminars while in the position nominally of a watchdog for Federal employee interests represents a clearcut betrayal of the responsibilities of his position, as well as a reversal of his stated goals as special counsel. This is not a situation where the chief prosecutor goes out and talks to the criminals about how to beat the system. I mean, his role was that of a prosecutor, not as a role of an adviser to the management officials of the Federal Government.

Mr. Kozinski consistently read his jurisdiction as special counsel more narrowly than we believed justified or intended by Congress. This attitude, of course, greatly contributed to the lack of prosecution by the office and is a harbinger of things to come should he be confirmed to the office he now seeks. For example, as special counsel he was numerous times asked to investigate the use of reductions in force, or RIF's, for improper ulterior motives. Mr. Kozinski stated the outrageous opinion that RIF's are not personnel actions and, therefore, they did not come within the jurisdiction of the OSC. I might note that Mr. Kozinski commented on my statement, and I stand by it. Certainly a RIF is a personnel action within anyone's definition and particularly if that RIF is conducted in a manner which violates the statute, and the statute which the Office of Special Counsel was to protect.

The self-imposed and unwarranted limitation on his prosecutorial power removed from review a large category of actions that have the clear potential for abuse. Managers could utilize the RIF to retaliate against or punish employees for all manner of prohibited reasons and, again, could do so with impunity.

And I might add that, as Mr. Kozinski stated, I did have a conversation with him prior to his installment to be the Office of Special Counsel, and I was encouraged by what he said. But I was certainly discouraged by his tenure because he did not do what he said he was going to do; he pandered to the managers through these seminars, and he did not prosecute.

So I find that the rhetoric was one thing, the reality was something else, and I think that that kind of rhetoricreality juxtaposition, again, shows a person who is not ready to assume a position on a court of appeals.

NTEU, like many other citizens groups, has a keen interest in protecting access to the Federal court system so precious to the preservation of Federal and constitutional rights. Mr. Kozinski's nomination to the ninth circuit court of appeals is but a further step in the Reagan administration's effort to limit access to the Federal courts and, with those limits, deny to millions of Federal workers as well as private citizens rights and remedies that only the Federal courts can adequately protect.

Mr. Kozinski, while preaching judicial restraint, has ignored long-standing legal precedents in his efforts to lock the doors to Federal courts and throw away the key. As we have noted, as special counsel Mr. Kozinski deliberately limited the jurisdictional reach of the Office of Special Counsel in a radical departure from the then-agreed upon scope of this special counsel's authority. The absence of any discernible prosecutorial activity in the OSC during Mr. Kozinski's tenure is further evidence of a willful disrespect to the duties of his office as those duties were set out in the statute and the case law.

Mr. Kozinski's active participation in changing the nature of the OSC and the scope of its jurisdictional mandate causes a grave concern. But look upon the Federal judiciary, we see Mr. Kozinski's confirmation as a further attempt——

Senator SIMON. Mr. Chairman, if I may interrupt the witnesses just briefly, and I apologize for doing that, I have some other commitments and I have to—I am already behind on—I would like to submit some questions to the two witnesses and then have them respond in writing to them and enter them in the record, if that is OK.

Senator GRASSLEY. Yes; that is perfectly all right and so that will be allowed, but he is on the agenda for the morning meeting so we would have to have those questions in writing by morning.

Senator SIMON. All right, I will check with the staff; yes.

Senator GRASSLEY. Proceed.

Would you be able to summarize?

Mr. TOBIAS. I only have a paragraph to go, Senator Grassley.

Senator GRASSLEY. Sorry to interrupt.

Mr. TOBIAS. Viewed from this perspective, Mr. Kozinski's nomination can hardly be characterized as a step toward judicial restraint. Mr. Kozinski's tenure as special counsel was a disaster for Federal employees and particularly for the whistle-blowers he was charged to protect. His record in ignoring the rights of conscientious employees who came forward to expose fraud, waste, and abuse was a startling contradiction of his Senate confirmation testimony. For these events to occur in a period of less than 1½ years suggests that promises he made to the Senate committee during his nomination hearing for the OSC were less than sincere.

It is Mr. Kozinski's apparent willingness to assure the committee whatever was necessary to secure his nomination that should make this committee skeptical of his assurances here. There is ample cause for you to reject his nomination to an office of such integrity as the United States Court of Appeals.

Thank you again for the opportunity to testify here today, and I will be certainly happy to answer any questions.

Senator **Grassley**. I do have one question and it is a question that we would ask any organization of whether or not this is, as far as speaking for 120,000 members, is the decision to oppose the nomination or the questions that have been raised about it come from a leadership decision or from a process of consensus or polling of the membership?

Mr. **Tobias**. I would say that there was certainly no poll of the membership with respect to opposing Mr. Kozinski's nomination. I would say that it was based more on the facts that have been articulated in the testimony set forth, and I think it should be judged on that basis.

Senator **Grassley**. OK.

[Material follows:]

STATEMENT
OF

ROBERT M. TOBIAS
NATIONAL TREASURY EMPLOYEES UNION

Mr. Chairman, Members of the Committee, my name is Robert M. Tobias, President of the National Treasury Employees Union. I am grateful for the opportunity to testify before you today concerning the nomination of Alex Kozinski as a judge to the United States Court of Appeals for the Ninth Circuit.

The National Treasury Employees Union represents over 120,000 federal workers. NTEU appears routinely before the U.S. Courts of Appeals nation-wide in the course of its active litigation practice. NTEU represents the interests of federal employees in a wide range of actions, including, for example, constitutional issues, statutory intepretations questions, and regulatory challenges. Because of NTEU's extensive practice in the federal courts, we are vitally concerned with both the attitudes and the qualifications of those seeking judgeships.

The National Treasury Employees Union opposes this nomination and I urge this committee to reject it. It is our opinion that Mr. Kozinski's lack of any meaningful or relevant judicial experience makes him unfit to assume so great and important a responsibility as a judgeship on the United States Court of Appeals. Moreover, Mr. Kozinski's record as Special Counsel of the Merit Systems Protection Board, when compared with his sworn testimony in connection with his nomination to that office, suggests a degree of disingenuity so profound in our opinion as to adversely reflect on his character and fitness for this judicial office. I will address these issues separately.

With respect to Mr. Kozinski's lack of experience, it should be pointed out that the United States Claims Court on which Kozinski has now served for less than 3 years as Chief Judge, is an Article I court created by Congress. As such, the Claims Court does not exercise Article III power and its judges are more akin to administrative judges and magistrates than to federal judges. Mr. Kozinski has never been a United States District Court judge, and, apart from his short tenure on the Claims Court, he has never held judicial office of any kind whatsoever.

Furthermore, Mr. Kozinski has, by his own admission, had virtually no experience practicing before any federal court. The materials Mr. Kozinski submitted in support of his nomination demonstrate that he has no practical experience which would qualify him for an appellate judgeship. He apparently has never tried a case by himself. He has been before the U.S. Courts of Appeals only once. The remainder of his federal court litigation experience consists of a few appearances in preliminary matters. Overall, he has practiced law for only three years. NTEU's own attorneys go routinely to federal court and most have substantially more litigation experience than Mr. Kozinski. In fact, Mr. Kozinski's litigation experience appears to be scarcely greater than that of NTEU's Litigation Law Clerk, who is an attorney and has worked for NTEU's litigation department for three years.

The importance of practical experience cannot be overemphasized in consideration of a candidate for a seat on an appellate bench. One hopes for appellate judges, whatever their philosophy, who possess wisdom born of experience. An appellate judge must make determinations which require more than a review of general principles of law. Without experience at the bar, one cannot hope to be distinguished at the bench. Mr. Kozinski lacks minimal background as a legal practitioner, and I reiterate that this is an area where an appellate judge simply cannot afford to be deficient. Therefore, I urge this Committee to recognize that Mr. Kozinski is not qualified to serve as a judge in a United States Court of Appeals due to his lack of legal experience.

Our second objection to this nomination rests upon the vast discrepancies between the rhetoric and the reality of

Mr. Kozinski's reign as Special Counsel to the Merit Systems Protection Board.

For example, at his Senate confirmation hearing on May 14, 1981, Kozinski promised 'an aggressive, and possibly expanded, role in investigating and acting on whistleblower complaints,' and to take 'extraordinary steps' to protect whistleblowers.

A week after his confirmation hearings Kozinski again asserted that he planned several administrative initiatives to improve the Office of Special Counsel's credibility among federal workers as a protector of the conscientious employee who steps forward to identify fraud, waste, and abuse.

His one-year tenure as Special Counsel, however, belied the noble statements made to the Senate in May of 1981. For the year ending May, 1982, OSC's own figures show the following.

- Stays of personnel actions had been sought in only four (4) cases between June, 1981 and May, 1982, and in one of these cases, the request was dropped.
- No corrective action orders were sent to agencies from Kozinski in that year.
- Five disciplinary cases were brought in that year. Not a single one against a management official for commission of a prohibited personnel practice.
- Only four allegations or wrongdoing were sent to agencies for investigation and not once did Kozinski use his statutory authority to say the report of an agency was inadequate.
- The Office of Special Counsel intervened in only six cases before the MSPB and not all of them were on behalf of the employee.

At the end of Kozinski's brief term as Special Counsel, Congressional critics, as well as the respected Government Accountability Project, were calling for the abolition of the OSC for its failure to follow through on and a willfull inattention to 'well-documented' whistleblower cases.

One of the major reasons why Congress considered abolishing the Office of Special Counsel, was Kozinski's focus on management interests to the detriment of the federal employees whose interests the Office of Special Counsel had been designed to protect. The most glaring example of Mr.

Kozinski's departure from the protection of federal employee interests were the seminars he conducted to teach federal managers how to beat the system and rid themselves of disfavored employees without being charged with prohibited personnel practices. The thrust of these seminars was not to explain the law; rather, they were designed to inform federal managers what criteria the Office of Special Counsel used in determining prohibited personnel practices. Federal managers could then go out armed with this knowledge and violate employee rights with impunity, upon advice by the Special Counsel. Mr. Kozinski's decision to conduct these management seminars while in the position, nominally, of watch dog for federal employee interests represents a clearcut betrayal of the responsibilities of his position, as well as a reversal of his stated goals as Special Counsel.

Mr. Kozinski consistently read his jurisdiction as Special Counsel more narrowly than we believe justified or intended by Congress. This attitude, of course, greatly contributed to the lack of prosecution by the Office and is a harbinger of things to come, should he be confirmed to the office he now seeks. For example, as Special Counsel, he was numerous times asked to investigate the use of reductions-in-force, or RIFs, for improper, ulterior motives. Mr. Kozinski stated the outrageous opinion that RIFs are not personnel actions, and therefore they did not come within the jurisdiction of the OSC. The self-imposed and unwarranted limitation on his prosecutorial power removed from review a large category of actions that have the clear potential for abuse. Managers could utilize the RIF to retaliate against or punish employees for all manner of prohibited reasons, and, again, could do so with impunity.

The gross discrepancies between Mr. Kozinski's stated positions and his actual deeds is nowhere more apparent than in his position on "judicial activism." While outwardly and publicly an advocate of judicial restraint, Mr. Kozinski practices judicial activism in the extreme.

NTEU, like many other citizens groups, has a keen interest in protecting the access to the federal court system so precious to the preservation of federal and Constitutional rights. Mr. Kozinski's nomination to the Ninth Circuit Court of Appeals is but a further step in the Reagan Administration's effort to limit access to the federal courts and with those limits, deny to millions of federal workers, as well as private citizens, rights and remedies that only the federal courts can adequately protect.

Mr. Kozinski, while preaching judicial restraint, has ignored longstanding legal precedents in his effort to lock the doors to federal courts and throw away the key. As we have noted, as Special Counsel, Mr. Kozinski deliberately limited the jurisdictional reach of the Office of Special Counsel in a radical departure from the then agreed-upon scope of the Special Counsel's Authority. The absence of any discernible prosecutorial activity in the OSC during Mr. Kozinski's tenure is further evidence of his willful disrespect of the duties of his office as those duties were set out in the statute and the case law.

Mr. Kozinski's active participation in changing the nature of the OSC and the scope of its jurisdictional mandate causes us grave concern. Let loose upon the federal judiciary, we see Mr. Kozinski's confirmation as a further attempt to preclude the effective litigation of federal rights in federal court and thereby deny or diminish those substantive rights to citizens in general and federal employees in particular.

Viewed from this perspective, Mr. Kozinski's nomination can hardly be characterized as a step toward judicial restraint.

Mr. Kozinski's tenure as Special Counsel was a disaster for federal employees, and particularly for the whistleblowers he was charged to protect. His record in ignoring the rights conscientious employees who came forward to expose fraud, waste and abuse was a startling contradiction of his Senate confirmation testimony.

For these events to occur in a period of less than a year and a half suggests that promises he made to the Senate Committee during his nomination hearings for the OSC were less than sincere. It is Mr. Konzinski's apparent willingness to assure the committee whatever was necessary to secure his nomination that should make this Committee skeptical of his assurances here. There is ample cause for you to reject his nomination to an office of such high integrity as the United States Court of Appeals.

Thank you again for the opportunity to testify here today. I would be happy to answer any questions.

Senator GRASSLEY. Mr. Devine.

TESTIMONY OF THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Mr. Chairman, thank you for inviting my testimony. My name is Thomas Devine and I am the legal director of the Government Accountability Project, which is a nonprofit, nonpartisan organization that provides legal assistance to Government and corporate whistle-blowers.

Senator GRASSLEY. You are going to summarize your statement.

Mr. DEVINE. I am summarizing my testimony, Senator.

Senator GRASSLEY. OK. Thank you.

Mr. DEVINE. I thought I would introduce myself.

In this capacity, GAP has monitored, worked with, and represented clients at the Office of Special Counsel.

I understand that I have been invited to share insights into Mr. Kozinski's performance as special counsel during his tenure, and I agree that his performance is directly relevant to his qualifications for the court of appeals where he will be responsible for guarding the constitutional rights of all Americans.

For the record in overview, I would like to respond to certain points that Mr. Kozinski made in his testimony. Mr. Kozinski stated, and I think it is probably the most fundamental statement he made, that it is not true he did not help whistleblowers. I only have two responses. No 1, what does he have to show for that claim? I would submit virtually nothing.

Further, we would urge this committee, if you are seriously reviewing this nomination, to ask the whistleblowers whether they agree with Mr. Kozinski. I have been in this business for 6 years now helping whistleblowers, and I have not met a one who would agree with Mr. Kozinski's assertion.

No. 2, Mr. Kozinski stated that he did not conduct the investigations at the Office of Special Counsel and therefore could not be responsible for answering questions about details, although he assumed overall responsibility. I am not sure how credible I find that answer. We worked closely with employees at the Special Counsel's Office, and the unanimous opinion we received was that Mr. Kozinski approved everything that went out of that office down to the level of routine closeout memoranda, which he had edited three to four times in some cases. It certainly surprises me that he would not have been aware of the methodology for the agency's fact-finding process.

No. 3, Mr. Kozinski stated that Mr. O'Connor has supported him in retrospect in the quality of his investigations. Whistleblowers would not find that endorsement particularly impressive. The current special counsel, Mr. O'Connor, has analogized whistleblowers to bag ladies. His endorsement of Mr. Kozinski's performance simply does not make us too pleased.

And, finally, Mr. Kozinski told you that he was not familiar with the case of Jay Thal, which Senator Simon asked about today. Well, I discussed the case of Mr. Thal with Mr. Kozinski on Monday, so I am surprised that he is still not familiar with it. But I think the case is significant. In that case the special counsel agreed it would be acceptable to reprimand employees for engaging in communications if they went outside of the chain of command. That, on an administrative level, would neutralize the *Pickering* v. *Board of Education* decision which has been the hallmark of first amendment principles for many years.

I think these are very serious problems that are touched upon just by a casual review of Mr. Kozinski's testimony. I will not repeat the context for Mr. Kozinski's responsibilities, and I will not repeat the successes that I wanted to compliment Mr. Kozinski on, because he took credit for them himself quite properly.

After finishing a 3-year study as an oversight project, we at GAP are finishing a report on the history of whistleblower protection at the Office of Special Counsel. Although the draft chapter on Judge Kozinski was nearly complete, last week he agreed to be interviewed about OSC special counsel staff criticisms of his leadership. He previously had not responded to a request for an interview, and I interviewed Judge Kozinski on Monday afternoon. We will expeditiously incorporate his responses in our completed analysis.

I asked Judge Kozinski what his primary goal was as special counsel. His predecessors had concentrated on protecting employees and his successor has concentrated on prosecuting those responsible for reprisals. Judge Kozinski responded that his goal was to make the Office of the Special Counsel an effective organization. He believed that nothing was happening when he arrived, and he wanted to build a record of professional achievement. Under this criterion, Senator, Judge Kozinski's administration at best was counterproductive. At worst, it was outright hostile to freedom of speech within the bureaucracy. Under his leadership the Office became a Trojan horse where whistleblowers had one strike going against them before they sought his help and two strikes after the special counsel was finished with them. As a result, it is our opinion that before recommending confirmation this committee should investigate the charges by one, the whistleblowers who believe that the special counsel's responses to their cases reinforced merit system abuses; two, the whistleblowers the special counsel created on the OSC staff who allege that he stifled dissent and engaged in illegal reprisals against his own employees; and, three, the leading members of the Federal bar who progressively stopped bringing cases to this Office simply because it was not in their clients' best interests.

These are serious charges. If the allegations are correct, Judge Kozinski was to dissent what Mr. Watt was to the environment. And after hearing both sides, GAP's conclusion is that the allegations are largely accurate. The issues are listed below in my written testimony. Certainly, however, we are not qualified to substitute for the committee as the judge of this debate. This can only occur if you hear from those who were victimized by Judge Kozinski's leadership.

Yesterday I contacted a sample of the witnesses and experts we have previously interviewed. Everyone enthusiastically agreed to testify if this committee schedules a followup hearing to seriously examine this nominee's record.

The areas of problem that we have seen in the special counsel's office involve alleged misconduct on a personal level. Judge Kozinski has told me, and I wanted to believe him and would like to believe him, that he has a deep commitment to the first amendment. But the values that his employees at the office described to me bear as little resemblance to those that Judge Kozinski told me, as Dr. Jekyll does to Mr. Hyde, Senator. And I would like to summarize the other side of the story that we have heard from the people who worked with Mr. Kozinski. They told us that there was personal hostility toward merit system principles, and there were prohibited personnel practice against special counsel employees. First, there was frequent humiliation, public humiliation of OSC employees. Second, there was a total intolerance for dissent against special counsel policy within the organization. Third, there was a gag order on a suspected OSC dissident at the same time the special counsel was taking credit for eliminating gag orders in other Federal agencies. Fourth, that there was an issuance of 20 to 25 page performance appraisal standards with critical elements so strict that an employee could be dismissed for a single punctuation error. Fifth, there was a memorandum to all employees warning that failure to follow any instructions could lead to termination, including disobedience of such rules as proper margins or legal case captions. Sixth, employee morale was at rock bottom with mass resignations, 40 percent of the agency employees in the first 10 months of his term.

And, finally, there was even pursuit of prohibited personnel practices against his predecessor whom he demoted and then terminated for refusing to accept a transfer.

Judge Kozinski responded that he did not enjoy embarrassing or criticizing people, but he became upset with staffers who did not, quote, "did not give a damn when Federal employees were depending on them. Sometimes the truth hurts," unquote. He insisted that he acted, quote, "out of a sense of responsibility," unquote. He added that employees of the office were more critical of their peers than he was, a comment that he made again today.

We realize that intentional harassment is in the eye of beholder, but the protests came from veteran special counsel staffers whose dedication and track record was above reproach. As supervisory trial attorney Jesse James, Jr. explained in his resignation later, "the special counsel appears to receive some type of sadistic pleasure out of forcing employees to resign or causing employees great mental anguish."

I would like to turn to the second area of concern that we have, policies that undercut the protection of employee rights. Complainants, attorneys, and special counsel employees have asserted that the policies of the Kozinski era included—One, a total deemphasis in practice, beyond an occasional memo or lip service, on helping employees victimized by illegal reprisal; two, a corresponding obsession with form over substance; three, taking credit for full investigations of whistleblower complaints when, in fact, none had occurred—that happened again in the case of Mr. Jay Thal; fourth, a directive on the need to close cases as a top priority which led to charges that worthy cases were closed in assembly-line fashion without investigation; fifth, failure to honor previous special counsel commitments to advise employees of the specific reasons for closing cases, as well as the additional evidence and legal support necessary for relief—in short, Mr. Kozinski in this area stopped using the standards that had existed upon his arrival and then characterized the office as an agency without standard when he came; sixth, a policy not to seek stays until a personnel action was formally proposed, and not to seek stays after the personnel action is ordered, which effectively eliminated one of the primary sources of relief under the reform act.

Senator **Grassley**. I would ask you to wrap up now.

Mr. **Devine**. Senator, probably the bottom line on the whistleblowers with the Office of Special Counsel is that nothing happened to help them during the year of Mr. Kozinski's tenure. I could further detail the techniques and the rationalizations and the excuses in the case studies behind that, but the facts speak for themselves. An office that was crippled when Mr. Kozinski arrived was paralyzed when he left. It has been painful for me to present this testimony. It is painful for me for several reasons; the first is that I genuinely like Mr. Kozinski on a personal basis. The second is that I have serious concerns how important these issues are to the Judiciary Committee.

In less than a year, however, Mr. Kozinski neutralized the most significant legislation in 90 years to protect the rights of whistleblowers. As one who has devoted my entire professional career to pursuing and defending freedom of speech, I urge you not to entrust the First Amendment to this man until the facts are in.

Senator **Grassley**. I have no questions for either one of you, so thank you very much for your testimony.

[Statement follows:]

TESTIMONY

OF

THOMAS M. DEVINE

ON BEHALF OF

THE GOVERNMENT ACCOUNTABILITY PROJECT

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for inviting my testimony today. My name is Thomas Devine. I am the Legal Director of the Government Accountability Project ("GAP"), a non-profit, non-partisan organization that provides legal assistance to government or corporate "whistleblowers" - - employees who dissent against illegality, abuse of power, waste, mismanagement or public health and safety violations where they work. If we believe a whistleblower's charges are credible and significant, we help the employee to be more effective in the dissent; to defend against subsequent retaliation; or both. In this capacity, GAP has monitored, worked with and represented clients at the Office of the Special Counsel ("OSC" or "Special Counsel") of the Merit Systems Protection Board ("MSPB" or "Board"), which serves as a guardian of constitutional rights in the civil service system, among other roles. I understand that I have been invited to share GAP's insights into Mr. Kozinski's performance as the Special Counsel during 1981 and 1982. This was before his appointment to the Claims Court. I agree that his performance in carrying out his duties as Special Counsel is directly relevant to his qualifications for the Court of Appeals, where he would be responsible for guarding the constitutional rights of all Americans.

The OSC was established under the Civil Service Reform Act of 1978 to defend the merit system against prohibited personnel practices listed in 5 U.S.C. section 2302, which codified employee rights against retaliatory personnel actions, such as reprisal for legitimate whistleblowing. 5 U.S.C. section 2302(b)(8). The Special Counsel also screens whistleblowing disclosures that challenge agency misconduct. If there is a "substantial likelihood" the charges are correct, the OSC can order an investigation and report on necessary corrective action by the head of the agency. The Special Counsel screens the report for reasonableness and completeness. 5 U.S.C. section 1206(b). Similarly, the Special Counsel can file disciplinary complaints against those who engage in merit system violations and can prosecute violations of the Hatch Act. 5 U.S.C. sections 1206(e) and 1206(g).

After a three year study and oversight project, we are currently finishing a report on the history of whistleblower protection at the Office of the Special Counsel. Although the draft chapter on Judge Kozinski was nearly complete, last week he agreed be interviewed about OSC staff criticisms of his leadership. He previously had not responded to GAP's request. On Monday afternoon, I interviewed Judge Kozinski and will expeditiously incorporate his responses into a completed analysis. With the Committee's consent, GAP will submit it for the record.

Initially, I asked Judge Kozinski what was his primary goal as the Special Counsel. His predecessors Patrick Swygert and Mary Eastwood concentrated on protecting employees against reprisals. His successor William O'Connor has emphasized prosecuting those responsible for retaliation. Judge Kozinski responded that he sought to make the OSC an effective organization within the statute. When he arrived, he believed that nothing was happening and the Office was the target of consistent criticism. He was concerned about the lack of standards and sought to restore a record of professional achievement.

Under this criterion, Judge Kozinski's administration at best was counterproductive. At worst, it was outright hostile to freedom of speech within the bureaucracy -- a Trojan Horse where whistleblowers who had one strike against them before seeking help had two strikes against them after the Special Counsel was finished. As a result, GAP believes that before recommending confirmation this Committee should investigate the charges by - - (1) whistleblowers who believe that the Special Counsel's response to their cases reinforced merit system abuses; (2) whistleblowers the Special Counsel created in his own Staff who allege that he stifled dissent and engaged in prohibited personnel practices against OSC employees; and (3) the leading members of the federal bar who progressively stopped bringing cases to the Special Counsel, simply because it wasn't in their client's best interest. These are serious charges. If the allegations are correct, Mr. Kozinski was to dissent what Mr. Watt was to the environment.

After hearing both the critics and Judge Kozinski's defenses, I am authorized to present GAP's conclusions that the allegations are largely accurate. The issues in the dispute are listed below in my written testimony. Time permitting, in my oral testimony or response to questions I will detail Judge Kozinski's defenses and why we are not satisfied. Certainly, GAP is not qualified to substitute for the Committee as judge of this debate, however. That can only occur if you hear from those affected by Judge Kozinski's leadership.

Yesterday I contacted a sample of the witnesses and experts we have interviewed previously. Everyone enthusiastically agreed to testify if this Committee schedules a follow-up hearing to seriously examine his record. Testifying today was not possible due to the lack of adequate notice for preparation. These witnesses could provide first hand knowledge about alleged misconduct by Judge Kozinski that I can only summarize as an investigator, including - - (1) personal hostility toward individual rights and prohibited personnel practices against OSC employees; (2) policies that undercut whistleblower protection; and (3) counterproductive results in terms of individual cases and overall effect on the merit system.

I. ACCOMPLISHMENTS

It would be unfair not to give credit where it is due. Early in his term as Special Counsel, Judge Kozinski issued sharp written warnings in what he described to me as a "campaign" against unconstitutional attempts to impose prior restraint through gag orders. The gag orders were withdrawn. During his term the OSC intervened successfully against the attempted removal of a holdover Democrat at the Department of Interior. He also authorized an intervention brief that a manager's alleged sexual coercion of a subordinate would not qualify as off-duty conduct unrelated to job performance. On Monday Judge Kozinski professed his deep commitment to the First Amendment, admitted to numerous major mistakes and said he had learned from his errors.

On balance, however, Judge Kozinski is proud of his performance as Special Counsel. As he was quoted on March 15, 1985 in The Los Angeles Daily Journal, "I feel my record speaks for itself. Anybody examining how I handled the job would find we did as well or better than can be expected." That assertion cannot withstand scrutiny.

II. ALLEGED MISCONDUCT

As seen below, the values espoused by Judge Kozinski on Monday bear as little resemblance to those described by his critics as Dr. Jekyll did to Mr. Hyde.

A. Personal hostility toward merit system principles and prohibited personnel practices against OSC employees

OSC employees' most frequent complaint was the trampling of their civil liberties, and even human dignity. Allegations included - -

(1) frequent public humiliation of OSC employees, from supervisors to secretaries;

(2) total intolerance for dissent and open hostility toward those who challenge agency policy;

(3) a gag order on a suspected OSC dissident, at the same time the Special Counsel was taking credit for eliminating similar gag orders at other agencies;

(4) bitter memoranda to OSC Staff accusing them of such crimes as failure to support social functions and leaving a dirty kitchen;

(5) development of performance appraisals without meaningful employee participation, an omission which the previous Special Counsel had interpreted as the basis for a prohibited personnel practice;

(6) issuance of 20-25 page performance appraisal standards with critical elements so strict that an employee could be dismissed for a single punctuation error;

(7) a memorandum from Mr. Kozinski to all employees warning that failure to follow any instruction could lead to termination, including disobedience of such rules as proper margins or legal case captions;

(8) employee morale at rock bottom, with mass resignations of the activists recruited to OSC as the agency that would clean up the bureaucracy while protecting employee rights. Forty percent of agency employees resigned in the first ten months of his term; and

(9) pursuit of prohibited personnel practices against his predecessor, Acting Special Counsel Mary Eastwood, whom he demoted and then terminated for refusing to accept a transfer to San Francisco.

Judge Kozinski responded to me that he did not enjoy embarrassing or criticizing people, but he became upset with staffers who "didn't give a damn when federal employees were depending on them. Sometimes the truth hurts." He insisted that he acted "out of a sense of responsibility." He stated that he sincerely wanted Ms. Eastwood to stay. He added that employees of the office were more critical of his peers than he was.

GAP recognizes that intentional harassment is in the eye of the beholder. But the most anguished protests came from veteran OSC staffers whose dedication and track record was above reproach. As supervisory trial attorney Jessie James Jr. explained in his resignation letter: "The Special Counsel appears to receive some type of sadistic pleasure out of forcing employees to resign or causing employees great mental anguish."

With respect to Ms. Eastwood, it was common knowledge at the OSC in September 1981 that Mr. Kozinski sought her departure. And the Staff's alleged lack of self-confidence during private interviews is inconsistent with the facts on a larger scale. During the OSC's darkest hours in 1980, there was not a single resignation, even when paychecks were cut off and employees furloughed due to an unexpected budget recission. When Judge Kozinski arrived, the OSC Staff was battered but had legitimate pride in its spunk and record of achievement under impossible circumstances. Within a year nearly half of these employees had given up on the Office. As one successful prosecuting attorney explained, "Now we know from experience what the whistleblowers go through."

B. Policies that undercut protection of employee rights

Complainants, attorneys and OSC employees have asserted that the policies of the "Kozinski era" included - -

* a total deemphasis within OSC meetings, lectures and memoranda on helping employees victimized by prohibited personnel practices;

* a corresponding obsession with form over substance, as briefs were copy edited from six to twelve times before eventually being completed long after the initial deadlines;

* taking credit for full investigations of whistleblower complaints when in fact none had occurred, as with the case of Mr. Jay Thal;

* a directive on the need to "close cases" as the first priority, which led to charges that worthy cases were closed in "assembly-line fashion" without investigation;

* excessive delays from six months to a year before cursory "investigations" that routinely ignored complainants' requests to interview supporting witnesses and were followed routinely by closing the case;

* failure to honor previous OSC commitments to advise employees of the specific reasons for closing cases and the additional evidence and legal support necessary to provide relief;

* a policy not to seek stays until a personnel action is formally proposed, and not to seek stays after the personnel action is ordered - - thus effectively eliminating this relief due to long Special Counsel delays;

* effectively eliminating independent evaluation of agency reports under 5 U.S.C. section 1206(b) into whistleblower dissent by following an unwritten policy that any report is reasonable if it is signed by the agency head; and

* an emphasis on Hatch Act prosecutions which were only pursued against Democrats.

The OSC became so alien that even whistleblowers who won back their jobs in MSPB litgation had to do so without help from the Special Counsel. In two cases the winning whistleblower had to successfully rebut the OSC's pro-management conclusions.

Mr. Kozinski responds that his emphasis on form was to insure that his staff communicated with lay people and "little old ladies" in English rather than bureaucratic legalese. Somewhat incongruously, he expressed surprise that his staff thought they were not supposed to investigate cases and said it must have been because he was a "poor communicator." He claimed ignorance of the policy shifts described above and added that in private discussions he was more of a champion for employee rights than was his Staff. He stated flatly that he never told his Staff to change the Office's prior policies for handling complaints. He rationalized the Hatch Act prosecutions as an inexpensive way to get on the job training in relatively simple cases for the inexperienced attorneys he had just hired out of law school.

These excuses won't wash. It is inherently not believable that the OSC was abandoning wholesale its prior policies without Judge Kozinski's knowledge. His reputation was as a stickler for details who personally edited and approved even the most routine correspondence. Despite Judge Kozinski's asserted ignorance of investigative policies, he took credit for proposed regulations that would have drastically strengthened his investigators' authority in the field. Most significantly, the OSC staffers whom Judge Kozinski credits for the new anti-employee policies were the same individuals who had helped to negotiate, develop and make commitments to honor previous policies sympathetic to employees. These people were followers, not leaders. It is difficult to accept that the OSC career employees coincidentally, systematically repudiated their policies of 2.5 years upon Mr. Kozinski's arrival, without some input from their new leader. At any rate, the Special Counsel cannot blame counterproductive policy shifts on his assistants any more than a judge could blame faulty legal analysis on his law clerks. Ultimately, Judge Kozinski accepted full responsibility on Monday for his policies.

Judge Kozinski's reasoning on Hatch Act prosecutions sounds more like an admission than a defense. In light of his dismay at the lack of client service when he arrived, the Special Counsel should have hired staff who were qualified to start challenging reprisals without first undergoing on the job training. Even then, it is dubious that the graduates Judge Kozinski hired from prestigious law schools were only qualified to prosecute federal employees. There should have been something they could have done -- such as taking depositions or conducting legal research -- that could have strengthened employee rights.

By contrast, the Special Counsel took initiatives to help management implement what he viewed as "the most important [merit system principle] of all" -- firing incompetents. On April 13, 1982, despite the absence of a single disciplinary complaint to punish management reprisals, Mr. Kozinski directed the staff to seek disciplinary actions against time and attendance abuses. These offenses have nothing to do with the Special Counsel's mission. OSC investigators would only duplicate a common management function.

On April 7 and 9, 1982, the Office of the Special Counsel took a major step -- teaching 100 management officials, lawyers and personnel experts at the Federal Communications Commission how not to get caught committing illegal retaliation. Judge Kozinski told me that he had the idea for this seminar during breakfast one morning with his "close personal friend" FCC Chairman Mark Fowler, who had complained that his managers were afraid of the Special Counsel investigators probing his agency at the time. Judge Kozinski suggested the plan as a way for the respective staffs to "get to know each other" and to demonstrate that "we're not ogres." His goal was "management cooperation with our investigations." This initiative also occurred after OSC had all but eliminated outreach to reprisal victims and failed to complete a manual for helping whistleblowers to combat reprisals.

Instead, OSC distributed a manual at the seminar that --

*was drawn largely from the agency's draft internal manual, normally the bureaucratic equivalent of proprietary information;

*shared OSC legal research with management and explained the significance of the various cases;

*informed management what OSC looks for in its reprisal investigations;

*offered tips to management on procedural steps to increase the chances of defeating employees when the case is weak on the merits;

*offered advice on how to take advantage of the "mixed motive" defense which permits retaliatory personnel actions that would have been taken anyway on other lawful grounds;

*shared model "proposed removal" letters and OSC performance appraisal standards that demonstrate how anyone could be fired; and

*enclosed portions of an MSPB survey that concluded most employees did not believe they would be fired for poor performance.

Judge Kozinski defended the seminars as "inexpensive." He added that he wanted to take the whole operation "on the road" -- but decided to close the show after one performance because of "critical reviews."

Thank goodness for critics! The manual and seminar are modern versions of the Malek/May Manual on how to successfully fire an employee without violating civil service rules, which served as a Watergate catalyst for civil service reform and creation of the OSC. As one OSC whistleblower explained to GAP, "This is like the FBI putting out a manual on how to do bank robberires without getting caught. It is a blueprint on how to beat us in court. Think how demoralizing this is. Anyone who can read knows precisely how to defeat us."

Judge Kozinski also informed me that the seminar was merely a "carrot" to neutralize the "stick" he had issued against agency harassment -- proposed regulations that would have give OSC investigators the authority to, inter alia, compel testimony over objections and to disqualify an employee's selected agency representtive. 47 Fed. Reg. 18602 (April 30, 1982). Under the proposal, the OSC could have filed a disciplinary complaint based on the employee's refusal to follow the investigator's orders. Judge Kozinski recalled that agency managers thought the proposed regulations were "draconian."

We agree. The proposal was unnecessary and dangerous. It was unnecessary, because the Special Counsel already has authority under 5 U.S.C. section 1205(b)(2)(A) to issue and seek enforcement of subpoenas. It was dangerous, because the same tactics could be used against whistleblowers. For instance, numerous employees who have sought help from Judge Kozinski's successor William O'Connor have complained of receiving the third degree instead.

At least Mr. O'Connor did not formally pass the proposal, which was still pending when Judge Kozinski departed. The current Special Counsel keeps these type of tactics in the closet; Judge Kozinski flaunted them.

c. Lack of results

Judge Kozinski could hardly claim that he was ignorant of his staff's track record. For whistleblowers, the bottom line is that the old "unprofessional, mismanaged" OSC was far more effective in obtaining results than after his "improvements." In 1980 there were five OSC corrective action recommendations against illegal reprisals. There was one after Judge Kozinski took office. In 1980 there were four disciplinary complaints to punish managers for illegal retaliation. There were none while Judge Kozinski served as Special Counsel. In 1980 there were 20 stay requests. There were four after Judge Kozinski took office. As Mr. James stated in his resignation letter, "We no longer provided any protection to federal employees from merit systems violations and abuses. In 1980 OSC received 13 reports under 5 U.S.C. section 1206(b)(3). In 1981 the Office received another 12 reports. By contrast, Judge Kozinski only ordered four full investigations during his administration.

Judge Kozinski largely has blamed budget cuts and instability for the OSC's nonexistent track record over nearly a year. That is unpersuasive to GAP, an organization which helps dozens of whistleblowers every year on a budget less than 10% of the Special Counsel's. It also is not convincing to claim that budget cuts precluded travel for investigations of reprisal when Judge Kozinski wanted to take his management seminars on the road.

Undoubtedly, the funding difficulties were obstacles. But they should not have been fatal. The real question was whether the Special Counsel did everything he could to creatively stretch his resources and provide whatever relief was possible. To illustrate, if a plane ticket is unavailable, a telephone interview is better than no interview. These should have been "inexpensive" initiatives like Hatch Act prosecutions and the infamous management seminar that Judge Kozinski could have taken to help accomplish the Special Counsel's mission. Maybe a seminar to teach employees their rights, instead of one to teach managers how to fire them, would have been affordable. Judge Kozinski had no explanation for the imbalance.

For whatever reason, the merit system was ill-served by Judge Kozinski's leadership, and federal employees got the message. Two MSPB studies of whistleblowering compared federal employees' perceptions before, and largely during, the Kozinski era. In 1980, 20% of potential whistleblowers did not report observed misconduct, because they feared reprisal. By 1983 the figure had risen to 37%. In 1980, 53% of potential whistleblowers kept silent because they didn't think anything would be done. By 1983 the figure was 61%. In short, the Office of the Special Counsel was crippled when Judge Kozinski arrived. It was paralyzed when he left.

III. DECISIONS IN THE CLAIM COURT

One way to test Judge Kozinski's promise that he learned his lesson is to review his opinions at the Claims Court. Accordingly, GAP did a computer search. One case in particular was revealing, and chilling -- In re Judicial Complaint, 2 Cl. Ct. 255 (1983), in which he dismissed charges of judicial misconduct brought by farmers who had been challenging alleged erosion of their crops. Judge Kozinski dismissed the case as frivolous, because the issues already had been adjudicated and the plaintiff's attorneys were stretching the evidence. But Judge Kozinski wasn't willing to rest with throwing out an unreasonable complaint against a judge. He offered an extensive treatise on the necessity to protect judges from irresponsible criticism. He fired and publicly reprimanded plaintiff's counsel, and referred the case to the Bar Association for investigation into disciplinary action.

The decision suggests a disturbing double standard. Of course, like beauty and harassment, frivolity is in the eyes of the beholder. But Judge Kozinski held the unfortunate attorneys to a much higher standard of responsible litigation than he set for himself.

In Special Counsel v. Gaudalupe Saldana, Docket No. HO 12068210023 (December 21, 1983), Special Counsel Kozinski had authorized the filing of a totally frivolous Hatch Act complaint, based solely on erroneous news articles and an ambiguous affidavit. The affiant, who was the Special Counsel's only witness, rejected OSC's interpretation of the statement. The Administrative Law Judge found that the OSC made no attempt to check the accuracy of news accounts and ignored key witnesses who supported Saldana. As the ALJ concluded, "This is not a failure to produce a preponderance of evidence; it is a failure to produce any evidence." If Special Counsel Kozinski had been held to the same standards of responsible criticism that he applied as Judge Kozinski, he would have been reprimanded, fined and referred for investigation,

Members of the Committee, it has been painful to present this testimony. I genuinely like Mr. Kozinski based on our discussions Monday. I am more than a little nervous about bringing cases to his court in the future, based on the hostility to criticism that he has demonstrated by deed, if not by word. But in less than a year Mr. Kozinski neutralized the most significant legislation in 90 years to protect federal whistleblowers. As one who has devoted my entire professional career to freedom of speech, I urge you not to entrust the First Amendment to this man until all the facts are in.

Judge KOZINSKI. Mr. Chairman, could I have one moment, please?

Senator GRASSLEY. Mr. Kozinski, I would ask you to hold for a moment, because we have also a letter from William O'Connor, who is presently special counsel for the Merit Protection Board, and if Mr. O'Connor is in the audience, I would like to have him come to the witness stand.

Mr. O'CONNOR. I am in the audience, Senator Grassley. I am honored to be here, sir.

Senator GRASSLEY. Would you raise your hand and be sworn? Do you swear that the testimony you give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. O'CONNOR. I do so swear, sir.

Senator GRASSLEY. My purpose for calling you is just for comment on the letter, because we will put the letter in its entirety in the record.

Mr. O'CONNOR. Thank you, Senator.

Senator GRASSLEY. But we would invite comment.

TESTIMONY OF K. WILLIAM O'CONNOR, SPECIAL COUNSEL FOR THE MERIT SYSTEMS PROTECTION BOARD

Mr. O'CONNOR. Senator Grassley, I have heard criticisms which I had been given to understand might be made of Mr. Kozinski, now Judge Kozinski, in his tenure in the Office of Special Counsel, and I am frankly distressed at what I have heard.

When I became Special Counsel in October 1982, as I have testified before in other committees in the other chamber, it was at the beginning of salvage time. The Office of Special Counsel when Judge Kozinski took it over was, indeed, a disaster. It was a sad joke. When I got there, the situation was improving, I think. The quarters were all right, at least, and the facilities were better, the staff was learning, but there were light years of progress required. Investigators who were on board when I came there lacked what I consider to be appropriate investigative training. They did not know how to conduct interrogations skillfully. The trial lawyers who were on board, wellintentioned and useful people, had not had prosecutorial litigation experience. Those were things that they should have had before they were ever required to perform the function Judge Kozinski was confronted with a staff that was demoralized by the fact that in a previous administration the head of the office, which he became head of, and the head of the board before which it appeared, had been suing each other. Imagine the situation, if you will, Senator, of the U.S. Attorney's Office if the U.S. attorney and the chief judge of the district court before which he appeared were in head-to-head litigation. What would that do to the staffs of those functions? I think it's remarkable that in 12 months they were able to do anything at all. This situation which Mr., now Judge, Kozinski found himself required Herculean efforts to bring some order out of the chaos. The order, the dimensions of it were only barely beginning to be perceptible when I got there, and for the last—it will be 3 years this October, God willing—for the last 3 years I have been trying to put flesh on the bones of the skeleton, which obviously does not satisfy certain critics who have appeared before this committee today.

I would be happy to answer any questions which the committee might have, but I would add one more thing. I was asked, Senator, to review a very large number of decisions made by Special Counsel, now Judge, Kozinski, when I came into this office. I found that, of the specific cases I reviewed, and there were about 30 of them, there was nothing wrong. Two or 3 or 4 or 10 were brought up by other people in the recent past over the last few years, and they were reviewed; again, nothing was wrong. In one I spent $30,000 of the taxpayers' money because of persistent assertions that Judge Kozinski had made the wrong decision. I had 60 interviews conducted in 40 States—40 States—and I found that Kozinski's decision based on what he had in the way of resources was right. Now, I ask you, how much endorsement can the man have for his decisionmaking? Three thousand matters were decided when he was there. I do not know whether he participated in 10 percent. I do not know how he could have participated in all of them, but there has been no reason to turn over any of those 3,000 decisions. My understanding of what a judge does, and I have been one, sir, is to make decisions. And when I was a judge, I did not make all of mine right. When Kozinski was special counsel, he did not make any wrong.

I would be glad to answer any questions, sir.

Senator **Grassley**. Well, of course, that speaks very well for the nominee, and we thank you for that, and I am sure that he does as well.

Your letter will be put in the record for the observance of everybody on the committee. Thank you very much.

[Information follows:]

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

The Special Counsel

1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

July 17, 1985

The Honorable Strom Thurmond
Chairman
U.S. Senate Committee
on Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

It has come to my attention that certain individuals and entities have made public representations about the Office of Special Counsel and, specifically, about the management of the office during the tenure of Chief Judge Kozinski as Special Counsel. I am advised that these representations have been made in the context of a hearing on the pending nomination of Chief Judge Kozinski to the U.S. Court of Appeals for the Ninth Circuit.

In respect for the Chairman and in deference to the Committee, it seems to me that I should clarify the record of the OSC as I found it when I succeeded Chief Judge Kozinski on October 6, 1982.

First, I should bring to the attention of the Committee a most significant fact which has, perhaps, been overlooked by some other commentators. When I was confirmed as Special Counsel, I was immediately requested, by the Chairwoman of the House Subcommittee on Civil Service, which has oversight of this office, to review some 27 decisions assertedly made by Judge Kozinski during his tenure as Special Counsel. (Her letter requesting this action, and my responses, are attached as Tab 1 and 2 for convenience of reference).

The significant fact is that, although I carefully reviewed each of the decisions questioned, and caused senior career staff to review the files and procedures anew, there was not one instance in which the decision made by then Special Counsel Kozinski was changed. All the decisions questioned were supported by the law and the facts.

This, in itself, is quite remarkable since in the brief tenure of Chief Judge Kozinski as Special Counsel, the office was underfunded, significantly defunded, reorganized and moved into new quarters; and the staff then on board had far less training in investigation than I believe is needful and proper for a prosecutorial office engaged in law enforcement in the federal government.

In addition to this major request for review, I have caused a number of other reviews of case decision files to be made because of questions raised by the complainants themselves, by Members of Congress on their behalf or by staff. In some cases, as many as 60 interviews and 6 months of investigation were required to find all the facts which could be relevant. When those facts were found, however, the decisions made during the tenure of Chief Judge Kozinski as Special Counsel were invariably sustained.

One other matter is worthy of comment, in the matter of the management of OSC under then Special Counsel Kozinski. It is that, when he became Special Counsel, the OSC was chaotic; staff disaffection was near absolute and internecine feuding with MSPB was rife. The OSC was kennelled - I will not say housed-in crowded, poorly designed lugubrious quarters; its equipment was marginal; and its staff distressed and confused by the turmoil and spectacle of the litigation which had pended between the Chairman of MSPB and the Acting Special Counsel in the prior Administration.

As Special Counsel, Chief Judge Kozinski had a first obligation to established OSC, as a working organization. He barely had been able to begin that task when he was elevated to the bench. An example of his careful attempts to direct staff to discharge obligations fully is found in his procedural direction - Review of Allegations dated May 11, 1982 (attached at Tab 3).

It would be unfair to allow unrebutted criticism of Chief Judge Kozinski for circumstances caused by the disarray found in OSC when he arrived, and which he had not time to repair before his elevation to the Bench. The fact is that he did very well to make a beginning, administratively, and was able to achieve a formidable array of correct conclusions as to the merits of complaints he received. According to available OSC statistics, it appears that some 3000 matters were decided during his tenure. There has not been any basis suggested for reversing these decisions; and that is an extraordinary result, given the circumstances of the OSC as he found it in 1981.

I hope this letter will not be viewed as unduly discursive; of course, if the Chairman should find it useful, I would be glad to testify to the facts and opinions I have described and expressed.

With respect,

K. William O'Connor

KWO'C/vj

Enclosures

TAB 1

NINETY-SEVENTH CONGRESS

PATRICIA SCHROEDER, COLO., CHAIRWOMAN
MORRIS K. UDALL, ARIZ.
WILLIAM (BILL) CLAY, MO.
GUS YATRON, PA.
CHARLES PASHAYAN, JR., CALIF.
GENE TAYLOR, MO.
JAMES A. COURTER, N.J.
FRANK R. WOLF, VA.

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
[illegible] CANNON HOUSE OFFICE BUILDING
Washington, D.C. 20515

TELEPHONE (202) [illegible]

October 15, 1982

Honorable K. William O'Connor
Special Counsel
Office of Special Counsel
Washington, DC 20419

Dear Mr. O'Connor:

Please accept my congratulations on your confirmation as Special Counsel of the Merit Systems Protection Board. The job has gained the reputation of being impossible; I do not think this reputation is deserved. With your vast experience as a prosecutor and jurist, I have confidence that you can make the Office of Special Counsel that which it has never been: a vigorous and successful protector of employee rights and of the merit system.

I write to you to clarify the mission of the Office, so that you do not fall into some of the misperceptions of your predecessor. The Office of Special Counsel, as enacted into law in 1978, bears little relationship to the office as proposed by the Carter Administration. No part of the Civil Service Reform Act (except perhaps the changes in veterans preference law) was as fundamentally altered by the legislative process as those relating to whistleblowing and Special Counsel protections. It is worth reviewing those changes to understand that Congress intended the Special Counsel to be a zealous advocate for employees suffering prohibited personnel practices. Among other important changes were:

* The definition of a "personnel action" in 2302 was expanded to include changes in duties or responsibilities. Further, during discussion about this section, Administration officials explained that the language of 2302(a)(2) covered a broad range of harassment and reprisal actions and that the language in 1206 concerning prohibited personnel practices which are "about to be taken" should be read to include threats of reprisals. These understandings were key element of the final language developed on whistleblower protection. They have been repudiated by the narrow and overly technical reading of 2302(a)(2) made by the Office of Special Counsel. Specifically, a RIF is a personnel action under 2302(a)(2).

* The definition of whistleblowing in 2302(b)(8) was greatly expanded to include a wide range of disclosures and to permit a channel for the disclosure of classified matter. Further, new prohibited personnel practices were added relating to the exercise of appeal rights (including to the Special Counsel), off duty conduct, and merit system principles. Additional, clarifying language on disclosures to Congress was added. Clearly, congressional intent was for the Special Counsel to have jurisdiction to investigate and prosecute a broad range of management actions against employees.

* Section 1206 was fundamentally overhauled to change the Office of Special Counsel from the weak ombudsman proposed by the Carter Administration into a strong and independent advocate. This change is revealed in the area of stays. The original

proposal gave the Special Counsel independent authority to issue stays involving personnel actions "having a substantial and adverse economic impact on the employee." This formulation would have made the Special Counsel into a neutral adjudicatory individual. So, Congress rejected this provision and instead made the Special Counsel into an advocate on behalf of employees. The Special Counsel would have to plead his or her case before the independent Merit Board. The Special Counsel was given license to investigate cases and patterns of prohibited personnel procedures on its own initiative and was required to tell employees why it refused to investigate their cases. This latter requirement was based on the notion that the Special Counsel's office was similar to a legal aid office for employees. A large provision was added to ensure that the Special Counsel would force an investigation of the substance of the complaint and review the investigation for adequacy. This was meant to ensure that whistleblower complaints were taken seriously. Language which would have required the Special Counsel to drop out if an administrative proceeding was on-going was deleted. The Special Counsel was given the right to intervene in any MSPB appeal on behalf of an employee.

The Office of Special Counsel has been operating as if it were the weak ombudsman originally proposed, instead of the powerful protector of employees which Congress wrote into the law. Any reasonable understanding of the law would make it impossible for the Special Counsel to give courses to agency management or to write letters suggesting that the intervention of the Special Counsel in a case should not necessarily be assumed to be on the side of the employee.

I urge you to review all the policies of the Office of Special Counsel to make certain they reflect the law and congressional intent in passing the law. This review should acquaint you with the causes behind the current intense congressional displeasure with the Office of Special Counsel.

I have attached a listing of 27 employees I have had contact with over the last six months who have received no action from the Office of Special Counsel. I do not have the staff or resources to investigate these cases, so I do not know which ones are meritorous. All of them, however, have received curt and unsatisfactory treatment from the Office of Special Counsel. I find this sort of dealing with cases to be inexcusable. I request that you personally review the files on each of these cases to see which ones should be reopened or investigated. Further, I request that you review the letters which are sent to complainants such as these to assure that your office treats other Federal employees with respect.

The Subcommittee on Civil Service and I stand ready to assist you in discharging the responsibilities of the Office of Special Counsel. I have the greatest hope that you will be able to turn the Office from the useless waste of taxpayers money it has been into the zealous defender of employees and the merit system that it was supposed to be.

Sincerely,

Pat

PATRICIA SCHROEDER
Chairwoman

Attachment

PS:af

Irene Adrian
Washington, DC
Department of Commerce

Larnardo M. Acker 10-0-90003
Bradbury Heights, MD
General Services Administration

Frank Bornholdt
Bedford, NY 50-2-01084
Internal Revenue Service

Lod L. Cash, Jr. 10-1-01348
Wise, VA
Department of Labor

Frank F. Drumm, Jr.
Open Grand Lake, CO 40-0-00178
Department of Agriculture 40-0-00281

June Deans
Atlanta, GA 10-0-00787
Small Business Administration

Morin Elfton
Lakewood, CO 40-2-00043
Department of Health & Human Services

John Gingles
Washington, DC
Department of the Interior

Tina Hobson
Open Washington, DC
Department of Energy

Ed Joslin 50-2-00781
Battle Creek, MI
Defense Logistics Agency

James Kellett
Open McLean, VA
Department of Energy

William J. Lyons
Lancaster, CA 10-1-00630
Department of the Air Force

Vincent Laubach
Open Fairfax, VA
Department of the Interior

Mary McAnaw, MD
Open Leavensworth, KS
Veterans' Administration

Clifford McKenzie 40-1-00043
Del City, OK
Department of the Interior 40-1-00247

Elaine Mittleman
Falls Church, VA 10-1-00291
Department of the Treasury

Open [illegible] M. Martin 10-0-90408 Open
Annapolis, MD
Department of Education 10-2-00363

Gary W. Nicholas
Littleton, CO 40-2-00100
Small Business Administration

James Pope
McLean, VA 10-1-00002
Federal Aviation Administration

Ronald L. Phelps
Grand Junction, CO N/R
Mine Safety & Health Administration

Albert Quiroga
West Palm Beach, FL N/R
Social Security Administration

Roger A. Rowehl
Kailua, HI 20-2-00165
Department of the Navy

Dorothy G. Rowell 10-1-00268
Mobile, AL
Social Security Administration

Phyllis E. Shockro N/R
Arlington, VA
Federal Communications Commission

Hugh O. Tidwell
Open Plaquemine. LA 10-2-00235
Department of Agriculture

Thomas J. Thomas 40-1-00249
Albequerque, NM
Department of Energy

Bob Wine [illegible]
Manassas, VA
Department of the Army 10-1-[illegible]

TAB 2

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

The Special Counsel

1120 Vermont Avenue, N.W.
Washington, D.C. 20419
202/653-9000

October 26, 1982

11-3-33691

The Honorable Patricia Schroeder
Chairwoman
Subcommittee on Civil Service
Committee on Post Office
and Civil Service
U.S. House of Representatives
209 Cannon House Office Building
Washington, D.C. 20515

Dear Madam Chairwoman:

Please let me express my appreciation for the very thoughtful letter which you sent to me on October 15, setting forth the legislative history and backdrop for the statute which established my office. I appreciate the thoughtful and thorough articulation in your letter and also the listing of the several employees who contacted your office. I appreciate your bringing the matter of the 27 employees to my attention, and I am looking into those matters and will report to you on all of them in due course.

I am enclosing, for such interest as it may be to you, a speech which I gave on October 21, to a local organization. In it I have attempted to indicate the general dimensions of the course which I propose to set, and the first which I have taken to set about that course.

I appreciate your continuing interest in this office and the offer of support which you and your Subcommittee have tendered in your very supportive letter of October 15.

With respect,

K. William O'Connor

KWO'C/mkb

Enclosure

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

The Special Counsel

1120 Vermont Avenue, N.W.
Washington, D.C. 20419
202/653-9000

January 4, 1982

The Honorable Patricia Schroeder
Chairwoman
Subcommittee on Civil Service
Committee on Post Office and
  Civil Service
U.S. House of Representatives
209 Cannon House Office Building
Washington, D.C. 20515

Re: OSC File No. 11-3-33601

Dear Madam Chairwoman:

This is in further response to your letter of October 15, 1982, with specific reference to the 27 employees listed in the attachment to your letter.

Your letter indicated that the employees listed complained to you that they had received no action from this office and/or they had received curt and unsatisfactory treatment. My review of the actions taken by this office with respect to each of the employees named suggests that the complainants' appraisal is not correct. I appreciate this opportunity to clarify these matters.

Since I do not have the specific complaints you received about the actions of this office, I cannot respond specifically to each. However, a review of the files discloses that --

1. The names Albert Quiroqa and Phyllis E. Shockro are not relatable in office files to any matter handled by this office.

2. The matters involving Hobson, Kellett, Laubach, McAnaw, Martin and Tidwell are still pending completion of necessary inquiry and/or legal review before a final determination is made. These matters will be closely scrutinized under the new review procedures I have instituted before a final determination is made.

The Honorable Patricia Schroeder
U.S. House of Representatives
January 4, 1983
Page Two

3. The files in the remaining matters reflect that the matters were closed on the basis of the merits of the complaint following appropriate review, inquiry and, in several instances, extensive investigation.

A brief synopsis of each of the matters reviewed is provided for your reference in the enclosed case listing.

On review of the closed matters, I find insufficient basis for reversing the previous determination or for directing reinvestigation. The matter relating to Loyd Cash has been reopened on the basis of new developments. In five of the cases, the employees also appealed to the Merit Systems Protection Board. The Board's initial decisions on the appeals affirmed the agencies' actions in three cases, reversed in one case, and the remaining case was settled between the appellant and the agency before hearing. In four other cases, the employees are or were entitled to appeal the agency's action or decision at issue to the Board or the Equal Employment Opportunity Commission, notwithstanding the Office of Special Counsel's determination that no prohibited personnel practice was involved.

Although my review does not support reopening the closed matters in the absence of any new and material information, it does suggest that our letters informing complainants of our determinations need to be more informative of the actions taken on the matter as well as the reasons for the determination, notwithstanding that we cannot hope to satisfy a complainant when a determination is not supportive of his or her claim. Additionally, we need to complete action on complaints within much shorter time frames than has been possible in the past. I hope that the procedures and timeframes I have now set will resolve these problems. The success of these initiatives will depend largely on the resources made available to the office; I look forward to your support and assistance so that this office can fulfill its intended role.

Please let me know if I can provide any additional information concerning these matters. I would of course be pleased to meet with you in your office at your convenience to discuss these or any other matters concerning this office.

With respect,

Bill

K. William O'Connor

KWO'C/bow

Enclosure

CASE LISTING

1. Irene Adrian, DOC.

Nature of Complaint. On initial contact on May 17, 1982, Adrian expressed her concern that her proposed termination under RIF from a temporary Schedule A position might be viewed as resulting from her involvement as party to a matter under investigation by the DOC IG. On questioning as to whether she was claiming her termination might be in reprisal for whistleblowing, she denied such claim. However, the following day, she filed a written complaint requesting a stay of the removal on the basis of her new claim her removal was in reprisal for her having cooperated with the IG in the investigation.

Action Taken. Based on preliminary inquiry, the Special Counsel requested the Secretary of Commerce to delay the termination for 45 days to allow the office to complete its investigation. The Secretary stayed the action as requested without the office having to petition the MSPB for a stay. The investigation, however, disclosed insufficient evidence of a nexus between Adrian's cooperation with the IG and the abolishment of her position to support a charge of reprisal. Nevertheless, pursuant to an agreement with the IG, the Department was asked on July 9 to extend the termination date for another 15 days to provide time to determine whether the new United States Commissioner General of the 1982 World's Fair (who was not a party to this matter) had a need for Adrian's position. The extension of the informal stay was granted, but it was determined the Commissioner General did not need the position. Accordingly, the office closed the matter. Adrian subsequently appealed her RIF to the MSPB, where the appeal is still pending decision.

2. Larnardo M. Acker, GSA.

Nature of Complaint. Acker complained initially in November 1979 about not being able to have his job desk audited, claiming GSA's failure to audit his position constituted racial discrimination. Then, in March 1981, Acker filed a new complaint alleging reprisal and harassment for his having filed discrimination complaints.

Action Taken. Inquiry into his first complaint disclosed insufficient basis for further action and the matter was closed on December 17, 1979, by deferral to the discrimination complaint procedures. The March 1981 matter was closed on May 5, 1981, when inquiry disclosed that, at that time, no personnel action was involved. However, on November 6, 1981, the agency removed Acker for performance and other reasons. The agency's removal action was sustained by the MSPB in its initial decision of September 27, 1982. Acker's request for reconsideration is now pending before the Board. The file is now under review in this office in light of MSPB's initial decision and recent submissions received from Acker.

3. Frank Bornholdt, IRS.

Nature of Complaint. Bornholdt styled his April 1982 complaint as a whistleblowing allegation of a violation of law, rule or regulation, mismanagement, gross waste of funds, and an abuse of authority. The factual basis for his complaint was that his supervisor had pulled and reviewed his case files in his absence and had been critical of his work.

Action Taken. The matter was reviewed, and closed on May 11, 1982, since no grounds for OSC intervention were found. Re-review discloses no basis for further action.

4. Loyd L. Cash, Jr., DOL.

Nature of Complaint. Cash' wife wrote originally in September 1981 about her husband, Loyd, being ordered to take a fitness for duty examination, allegedly in reprisal for disclosing mismanagement by Cash' supervisor. Cash' union representative wrote in January 1982 about the same matter after the office had responded to the original complaint. Then, in June 1981, Mrs. Cash wrote to President Reagan complaining about her husband's reassignment from Wise, VA, to Logan, W. VA in a reduction in force.

Action Taken The initial matter was closed on November 11, 1981, since no prohibited personnel practice or other violation was evidenced. The reassignment under RIF is still under review by the Washington field office.

5. Frank F. Drumm, Jr., USDA.

Nature of Complaint. Drumm complained in April 1980 that his agency was retaliating against him for whistleblowing (i.e., submitting personal grievances).

Action Taken. The matter was closed initially on April 22, 1980, since no personnel action was involved. Drumm immediately requested OSC reconsideration. He was subsequently reassigned in November 1980. On-site investigation was conducted in February 1981 and further inquiry was conducted thereafter. The matter was closed on February 16, 1982, for lack of sufficient evidence of any prohibited personnel practice to warrant further action. Re-review discloses no basis for further action.

6. June Deans, SBA.

Nature of Complaint. In May 1980, Deans, a GS-6 Program Assistant, complained her reassignment from Atlanta to Denver and related agency actions were in reprisal for whistleblowing (i.e., complaining to a Congressman about the consolidation of Deans' office in Atlanta with the Denver office).

Action Taken. The matter was reviewed and closed in June 1980 since inquiry disclosed no nexus between Dean's complaint to the Congressman (i.e., transfer of function was decided before Deans wrote to the Congressman and Deans was not singled out in the matter). Deans then wrote First Lady Rosalyn Carter in July 1980 about the same matter. We responded to that letter also in September 1980. Notwithstanding Deans insistence that she should be given a job in Atlanta, re-review of matter discloses no basis for OSC intervention.

7. Norin Elfton, HHS.

Nature of Complaint. Elfton complained in October 1981 about an EEOC complaint examiner's finding on his age discrimination complaint and alleged his non-selection for promotion before his voluntary disability retirement was in reprisal for his discrimination complaint. Elfton sought OSC assistance in obtaining a retroactive promotion (as a means of enhancing his annunity).

Action Taken. The matter was reviewed, deferred to the discrimination complaint procedures and closed in February 1982 since there was no evidence of reprisal. This review disclosed no basis for further action.

8. John Gingles, DOI.

Nature of Complaint. Gingles complained initially in June 1981 that his removal under RIF was politically motivated.

Action Taken. An investigation was initiated and the Special Counsel filed a notice of intervention in Gingles RIF appeal before the MSPB. The matter was settled between Gingles and the agency before the matter came to a hearing. OSC continued to monitor Gingles situation. In May 1982, further action to terminate Gingles was reported to OSC. The matter is still under investigation.

9. Tina Hobson, DOE.

Nature of Complaint. Hobson complained in September 1982 that her SES performance appraisal and displacement under RIF violated merit system principles.

Action Taken. As a result of previous complaints (including one to which Hobson was a party), DOE's SES performance appraisal procedures were already under investigation before Hobson's current complaint was received. Preliminary investigation had disclosed sufficient grounds for OSC to cause the Department to correct its procedural instructions. As a result of further inquiry, OSC requested the MSPB to stay all personnel actions resulting from the performance appraisals of 19 SES employees (including Hobson). The Board ordered the initial stay. OSC's request for extension of the stay is pending and the matter is still under investigation.

10. Edmund R. Joslin, DLA.

Nature of Complaint. Joslin complained in March 1982 that DLA, Battle Creek, MI, was not complying with the terms of a settlement agreement between himself and his agency concerning his discrimination complaint. Joslin, who suffers an asthmatic condition, had been unemployable until he was hired by DLA under the employment of the severely handicapped program to work in its computer operations with its closely controlled environment. However, he was terminated when the agency determined he could not work effectively even in that environment. Nevertheless, the agency agreed under the settlement agreement to offer him reemployment to a GS-5 or GS-6 position found suitable for him by the Michigan Rehabilitation Services. Joslin complained the agency's offers to him did not meet what he wanted under the settlement agreement.

Action Taken. Review of the matter disclosed no evidence the agency was not complying with the terms of the settlement agreement, which Joslin had signed with the advice of his counsel, or any indication of any matter within the purview of this office. Accordingly, the matter was closed in July 1982. Review disclosed no basis for further action.

11. James Kellet, DOE.

Nature of Complaint. Kellet complained in March 1982 about his SES performance appraisal by DOE.

Action Taken. Inquiry into Kellet's complaint was subsumed under the ongoing investigation of the DOE SES performance appraisal matter, similarly to the Hobson matter. The matter is still under investigation and the MSPB has been requested to extend the initial stay of personnel actions resulting from the performance appraisals at issue.

12. William J. Lyons, DAF.

Nature of Complaint. Lyons complained in February 1981 that his superiors at Edwards AFB were taking reprisal against him for having contacted the USAF Inspector General, notwithstanding that he did not consider himself a whistleblower. He subsequently complained about his performance appraisal and being detailed to a different job.

Action Taken. Inquiry disclosed no evidence of any prohibited personnel practice. Lyons was removed for cause on May 29, 1981. On appeal to the MSPB, the agency's action was sustained by the presiding official on October 12, 1981. The matter was closed on December 23, 1981, following further review of the voluminous file and the Board decision. This review disclosed no basis for further action.

13. Vincent Laubach, DOI.

Nature of Complaint. In September 1982, Laubach requested his proposed removal from his excepted position with the Office of the Solicitor, DOI, be stayed. However, he suggested no prohibited personnel practice as a basis for the stay.

Action Taken. On initiation of preliminary inquiry, the agency agreed to withhold its decision on the proposed removal pending completion of OSC's investigation. Investigation has been completed and final determination is pending legal review.

14. Mary McAnaw, VA.

Nature of Complaint. McAnaw complained initially in July 1981 about her employment situation at the VAMC, Leavenworth, KA, without suggestion of any prohibited personnel practice. The matter was closed in November 1981 for lack of sufficient basis for further action as well as lack of travel funds for conducting an on-site investigation. Information received subsequently indicated McAnaw's proposed reassignment for cause may involve reprisal for whistleblowing.

Action Taken. The matter was reopened in March 1981 for further review. On-site investigation has been conducted. Disposition is pending completion of the investigative report and legal review of the voluminous file.

15. Clifford A. McKenzie, BIA.

Nature of Complaint. McKenzie complained in December 1980 that his unsatisfactory performance appraisal and the denial of an IPA assignment were in reprisal for his having filed a classification appeal with the MSPB. (OPM deals with classification appeals, not MSPB) While OSC inquiry was being made, McKenzie filed suit in district court claiming his unsatisfactory performance appraisal and the denial of the IPA assignment were in reprisal for his disclosing information to the DOI Inspector General. Subsequently, agency rated McKenzie's performance as unsatisfactory and removed him for unacceptable performance effective September 19, 1981.

Action Taken. The voluminous file accumulated by the OSC field office was reviewed and found not to support McKenzie's claim of reprisal. Accordingly the matter was closed on November 6, 1981. On McKenzie's appeal of his removal to the MSPB, however, the presiding official reversed the agency's removal action on the basis the agency had failed to prove its case by the preponderance of the evidence (without reaching the issue of reprisal). The agency then requested reconsideration of the initial decision and the matter is pending before the Board. This review disclosed no clear basis for OSC reopening the matter.

16. Elaine Mittleman, Treasury.

Nature of Complaint. Mittleman. then a temporary Schedule A employee in Treasury's Office of Chrysler Finance, complained in December 1980 that the changing of her duties, taking away of her office keys and suggestions that she look for a new job were in reprisal for her criticizing the analysis of Chrysler's operating plans and asking hard questions. Subsequently, the agency terminated her appointment and she claimed the agency's actions were in reprisal for whistleblowing.

Action Taken. On-site investigation and review of the Treasury IG's report of investigation of the same matter disclosed insufficient evidence to support a charge of reprisal for whistleblowing or any other prohibited personnel practice. Accordingly, the matter was closed in December 1981. This review discloses no basis for reopening the matter.

17. Ann M. Martin, DOE.

Nature of Complaint. Martin complained in August 1982 that her reduction in grade were in reprisal for her exercising her appeal rights.

Action Taken. Preliminary inquiry has been conducted. Disposition is pending completion of investigation and legal review.

18. Gary W. Nicholas, SBA.

Nature of Complaint. Nicholas claimed in December 1981 that SBA's closing of a 12 employee office in Denver and offering the affected employees reassignments to Washington, D.C. was in reprisal for several of the employees filing grievances. He also claimed the agency should have used RIF procedures. However, he was terminated in January 1982 for failure to accept the reassignment.

Action Taken. Review disclosed insufficient basis for OSC action and the matter was closed in February 1982. Nicholas appealed his removal to MSPB. This review discloses no basis for reopening.

19. James C. Pope, FAA.

Nature of Complaint. In October 1980, Pope claimed his reassignment in March 1979 from Washington, D.C. to Seattle, WA, was in reprisal for his dispute with top agency management over an airborne aircraft collision avoidance system he had been advocating.

Action Taken. OSC initiated contact with Pope on the basis of a newspaper article concerning his complaint before he filed a formal complaint with this office. Investigation at Seattle and Washington, D.C., however, established no nexus between Pope's reassignment and his whistleblowing claims, notwithstanding that every lead provided by Pope through his attorney was checked out. While the OSC investigation was in process, Pope was assigned to new duties as a follow-up to his claim that he had no work to do in the position to which he had been assigned. He was then successively suspended for being AWOL and then removed for unacceptable performance. Investigation of these matters disclosed insufficient evidence of reprisal or other prohibited personnel practice to warrant further action by OSC. Accordingly, the matter was closed on October 14, 1981. On October 13, 1982, an ALJ of the MSPB dismissed Pope's appeal of his removal on the basis of the agency having cancelled the removal in a settlement between Pope and the agency which provided for Pope's disability retirement retroactive to December 19, 1981, as approved by OPM. This review disclosed no basis for further action in this matter.

20. Ronald L. Phelps, DOL.

Nature of Complaint. Phelps did not complain directly to this office. However, his situation in a RIF in the Mine Safety and Health Administration was among the matters complained of by union representative Richard W. Coon. The general complaint was that the performance appraisals of some employees of MSHA had been manipulated to favor certain employees in a RIF to the disadvantage of other employees such as Phelps.

Action Taken. The matter was investigated at Denver, CO, and the worksites of the employees whose performance ratings were claimed to have been inflated to protect them from the RIF. The investigation disclosed no irregularity in the performance appraisals at issue and the matter was closed on October 29, 1982.

21. Albert Quiroga, SSA. There is no record of a complaint from this individual.

22. Roger A. Rowehl, Navy.

Nature of Complaint. Rowehl complained in May 1982 about agency actions which resulted, he claimed, in a unwarranted delay in his appointment from a civil service register to a GS-5 Industrial Engineer Technician job at the Pearl Harbor Naval Shipyard.

Action Taken. Notwithstanding that the information concerning Rowehl's appointment did not disclose any matter within the office's purview, further inquiry was made to the shipyard concerning the manner and circumstances of several other staffing actions complained of by Rowehl in his subsequent correspondence. The inquiry disclosed no evidence of any prohibited personnel practice or other irregularities and the matter was closed on September 16, 1982. This review discloses no basis for further action.

23. Dorothy G. Rowell, SSA.

Nature of Complaint. Rowell complained in April 1981 about "waste and fraud" in the Social Security Administration's use of the Claims Representative competitive examination (CRESS) for hiring new Claims Representatives. She claimed the unassembled examination was designed to facilitate the hiring of minorities and that the agency should use the PACE register with its 40,000 eligibles.

Action Taken. Review disclosed no basis for action and the matter was closed on June 24, 1981. This review discloses no basis for reopening.

24. Phyllis E. Shockro, FCC. There is no record of a complaint from this individual. Her complaint may relate to an MSPB decision on an appeal.

25. Hugh O. Tidwell, USDA.

Nature of Complaint. Tidwell complained in May 1982 that his proposed reassignment by the Soil Conservation Service constituted discrimination on the basis of his age and non-job related conduct and resulted in obstruction of his right to compete for employment.

Action Taken. Disposition pending completion of inquiry.

26. Thomas J. Thomas, DOE.

Nature of Complaint. Thomas, a GS-9 nuclear shipment specialist, claimed in June 1981 he was being pressured to resign or accept a voluntary downgrade because he had contracted his Congressman about his situation.

Action Taken. Inquiry disclosed Thomas had been reassigned to Albuquerque, NM, from Oak Ridge, TN, as a result of an investigation of charges against Thomas which disclosed his judgment errors had degraded the security of DOE shipments. Subsequently, Thomas was reduced in grade for unacceptable performance of his duties at Albuquerque. MSPB sustained the agency's action in its initial decision of December 8, 1981. In light of the information disclosed by our inquiry and the MSPB decision, the matter was closed on March 5, 1982. This review discloses no basis for further action.

27. Bob (Byron S.) Wine, Army.

Nature of Complaint. Wine complained in January 1981 about a determination by the personnel office at Walter Reed Army Medical Center about the qualification requirements (and classification) of a position for which he applied.

Action Taken. Review disclosed no merit to his complaint or any basis for action and the matter was closed on June 3, 1981. This review disclosed no basis for further action.

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

TAB 3

1030

Memorandum

TO: All Investigators - Central, Field & Branch Offices

FROM: Alex Kozinski
Special Counsel

DATE: May 11, 1982

RE: Review of Allegations

From my review of reading files and discussions with various staff members, I have become concerned that some complaints warranting inquiry may be overlooked in our screening process. Also, some of our closeout letters are so curt as to be uninformative, leaving the complainant wondering whether someone has actually reviewed and understood his claim.

Keep in mind that complainants have varying degrees of education and personnel law expertise, and that most have not had the benefit of our USDA writing seminar. We cannot expect them to articulate their allegations so as to track the CSRA or to fully set forth a prohibited personnel practice or other matter within our jurisdiction. Unless the complaint reveals that the matter is outside our authority (e.g., postal employee), give the complainant the benefit of the doubt in your initial review, with an eye toward finding a basis for action rather than closing it out. Also, remember that the complainant is only the starting point for your inquiry. As personnelists, you may detect merit system abuses of which the complainant is not aware.

I would suggest the following steps in conducting an inquiry:

(1) Try to understand precisely why the complainant believes he has been wronged. If details appear to be missing, ask yourself whether there are any circumstances under which the missing details might make the complaint viable. If so, note what those circumstances might be.

(2) On the basis of your notes, frame questions which will probe for the missing information without suggesting particular answers. Then call the complainant and talk to him informally, asking those questions as well as any follow-up questions that seem appropriate.

(3) If the inquiry reveals a prohibited personnel practice or other basis for corrective action, proceed with the investigation, subject to instructions from your supervisor. Note that corrective action may or may not give the complainant precisely what he wants. (For example, if we establish that procedures for a merit promotion were improper, we might be able to reverse the promotion but could not assure the complainant that he would then be selected for the position.)

(4) Always consider the possibility of disciplinary action even though corrective action may not be possible. Remember, if a prohibited personnel practice cannot be established, a violation of any other civil service law,

rule or regulation may still be a basis for discipline. Be expansive in your view of what matters should be subject to discipline. If you see wrongdoing, i.e., any tampering with the merit system, discuss the possibility of disciplinary action with your supervisor even if our jurisdiction is questionable. We have been doing quite a bit of legal research in our attempt to define the precise limits of our jurisdiction. Bob Mayer is in the process of coordinating this research and supervisors should refer any questions of jurisdiction to him.

(5) If after review of all issues you find there is no case, do not tease the matter along in the hope something will turn up. Your closeout letter should contain enough information so the complainant will know that someone has examined and understood his claim. Simply reciting some formula such as "we have reviewed your allegation and it does not disclose any information within our investigative authority" is insufficient.

Remember, the idea behind writing tersely and succinctly is to avoid obscurity. Letters are communications between us and the complainant, and they should convey some information relevant to his claim. While the letter need not dispose of every single factual matter raised, it should contain enough to let the complainant know that you have read what he has written, have understood the gist of his allegation and that there is a reason we cannot proceed. Where several serious legal issues are raised, you should generally dispose of each of them. If you have spoken to the complainant, mention the conversation, as well as any other inquiries you have made. Please refer to Jim Sugiyama's memorandum of April 9, 1982, for further guidance on case closure letters.

I know that every case is different and complainants vary greatly in their intelligence, persistence and communicative skills. These suggestions should therefore not be viewed as ironclad rules. (I know many of you are already doing many of these things.) Do, however, remember that you are dealing with another person who, justifiably or not, believes he has been wronged. Approach each case with sympathy for that person and with an understanding that you may have to go out of your way to articulate his claim or to explain to him why he has none.

I would be pleased to receive comments on these guidelines, as well as further suggestions as to techniques for investigations. Unless you indicate otherwise, I will circulate the comments I receive for the benefit of everyone.

Mr. O'CONNOR. Thank you, sir.

Senator GRASSLEY. One other thing. For the record, I have a letter here from Ruth Prokop. She was the first chairman of the Merit Systems Protection Board who was appointed by the previous President, President Carter, and this letter is supportive of Judge Kozinski.

[Information follows:]

PROKOP & EDMISTEN
COUNSELLORS AT LAW
1072 THOMAS JEFFERSON STREET, N. W.
GEORGETOWN
WASHINGTON, D. C. 20007

TELEX
292057 LEX UR

TELEPHONE
(202) 342-5640

July 17, 1985

The Honorable
Strom Thurmond
Chairman
Committee on the Judiciary
218 Senate Russell Office
Building
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing in support of the confirmation of Judge Alex Kozinski as Judge for the United States Court of Appeals for the Ninth Circuit.

In 1979 I was appointed by President Carter as the first Chairman of the Merit Systems Protection Board and served in that position until July 1981. During the last few months of my tenure as Chairman, President Reagan appointed Alex Kozinski to serve as Special Counsel to the Board.

Although our terms in office overlapped for a brief period, I did have the opportunity to work with Alex Kozinski as he assumed leadership of the Office of Special Counsel. At that time the Office had been in existence for less than three years and its activities had been constrained by budgetary difficulties and the absence of a confirmed Special Counsel during its entire existence. My observations were that Alex Kozinski approached the task of Special Counsel with a high degree of integrity and professionalism and was willing to expend long hours to enhance the investigative and legal skills of that Office. He demonstrated an understanding that to be truly effective on behalf of government employees, the Office of Special Counsel had to exercise its prosecutorial duties with a high degree of professionalism and with a thoroughness in both preparation and presentation of its cases. To assume the leadership of the Office of Special Counsel in 1981 was an extraordinarily difficult but challenging task. He approached that task with enthusiasm, temperance and professionalism, qualities which have and will continue to serve him well in a judicial position.

I am hopeful that these personal observations of Judge Kozinski's performance as Special Counsel to the Board will be of assistance in your deliberations on his confirmation.

Sincerely,

Ruth T. Prokop

Ruth T. Prokop

Senator **Grassley**. Would you like to come back to the table Judge?

Judge **Kozinski**. I have already burdened the committee——

Senator **Grassley**. I would like to remind you and everybody that you are still under oath.

Judge **Kozinski**. I am still under oath. I am planning to offer two more documents

Senator **Grassley**. Please sit down.

Judge **Kozinski**. Thank you. I was struck by a couple of the comments made, and I thought I would submit to the committee two documents.

The question was asked, Kozinski may have tried hard but what did he show for his efforts? Ask the people who dealt with him. Apparently the witnesses were not aware of the fact that we had a consistent program of trying to settle cases within the agency without litigation, without publicity. Going through my files, incomplete though they are, I found the January 4, 1982, memo from my southern region listing no fewer than 30 cases that had been resolved to the satisfaction of the employee without the need for litigation. That is one sample in one region, one regional office. I have no idea how it happened to be ascribed in my file.

Additionally, here is the much-touted memo, the much-touted manual which went with the seminar at the FCC. The witnesses had it. They did not pull it out. So I present to the committee, let them substantiate the charges that they made as to what that manual contains. It contains the law, it shows managers who I believe to be law-abiding citizens—not, as Mr. Tobias suggests, criminals—law-abiding citizens, how to stay within the law. I challenge the witness or the committee to find anything in this manual that substantiates the wild charges in the testimony about what this seminar or what this manual did.

For the opportunity to present these two other items to the committee, I thank the committee and the chairman and staff for all their patience.

Senator **Grassley**. The committee is aware of the allegations made against you. They were made for service in another capacity over 3 years ago, and from what we have been able to glean, no critical comment of your service as chief judge of the Claims Court, and the committee is sure that you will serve the Ninth Circuit well, if confirmed.

Thank you very much.

Judge **Kozinski**. Thank you very much, Mr. Chairman.

Senator **Grassley**. The meeting is adjourned.

[Whereupon, at 4:26 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

Roger J. Miner

NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT

Birth: April 14, 1934, Hudson, NY.
Legal Residence: New York.
Marital Status: Married to Jacqueline Mariani Miner, 2 children.

Education: 1951-1953—Columbia College. 1953-1956—New York Law School, LL.B. degree, cum laude. 1977—State University of New York, External Degree Program, B.S. degree.

Bar: 1956—New York.

Military Service: 1956-1959—United States Army, Honorable discharge.

Experience: 1959-1975—Miner & Miner, Partner. 1961-1964—Corporation Counsel, City of Hudson, New York. 1964—Assistant District Attorney, Columbia County, New York. 1968-1974—District Attorney, Columbia County, New York. 1975-1981—Justice, New York Supreme Court, Third Judicial District, Hudson, New York. 1981-present—United States District Judge, Northern District of New York.

ROGER L. WOLLMAN

NOMINEE, U.S. CIRCUIT JUDGE, EIGHTH CIRCUIT

Birth: May 29, 1934, Frankfort, SD.

Legal Residence: South Dakota.

Marital Status: Married to Diane Schroeder Wollman, 3 children.

Education: 1952-1954—Tabor College, 1955-1957—B.A. degree. 1959-1962—University of South Dakota, School of Law, J.D. degree. 1963-1964—Harvard Law School, LL.M. degree.

Bar: 1962—South Dakota.

Military Service: 1957-1959—United States Army.

Experience: 1962-1963—Law Clerk, Honorable George T. Mickelson, U.S. District Court, District of South Dakota. 1964-1971—Law Office of Douglas W. Bantz, Associate. 1967-1971—Brown County State's Attorney (part-time position). 1971-present—Associate Justice, Supreme Court of South Dakota (Chief Justice 1978-1982).

ALEX KOZINSKI

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: July 23, 1950, Bucharest, Rumania, Naturalized, 1968.

Legal Residence: California.

Marital Status: Married to Marcy Jane Tiffany, 2 children.

Education: 1968-1972—UCLA, A.B. degree. 1972-1975—UCLA Law School, J.D. degree.

Bar: 1975—California. 1978—District of Columbia.

Experience: 1975-1976—U.S. Court of Appeals, Ninth Circuit, Law Clerk to Hon. Anthony M. Kennedy. 1976-1977—U.S. Supreme Court, Law Clerk to Hon. Warren E. Burger. 1977-1979—Forry, Golbert, Singer & Gelles, Los Angeles, CA, Associate. 1979-1981—Covington & Burling, Washington, DC, Associate. 1980-1981—Office of President-elect Reagan, Deputy Legal Counsel. 1/81-6/81—The White House, Office of the Counsel to the President, Assistant Counsel. 6/81-8/82—Merit Systems Protection Board, Special Counsel. 8/82-10/82—U.S. Court of Claims, Chief Trial Judge. 10/82-present—United States Claims Court, Chief Judge.

RICHARD H. MILLS

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT ILLINOIS

Birth: July 19, 1929, Bardtown, Ill.

Legal Residence: Illinois.

Marital Status: Married to Rachel Keagle Mills, 2 children.

Education: 1947-1951—Illinois College, B.A. degree. 1951-1952, 1954-1955—University of Illinois, College of Law. 1955-1957—Mercer University, J.D. degree. 1982—University of Virginia, School of Law, LL.M. degree.

Bar: 1957—Illinois.

Military Service: 1952-1954—United States Army. 1961-present—U.S. Army Reserve.

Experience: 1957-1960—Epler C. Mills, Esq., Associate. 1958-1960—Illinois Youth Commission, Legal Advisor (part-time). 1960-1964—State's Attorney, Cass County, Ill. 1964-1966—Private Practice. 1966-1976—Judge, Circuit Court of Illinois, Eighth Judicial Circuit. 1976-present—Judge, Appellate Court of Illinois, Fourth Judicial District.

ROGER G. STRAND

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ARIZONA

Birth: April 28, 1934, Peekskill, NY.

Legal Residence: Arizona.

Marital Status: Married to Joan Williams Strand.

Education: 1951-1955—Hamilton College, B.A. degree. 1958-1961—Cornell Law School, LL.B. degree.

Bar: 1961—Arizona.

Military Service: 1955-1958—United States Navy.

Experience: 1961-1967—Fennemore, Craig, Allen & McClennen, Law Clerk (1961), Associate. 1967-present—Judge, Superior Court of Arizona, Maricopa County.

JOHN M. WALKER, JR.

NOMINEE, U.S. DISTRICT JUDGE SOUTHERN DISTRICT OF NEW YORK

Birth: December 26, 1940, New York, NY.

Legal Residence: New York.

Marital Status: Divorced.

Education: 1958-1962—Yale University, B.A. degree. 1963-1966—University of Michigan, Law School, J.D. degree.

Bar: 1969—New York.

Experience: 1966-1968—Africa-Asia Public Service Fellowship, Republic of Botswana, Attorney. 1969-1970—Davis, Polk & Wardwell, Associate. 1970-1975—Assistant U.S. Attorney, Southern District of New York. 1975-1981—Carter, Ledyard, & Milburn, Associate (1975-1977), Partner (1977-1981). 1981-present—Department of the Treasury, Assistant Secretary, Enforcement and Operations.

APPENDIX

John P. Wiese
Judge

Chambers
United States Claims Court
717 Madison Place N.W.
Washington, D.C. 20005

July 15, 1985

The Honorable Strom Thurmond
Chairman of the Senate Committee
on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I presently serve as a judge with the United States Claims Court under a term of office that commenced with an appointment in 1974 as trial commissioner to the United States Court of Claims -- the present court's statutory predecessor. Recently I learned that a colleague, Alex Kozinski, Chief Judge of the United States Claims Court, will be appearing before your committee for a confirmation hearing in connection with his proposed appointment as a judge to the United States Court of Appeals for the Ninth Circuit. In view of my current professional association with Alex Kozinski and in view also of my very long association with the predecessor Court of Claims (the above-mentioned 1974 appointment as trial commissioner to that court was preceded by a private law practice mainly focused in that same forum), I feel uniquely qualified to speak to the merits of Alex Kozinski's proposed elevation to the appellate bench. I do so now in the genuine hope that what I have to say shall be of value to your committee.

Alex Kozinski was appointed as the first Chief Judge of the United States Claims Court in October 1982. The task he was charged with was not an easy one to fulfill: to honor the Congressional mandate of the Federal Courts Improvement Act of 1982 by fashioning the newly-created Claims Court into a first-class judicial institution. There were formidable difficulties standing in the way of the realization of that goal. Confronting the new court were many problems: an inherited backlog of over 1,700 cases, the uncertain burden of coping with an expanded Tucker Act jurisdiction, a significant reduction in overall staffing, and, indeed, even the inefficiencies of a physical plant in drastic need of improvement.

Judge Kozinski met these problems head-on. New rules of practice were written, new procedures were adopted, improvements in plant and equipment were introduced that would allow the judges and their staff to meet the burdens of a large increase in workload and, finally, and most importantly, a note of inspiration was sounded. By personal example Chief Judge Kozinski showed that the court could manage its docket with efficiency and fairness: he performed the administrative duties of his office while concurrently maintaining a full trial docket and achieving one of the highest case disposition rates. More could indeed be done with less!

That is not to say that the backlog which the Claims Court inherited has been totally overcome. The case is far from that; still the record is a most impressive one. On October 1, 1982, the Claims Court inherited 1,796 cases from the former United States Court of Claims. In the two and one-half years of its existence, the new court has reduced this backlog by 237 cases while simultaneously disposing of 1,827 new filings. That is a record of substantial accomplishment, particularly given the often complex nature of the Claims Court's cases and the large records that generally go with such cases. Having observed other judicial administrations in office, I am fully convinced that, but for Chief Judge Kozinski's "can do" philosophy, the Claims Court today would be confronting a growing backlog of cases rather than a diminishing one.

I do not mean to extol only Chief Judge Kozinski's administrative talents. Indeed, were that his forte alone, I would not consider it appropriate to urge his confirmation, for clearly the Federal Judiciary needs more than just administrative excellence among those who make up its ranks. Rather, what does persuade me to speak now is that Alex Kozinski offers that unique combination of a truly superb intellect tied to an unbending commitment to excellence. He is -- if I may put it this way -- a legal scholar of the first order with the dedication to task of a champion. Beyond any doubt, room should be made for him in the Federal appellate judiciary for his contribution to our legal system shall be both qualitatively and quantitatively great. Few will equal him.

Finally, I add a note about Chief Judge Kozinski as a person. When he took over the reins of the Claims Court, there was much uncertainty among its personnel -- better call it apprehension -- as to who would be allowed to stay and who would be required to leave. This uncertainty, I should explain, was the result of the enabling legislation, the Federal Courts Improvement Act of 1982, in that it mandated a limitation to the term of office of the incumbent trial commissioners, and thus also to their staffs.

Chief Judge Kozinski dealt with this problem with much sensitivity. He saw it as an issue in which compassion rather than administrative efficiency had to be the governing rationale. The result was that whenever an employee could be saved, he was; hence, the court's supporting staff today is very much the same as it was when Chief Judge Kozinski came aboard.

In summary, I offer this thought: Chief Judge Kozinski deserves the committee's endorsement because it is a rare candidate for judicial office who has as much to offer and rarer still one who can give so enthusiastically of himself. Our nation would be enriched by his service.

If your committee should wish it, I would be pleased to appear to offer more detail with respect to the views stated herein.

Respectfully submitted,

John P. Wiese

John P. Wiese
Judge

CONFIRMATION HEARING ON: RICHARD K. WILLARD AND DOUGLAS H. GINSBURG

WEDNESDAY, JULY 24, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:08 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell, Metzenbaum, Specter, and Simon.

Staff Present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met to consider confirmation of certain appointees. First is Richard Kennon Willard, of Virginia, to be Assistant Attorney General for the Civil Division.

Senator Kennedy is here now and I do not believe Warner and Gramm are here at this moment, so we will take Senator Kennedy. I know he is anxious to get back.

Senator Kennedy, you are here to introduce Mr. Ginsburg.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much. I want to say what a pleasure it is to be with my chairman again this afternoon. As the chairman knows very well, we are both involved in an extremely important undertaking with the completion of the defense authorization bill. I appreciate the chance to appear before the members of our committee to say a few words about a very distinguished individual from my State of Massachusetts who has been nominated by the President to be the Assistant Attorney General for the Antitrust Division, and that is Douglas Ginsburg.

He is a native of Chicago, and has spent most of his professional life in Cambridge, where he distinguished himself as a professor at law at Harvard University, specializing in antitrust and economic regulation.

Mr. Ginsburg has an outstanding record of academic and professional qualifications. He received his undergraduate degree at Cornell University in 1970 and his law degree cum laude from the University of Chicago in 1973. He was elected to the Honor Society and was a distinguished articles editor at the University of Chicago Law Review.

After serving as the law clerk to Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia and Supreme Court Justice Thurgood Marshall, he joined the faculty at Harvard Law School.

From July 1983 to 1984, he served as the Deputy Assistant Attorney General for the Antitrust Division. Most recently, he has served as Administrator for Information on Regulatory Affairs in the Office of Management and Budget.

Professor Ginsburg has published extensively in the fields of antitrust and regulation. His integrity, his impressive qualifications and his expertise in antitrust law are recognized and respected by his peers.

While in Government service, he devised creative and innovative solutions to troublesome problems. While at OMB, he initiated a proposal to develop a regulatory program which would establish an annual set of priorities for Federal regulations to be pursued in this coming year. The President authorized the regulatory program proposal in Executive Order 12493, and due to Professor Ginsburg's efforts, the first annual regulatory program will be announced shortly.

So he brings to this job a rare combination of scholarly background and academic achievement and accomplishment and administrative talent. I believe he makes an excellent nominee for the important position of Assistant Attorney General for the Antitrust Division. So I am pleased to recommend him to this committee and urge the committee to confirm Professor Ginsburg.

The **CHAIRMAN**. Professor Ginsburg, I want to congratulate you on your appointment by the President.

Senator **KENNEDY**. He has members of his family here, Mr. Chairman.

The **CHAIRMAN**. Yes, I will call on them in just a minute.

I also want to congratulate you on having the backing of Senator Kennedy. It makes it much easier for you to get through this committee if you have the backing of Senator Kennedy.

Senator **KENNEDY**. Well, I am not always sure about that, Mr. Chairman. [Laughter.]

Usually, if he has the backing of Chairman Thurmond and Senator Kennedy, then we have a few votes.

The **CHAIRMAN**. Senator Kennedy, we are glad to have you with us, and thank you for coming to endorse him.

Senator **KENNEDY**. Thank you very much.

The **CHAIRMAN**. Now, are the Virginia Senators here yet?

[No response.]

The **CHAIRMAN**. Is the Texas Senator here yet?

[No response.]

The **CHAIRMAN**. We will go ahead with you, then, Professor Ginsburg, and if you and Mr. Willard will both stand up, I can swear you both in at once. Raise your right hands.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth so help you God?

Mr. **GINSBURG**. Yes.

Mr. **WILLARD**. Yes.

The CHAIRMAN. I see Senator Warner has now come in. So, Professor Ginsburg, if you will just step aside until we hear from him, and Mr. Willard, you come up. Senator Warner is a very busy man right now. We are on this Armed Services conference and he needs to get back and I do, too, as quickly as I can.

Senator Warner, we are delighted to have such a distinguished Senator come and testify before us—one who has an outstanding record in many fields and one who is very attractive to the women, I understand. [Laughter.]

We would be glad to hear from you now.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Mr. Chairman, I appreciate most of what you said and I hope you have your proxy in the military committee so I can go back and vote it.

Mr. Chairman and members of the committee, it is a pleasure for me to introduce Richard K. Willard, who has been nominated by the President to serve as Assistant Attorney General for the Civil Division of the Department of Justice.

Mr. Willard has made Virginia his home for some time, and his lovely wife, Leslie, is a native of Richmond. Mr. Willard has served ably as Acting Assistant Attorney General for the Civil Division for nearly a year-and-a-half. During this time, he has demonstrated his ability to manage the division's varied litigation in trial and appellate courts, and to direct the work of some 400 attorneys.

Before joining the administration, he practiced law in Houston, TX, and served as law clerk to Judge Kennedy of the U.S. Court of Appeals for the Ninth Circuit, and as clerk for the U.S. Supreme Court.

I would like to add that the nominee has valiantly served in the U.S. Army as a military intelligence officer during Vietnam.

Mr. Chairman and members of the committee, I unqualifiedly endorse the nomination of Mr. Richard R. Willard for the position of Assistant Attorney General for the Civil Division.

I take note here that at one time I was law clerk for a circuit judge and went to work in the Civil Division. I was one of those 400 attorneys a long time ago.

Good luck. You are on your own.

The CHAIRMAN. Senator Warner, we thank you for taking the time to come and testify, and your testimony will bear great weight with the committee.

Senator WARNER. Thank you, Mr. Chairman.

The CHAIRMAN. Senator McConnell, we will be glad to hear from you.

Senator MCCONNELL. Thank you, Mr. Chairman. As another refugee from the Department of Justice, having served there as a deputy assistant some years back, I wanted to stop by and commend you, Mr. Ginsburg, and also you, Mr. Willard, on your nominations by the President. It is an honor.

I am certain you will be found to be qualified and I look forward to supporting you both.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

Before we call the first nominee, I wish to place a statement of Senator Paul Laxalt in the record.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR PAUL LAXALT, ON THE NOMINATIONS OF RICHARD K. WILLARD AND DOUGLAS H. GINSBURG

Mr. Chairman, from all that I have seen and been able to ascertain, Richard Willard and Doug Ginsburg are both outstanding public servants. I am pleased that the President, in selecting these nominees, has so appropriately recognized their contributions to his Administration.

Our task in this confirmation process seens simplified because Mr. Willard comes to us as a man of demonstrated ability in the very post for which he is now proposed. As Acting Assistant Attorney General for the Civil Division since 1983, Mr. Willard has personally and successfully handled a string of significant litigation matters while ably supervising the work of the Division's other lawyers. He has not always escaped the controversies that acccompany the myriad thorny legal issues that fall within his Division's wide purview, but he has met the challenges in a most forthright and professional manner.

The skill and dedication that Richard Willard has evidenced in his current capacity were certainly forshadowed by his prior experience and training. Most significant is his service in the United States Army, for which he was awarded the Bronze Star. His later progression from Notes Editor of the Harvard Law Review to a clerkship for the Supreme Court and then to association with the prestigious law firm of Baker and Botts clearly attests to his fitness for the Civil Division.

Doug Ginsburg's academic and professional credentials are stellar as well, although some may be suspicious of an antitrust chief whose resume boasts considerable experience in "compatibility research." His fine record as a student at the University of Chicago Law School, as a Supreme Court clerk, and as Professor of antitrust law at Harvard marked him for the successes that he has achieved in his governmental duties over the last few years.

Mr. Ginsburg is a nationally recognized expert in regulatory affairs, and his work both at the Department of Justice and at the Office of Management and Budget has manifestly advanced the President's economic agenda. His efforts over the last year to make agency regulatory decisions more open to public and congressional scrutiny are of potentially great significance.

Mr. Chairman, I applaud the high caliber of these two nominations, and I hope that we can discharge our obligations here with the efficiency that the public deserves.

The **Chairman**. Now, the first one we had on the agenda today, and I guess we will take them in that order, was Mr. Willard, to be Assistant Attorney General for the Civil Division. So, Mr. Willard, would you like to introduce your family or friends?

STATEMENT OF RICHARD KENNON WILLARD, OF VIRGINIA, TO BE ASSISTANT ATTORNEY GENERAL FOR THE CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. **Willard**. Thank you, Mr. Chairman. My wife, Leslie, is sitting right here on the front row with me today. We decided, in the interests of the decorum of the committee, to leave our 2-year-old and our 6-year-old at home today.

The **Chairman**. Now, without objection, a statement by Senator Phil Gramm introducing Mr. Willard and a statement by Senator Bentsen before the Senate Judiciary Committee endorsing him will be placed in the record at this point.

[Committee insert.]

PREPARED STATEMENT OF SENATOR PHIL GRAMM

Thank you, Mr. Chairman. It is a pleasure to appear here today to present a fellow Texan, Mr. Richard K. Willard, to the Committee. Mr. Willard has been nominated by the President to the important position of Assistant Attorney General for the Civil Division of the Department of Justice. The Civil Division of the Justice Department represents the United States in a great variety of litigation.

Mr. Willard has compiled a distinguished record in his four years of service with the Department of Justice. He joined the Department in 1981 as the Attorney General's Counsel for Intelligence Policy, a sensitive position involving the coordination of cases involving espionage and related matters.

In 1982, Mr. Willard was named Deputy Assistant Attorney General in charge of the Federal Programs Branch of the Civil Division. In December of 1983, Mr. Willard was named Acting Assistant Attorney General in charge of the entire Civil Division, where he continues to serve with distinction.

Prior to joining the Justice Department, Mr. Willard practiced law, clerked for the United States Supreme Court, and served as an editor of the prestigious Harvard Law Review. In sum, Mr. Chairman, Richard Willard is an excellent candidate in every respect, and I would urge the Senate to act quickly and favorably on his nomination.

PREPARED STATEMENT BY SENATOR LLOYD BENTSEN

Mr. Chairman, this afternoon I appear before your committee on behalf of a fellow Texan and Houstonian, Richard K. Willard, who has been nominated to serve as Assistant Attorney General for the Civil Division at the Department of Justice.

Richard Willard, at the young age of 37, has achieved a notable career in law. Mr. Willard has been with the Justice Department since 1981. Prior to his association with Justice, he practiced law in Houston with Baker & Botts, a fine and respected Texas law firm. After his 1967 graduation from Emory University he served 3 years in the U.S. Army, including a year in Vietnam, as a first lieutenant with the Army Security Agency. He was awarded the Bronze Star for his service in Vietnam.

For the last year and a half, Richard Willard has been Acting Attorney General in charge of the Civil Division at the Department of Justice. Mr. Willard has served his country repeatedly, both as a military man and as a lawyer for his government. I applaud Mr. Willard's continued service to his country, and urge prompt confirmation of this nominee.

I extend my sincerest congratulations to both Richard and Leslie Willard on this nomination and wish the Willards and their two children continued happiness and success.

The **CHAIRMAN**. Now, Mr. Willard, I believe you were born in Houston, TX.

Mr. **WILLARD**. That is correct, Mr. Chairman.

The **CHAIRMAN**. And you moved to Virginia and your residency is now here?

Mr. **WILLARD**. Yes, Mr. Chairman.

The **CHAIRMAN**. I believe your father was born in South Carolina, and his father was a good friend of mine and the campaign manager for me in Union County, S.C.

Mr. **WILLARD**. That is correct, Mr. Chairman.

The **CHAIRMAN**. You come from such good stock, I know you are a good man. [Laughter.]

I notice here you went to Emory for your BA degree in Georgia, and then you went to Harvard Law School after that. I am glad you have not turned left yet. [Laughter.]

I just have a few questions here. You served for a year as a counsel to the Attorney General for Intelligence Policy and Review, I believe.

Mr. **WILLARD**. That is correct, Mr. Chairman.

The **CHAIRMAN**. Would you briefly describe for the committee your responsibilities in that position?

Mr. **WILLARD**. That office serves as an advisory office to the Attorney General on the legality of various intelligence activities conducted by the United States. For example, we would review and approve proposed electronic surveillance by the FBI in counterintelligence cases.

That has been an area of great concern and one where we have had increasing activity as a result of the large number of espionage cases that the country has seen in the last few years.

The CHAIRMAN. Mr. Willard, what was your role in the drafting of national security decision directive 84, and what is the status of that initiative today?

Mr. WILLARD. The Attorney General was asked, in early 1982 by Judge Clark, who was then the President's national security adviser, to convene an interdepartmental group to study the problem of unauthorized disclosures of national security information and recommend possible solutions for it.

The Attorney General asked me to chair that group, and I served on it, along with representatives of several other departments and agencies, including the State and Defense Departments.

We prepared a report and recommendations which ultimately led to the directive. After the directive was issued, some questions were raised in Congress about two of the provisions, one involving use of the polygraph in investigating "leaked" cases, and another involving prepublication review agreements.

At that time, then, the President decided to suspend indefinitely those provisions of the directive to allow for consultation with Congress. In fact, I understand right now the conference on the Defense Authorization Act is considering legislation involving use of the polygraph at the Department of Defense, and also the death penalty for espionage cases.

But in recent years, I have not been actively involved in that area because the interdepartmental committee I chaired was disbanded and I no longer serve actively in that capacity.

The CHAIRMAN. Mr. Willard, you have been Acting Assistant Attorney General for the Civil Division since 1983, I believe.

Mr. WILLARD. That is correct, Mr. Chairman.

The CHAIRMAN. Would you tell the committee what your major contributions have been to the Civil Division and what your long-range goals are?

Mr. WILLARD. Our major contribution, I think, Mr. Chairman, has been to try to keep the effective management of the large caseload the Division has. We are responsible right now, currently, for about 12,000 pending cases that our lawyers handle by themselves, and another 24,000 cases that we work on jointly with lawyers in U.S. attorneys' offices.

It is a large organization and it is important for us to try to keep the morale of the attorneys up as they handle this heavy caseload. We try to keep actively involved in managing the caseload and meeting the needs of our lawyers and, as a result, I think, have compiled a very successful record of handling the litigation assigned to us.

My long-range goal, if confirmed, would be to continue the good work we have so far been carrying out in representing the Government in these cases as efficiently as we possibly can.

The CHAIRMAN. Would you repeat the number of cases being handled out of Washington, and then the number by district attorneys or other people?

Mr. WILLARD. Yes, Mr. Chairman. We are handling about 12,000 cases in the Civil Division by ourselves, and we are handling another 24,000 cases, jointly with lawyers in U.S. attorneys' offices.

In addition to that, there are tens of thousands of civil cases that are being handled directly by U.S. attorneys' offices without our being directly involved.

The CHAIRMAN. Now, Mr. Willard, the Civil Division litigates on behalf of the United States, its departments and agencies, members of Congress, Cabinet officers, and other Federal employees acting in their official capacity.

The Division's area of responsibility is virtually as broad and varied as the activities of the entire Government. Now, what are the resources of the Division, and do you feel they are sufficient?

Mr. WILLARD. We think our resources are currently adequate for the job we have. We have approximately 400 lawyers and 300-and-some-odd support personnel who work in the Division.

Of course, we have an ever-increasing caseload, as litigation in this country in every court continues to increase dramatically. So in the future, there may be some expansion necessary, but right now I think our resources are adequate to do the job as it now exists.

The CHAIRMAN. Mr. Willard, one of the important issues of the Department of Justice is the control of civil litigation within the Department. Efforts to transfer litigation authority to other agencies and departments are constantly being proposed.

What, in your opinion, should be the role of the Department in controlling the litigation activity of the Federal Government?

Mr. WILLARD. Mr. Chairman, I think the Federal Government is much better off having litigation primarily handled by the Department of Justice rather than by agencies themselves who may be parties.

There is the old saying that a lawyer who represents himself has a fool for a client, and there is, I think, a real benefit in having outside lawyers from the Department of Justice handle litigation because we are one step removed from the client agencies and we can give them impartial advice about the litigation. We think that serves a valuable function and hope that that will continue to be the case.

The CHAIRMAN. When you try a case out of Washington down in some State, I presume you associate a lawyer there, though, that could help pick the jury and handle details and work with you, do you not?

Mr. WILLARD. Exactly, Mr. Chairman. We always consult the U.S. attorney when we are handling a case in his district. His name appears on the papers we file and we usually have an assistant in his office who works as our local liaison.

The CHAIRMAN. I remember several years ago, I had several hundred condemnation cases in Aiken, my home county, when the Savannah River plant came down there. Mr. McCloud, the son of a former Governor, was representing the Department in those cases.

I do not know whether he ws selected by you all or the district attorney, but I think by the Government up here, and dealt directly with you all. That is what I was trying to illustrate.

Senator **Metzenbaum**. I hope that fellow was a good supporter of yours.

The **Chairman**. Well, he was a good supporter of mine, but I tried to whip him in those cases. [Laughter.]

Mr. Willard, there is frequently the suggestion that one way to erase the backlog of cases before the courts is to keep frivolous claims out of court. Do you have any thoughts on minimizing the extent to which a court devotes time to hearing such cases?

Mr. **Willard**. I think one of the most valuable things a court can do, Mr. Chairman, in that regard is to rule quickly on potentially dispositive motions—motions to dismiss and motions for summary judgment.

We try to make a practice in our litigation, where we think we have a good legal issue that will dispose of the case, to present it early to the court so that it can resolve the case quickly with a minimum of delay to the parties involved.

The **Chairman**. Mr. Willard, there have been suggestions that alternative dispute resolution mechanisms might be further utilized. Do you feel this is a workable solution and, if so, why?

Mr. **Willard**. I definitely feel it is worthwhile, Mr. Chairman. We have cooperated with the Center for Public Resources and other groups that are developing the use of alternative dispute resolution, and we want to be as supportive as we can.

If confirmed for this job, I would intend to continue to do that on behalf of the Civil Division.

The **Chairman**. I just have one more question. I see Senator Gramm has come in and we will call on him.

Mr. Willard, will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. **Willard**. Yes, Mr. Chairman; I will.

The **Chairman**. Senator Gramm, we are delighted to have you with us. I know how busy you are in connection with the armed services conference matter, and I have got to get back there myself. But we will hear from you at this time.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **Gramm**. Well, thank you, Mr. Chairman. You have been generous enough to put my statement in support of Richard Willard in the record. I just wanted to come over and make it clear that I strongly support his nomination.

He has a distinguished record as a student of the law, a distinguished record in the private sector. He has held two very responsible and sensitive positions in the Justice Department.

I strongly support this fellow Texan for the appointment which the President has asked this committee to deal on. So I will head back to committee, leave this in your good hands, and represent your interests there.

The **Chairman**. Thank you very much, and look after my interests until I get back there. We appreciate your coming. I am sure your support means a great deal to Mr. Willard.

The distinguished Senator from Ohio, Mr. Metzenbaum.

Senator **Metzenbaum**. Thank you, Mr. Chairman.

Mr. Willard, do you believe that the practice of delegating important regulatory powers to independent agencies, such as the Federal Reserve Board, the FCC, or the SEC, is constitutional?

[Pause.]

The CHAIRMAN. He is asking you a question, Mr. Willard.

Senator METZENBAUM. He is thinking about it.

Mr. WILLARD. Yes, Mr. Chairman; I am trying to think about my answer.

That covers a lot of territory, Senator. I think that that question depends a lot on the nature of the powers that are delegated and the authority of the agencies in question. It would be difficult to answer flatly yes or no across the board.

I think that there are constitutional issues raised when executive authority is conferred upon an agency that is not part of the executive branch, but how that question is resolved, probably depends very much on the precise nature of the statutory authority conferred.

Senator METZENBAUM. Well, you know the statutory authority that presently exists for the FRB, the FCC, and the SEC. Do you have some concerns about whether those delegations of authority are constitutional?

Mr. WILLARD. I have not reviewed the authorities conferred on each of those agencies in detail or been asked to form an opinion on those matters, and so I am not really in a position to offer a legal opinion about all of the authorities conferred on each of those agencies and whether they would be constitutional or not. I have not specifically studied the issue.

Senator METZENBAUM. Have you ever expressed the view that the well-established practice of delegation to independent agencies is unconstitutional?

Mr. WILLARD. I do not recall that I have ever expressed any kind of legal opinion or judgment on those matters. In the Department of Justice, it has not been an area that has fallen within my responsibility to offer any kind of formal judgment on.

Senator METZENBAUM. Did you not express that opinion in a meeting with some colleagues within the last 5 months that such a delegation of authority is unconstitutional?

Mr. WILLARD. I have not been asked to express any kind of formal legal judgment on this issue, Senator, in a well-studied context. I think I have indicated that this is an issue of some complexity in terms of separation of powers and it is one that concerns me.

But I have not studied in detail, and before I made any kind of a formal determination about what my opinion was on that legal issue, I would want to do some careful research and study.

Senator METZENBAUM. How would it be involved with respect to the issue of separation of powers? Delegating authority to the FRB, the FCC, or the SEC—nobody would claim that those were legislative agencies or legislative creations, and even if they were, I am not sure that would be unconstitutional.

So my question is, how do you relate this issue of separation of powers to the position which you apparently took in a meeting concerning the decision that the Department should take on the petition for certiorari in the Board of Governors of the Federal Reserve System against Dimension Financial Corp.?

Mr. **Willard**. Well, Senator, the issue in the *Dimension Financial* case is now pending in the——

Senator **Metzenbaum**. Well, first, let us get to the separation of powers question. Let us get to that first.

Mr. **Willard**. Well, I will be happy to answer both questions.

Senator **Metzenbaum**. OK.

Mr. **Willard**. And I will start with the separation of powers one.

As a starting point, the Constitution provides the Executive power to be vested in the President of the United States, and as a result, most of the executive branch is subject to the President's control. This is not the case with certain independent regulatory agencies that are independent of the President.

The line as between what kind of powers can be given to an independent agency outside the executive branch is one that is difficult to draw, I think, in many cases. Certainly, the powers, for example, of the Secretary of State could not be given to an independent agency without raising serious separation of powers problems in terms of its derogation of the President's constitutional authority.

Where you draw the line between the powers of an agency such as the Department of State, which constitutionally ought to be within the executive branch, and various other independent agencies is one that I think has to be resolved carefully on a case-by-case basis.

Now, with regard to the *Dimension Financial* case, there was no issue there about the constitutionality of the Federal Reserve Board. It was a question of statutory interpretation with regard to, as I recall, the issue of nonbank banks.

In that situation, we have several client agencies who have an interest in the matter. We represent, in addition to the Federal Reserve Board, the Comptroller of the Currency, the Secretary of the Treasury, the Federal Deposit Insurance Corporation, and other agencies that have an interest in the financial institution regulatory area.

We had received recommendations from those agencies that differed as to what approach to take in the Dimension Financial case. Ultimately, the Department decided to authorize the Federal Reserve Board to file a petition for certiorari in that case, but did not join in the petition.

There was no question as far as I can recall raised in that case as to the constitutionality of the Federal Reserve Board, and I do not recall that I suggested that that would have anything to do with the resolution of the issues in the petition by the Supreme Court.

Senator **Metzenbaum**. We are informed, and I am prepared to have you confirm or deny, that you asserted that one reason why the Justice Department should not support the Federal Reserve Board was your view that the Fed was an unconstitutional agency. Do you think you said that?

Mr. **Willard**. It is certainly possible I may have said that, Senator, but that was not the product of any legal analysis in detail. Before I formed any kind of legal judgment on that issue, I would want to study it carefully. That was not an issue in the Dimension Financial case.

Senator **Metzenbaum**. You might have said it, but that is really not too important that the man who is to be the head of the Civil

Division of the Department of Justice just very casually tosses off a one-liner and says, "I do not think the Federal Reserve Board is a constitutional agency?"

Mr. WILLARD. Senator, I did not—I do not recall exactly what was said, and the reason I am trying to be careful is because I do not want to inaccurately relate what occurred at a meeting.

That was not an issue in the Dimension Financial case; it was not raised by any party in the case. And if I said something along those lines, it was not because it had any bearing on the issues that were raised in the petition for cert in the case, which was purely a question of statutory interpretation and not a question of constitutional law.

Senator METZENBAUM. I understand that it might not have been critical to the case. But, you know, it could have been just a throwaway line, but the fact you said it, if you did say it, is a reason for some of us to have a little concern. And would you not have a little concern if you were sitting here and you were told that the nominee to head up the civil end of the Justice Department has made a comment, even though was an extra line, it did not mean much, but he thought that maybe the Federal Reserve Board was not constitutional? Do you think it is constitutional?

Mr. WILLARD. Senator, before I expressed any kind of a public judgment on that issue, I would want to study it. I have not studied the full area of statutory authority. It may be of interest to note that we are currently defending the Federal Reserve Board in litigation brought by members of Congress challenging its constitutionality with regard to the Federal Open Market Committee.

Senator METZENBAUM. How did the Members of Congress get standing in that case?

Mr. WILLARD. Well, we have defended the case by arguing that Members of Congress do not have standing to challenge.

Senator METZENBAUM. Do you think it would be a good idea to change the law so that Members of Congress do have standing when they want to challenge an action of the administration?

Mr. WILLARD. I think that would probably require an amendment to the Constitution to the extent that standing is based on the requirements of article III with regard to injury-in-fact and a personal stake in the controversy.

I do not think legislation alone would be sufficient to confer such standing.

Senator METZENBAUM. Beyond article III, should there be any other limits on congressional standing?

Senator SPECTER. If the Senator would yield to me for a question at this time. Is not standing handlable by statute? Did not the Congress handle the standing problem in *Buckley* vs. *Valeo* with legislation?

The case in controversy is a constitutional requirement, but cannot standing be handled through statutory enactment?

Senator METZENBAUM. Well, I guess whether it is or is not, I am not questioning the fact that Members of Congress have great problems in establishing standing. Senator Goldwater and I were thrown out of court when we sued the Navy because we did not have standing.

And I am asking this witness, who is certainly in a position of a—about to be in a position of a policymaker as to whether or not he thinks there ought to be some changes made so that we in Congress do have standing.

Senator SPECTER. But, Senator Metzenbaum, I was looking to a more fundamental point, and that is whether we can affect the standing issue by legislation, and I think we can. That is the question that I wanted to get cleared up.

Senator METZENBAUM. I think we can, also, and I think Senator Thurmond and I are going to go vote. You probably already have, and when we come back, he will tell me what his answer was.

The CHAIRMAN. Have you voted?

Senator SPECTER. I have not voted.

The CHAIRMAN. We will have to take a recess, then, and we will be back as soon as we can.

[A brief recess was taken.]

Senator SPECTER [presiding]. The Committee on the Judiciary will reconvene. Senator Thurmond is attending a mark-up, as I understand it, on Armed Services and has asked me to preside in his absence. And we shall proceed where we left off, with Senator Metzenbaum questioning.

Senator METZENBAUM. Thank you. Mr. Willard, do you recall our correspondence in the spring of last year regarding the Syntex Corp. infant formula matter?

Mr. WILLARD. Yes, I do, Senator.

Senator METZENBAUM. For the benefit of those who are not familiar with the case, let me briefly describe it. Syntex Laboratories, of Palo Alto, CA, was a major producer of infant formula in this country up until the late 1970's.

However, on March 23, 1978, Syntex' chief scientist and nutritionist, Dr. Sidney Saperstein, ordered that sodium chloride—salt—be deleted from the formula. Dr. Saperstein said in an internal memo he ordered this change because the salt was not required in the formula.

Now, one would assume that a huge corporation's chief scientist and nutritionist would be aware that sodium chloride is an essential nutrient and that by deleting it, the baby formula was transformed into a life-threatening concoction.

As we all know, infant formula is the sole source of nutrition for a baby who is unable to take mother's milk.

This tragic error was then compounded. Five days after this reformulation, Dr. Saperstein initiated a label change to reflect the absence of salt in the product. In the meantime, the formula continued to be produced and mislabeled as containing salt.

In fact, the final Syntex official to sign off on the label change did not do so until over 2 months later. And in an advertisement that ran in the December 1978 edition of Pediatrics Magazine, salt was clearly listed as an ingredient in the formula. That just was not true. It had been eliminated 10 months earlier.

Mr. Willard, are you aware of all of this?

Mr. WILLARD. Yes, Senator, I am.

Senator METZENBAUM. Now, as a consequence, 20,000 babies—20,000 babies—were exposed to this defective formula. As a matter of fact, you have a child 2 and you have a child 6. Only your wife would know, probably, as to whether one of your children was exposed.

But whoever's children, many infants experienced a condition called metabolic alkylosis. Many of these babies will be physically and mentally impaired for the rest of their lives.

In fact, in an internal Justice Department memo that you yourself authored, you wrote:

> We are aware of at least 247 infants who had documented health problems while being fed these formulas. These problems range from very minor illness to death.

You also stated in that same memo that:

> The facts are basically undisputed and indicate that Syntex may have violated Section 331 of the Food, Drug and Cosmetic Act, which prohibits the transportation in or introduction into interstate commerce of adulterated or misbranded food.

Despite that statement which you wrote, you later decided that the Justice Department would not prosecute Syntex Corp. or anyone else that was involved. So far, am I correct in my facts?

Mr. WILLARD. I cannot say for sure about the statements from the document, but as a general matter I think your statement is consistent with what I recall to be the facts.

Senator METZENBAUM. Now, the Food and Drug Administration strongly recommended that the Department of Justice prosecute, correct?

Mr. WILLARD. We did receive a recommendation from the Food and Drug Administration to initiate a criminal prosecution in the case, that is correct.

Senator METZENBAUM. And you decided not to do so?

Mr. WILLARD. I was among those who were involved in that decision, that is correct, Senator.

Senator METZENBAUM. Your name is signed on the letter to the FDA in which you wrote:

> I have serious doubts whether we could prove at a criminal trial that the Neomulsoy and Cofree infant formulas produced after March 1978 were adulterated or that Neomulsoy was misbranded.

But at that time, you knew, did you not, that the production records showed that salt was deleted and that no label change had been made? You knew that, did you not?

Mr. WILLARD. That is consistent with my recollection.

Senator METZENBAUM. It is consistent with your recollection, is that right? Is that what you said?

Mr. WILLARD. That is correct, Senator.

Senator METZENBAUM. Pardon?

Mr. WILLARD. That is what I said.

Senator METZENBAUM. What about that ad that ran 10 months later, and what about your earlier statement that the facts were undisputed and that Syntex was clearly in violation of the Federal law? Yet, you concluded not to prosecute. Why?

Mr. WILLAPD. Senator, as I stated in my letter to you after you wrote and urged that we reconsider and initiate this criminal prosecution, there were a number of factors that went into the decision.

Initially, this case was referred to the Justice Department by a House subcommittee in March, I believe it was, of 1980 during the Carter administration. And the case had been being bounced back and forth between the Justice Department and the Food and Drug Administration for, I believe it was, over 4 years.

And at the time I became acting head of the Civil Division, the case was brought to my attention for a final determination. The recommendations of the career staff attorneys of the Justice Department who looked at it, the view of the U.S. Attorney in Chicago, Dan Webb, who reviewed the matter, and the view of my superior, Acting Deputy Attorney General Lowell Jensen, were all that we should not prosecute, and that was my view.

As you have indicated, the Food and Drug Administration recommended that we should prosecute. The consensus, though, of all the people at the Department of Justice who looked at it, as far as I can recall, was that this was not a case that should be prosecuted, for a variety of reasons.

One of the reasons was that there was some uncertainty about the status of the law with regard to the requirement of chloride as an ingredient in infant formula at that time. The Food and Drug Administration had regulations in place, as I understand it, at the time that required certain essential nutrients to be included in labeling of infant formula. And as I recall, chloride was not included on that list in the FDA regulations at the time.

Although we thought that a case could be made under the law as it then existed, we also believed that there was significant litigative risk, particularly in the context of a criminal prosecution.

In addition, the Congress had reacted to the Syntex incident in 1980 by passing the Infant Formula Act of 1980, which set much clearer standards with regard to the production of infant formula.

And it was our view that litigation over what the state of the law was pre-1980 would not serve a significant deterrent purpose for the future because the law had been changed by the action of Congress in the Infant Formula Act, and that that new legislation would govern in future cases that would be considered.

There were a variety of facts considered. A grand jury was convened and heard testimony from a number of witnesses. A large number of documents were reviewed by the staff, and in light of all of the factors, including the ones you have mentioned and a number of others, the judgment of the people who looked at it, including myself, was that the case did not have sufficient prosecutive merit to go forward with criminal prosecution.

Senator **METZENBAUM**. You know that mislabeling is a violation of the law and the misadvertising, the misrepresentation of the advertising, is a violation of the law. You know that putting out food that is adulterated without indicating that it has been, such as eliminating the chlorides—all of that, you have an obligation under the law to make that fact public. It was not done.

You said you would not prosecute because "we have no evidence of prior warnings or notice to Syntex or its employees from either external or internal sources that their processes were deficient in any respect."

And, incidentally, I was the author of the Infant Formula Act when it passed the Senate; present Senator Gore was the author in the House. And we never thought that any cases were going to be dropped, and we never indicated that in any testimony or any colloquy or anything of the kind that something that had violated the law yesterday would no longer be a violation of the law by reason of the enactment.

I pointed out to you at the time of your statement that there was no evidence of prior warnings or notice to Syntex from either external or internal sources--that that was not the case.

In fact, in 1977, an FDA district director wrote to Syntex board chairman George Rosencrantz to complain about deficiencies at Syntex' Elgin, IL, manufacturing plant. The FDA Director wrote:

> What disturbs us is simply the attitude of management at your Elgin facility. A review of our investigator's inspection report shows that management refused to provide this investigator with an exact count of the miscoded cans.

In an internal memo to Dr. Saperstein from a Syntex quality control specialist, grave concern is expressed over the electrolyte value of the formula because of the deletion of salt.

The quality control specialist tells Dr. Saperstein that he is not "knowledgeable regarding acceptable ranges of these electrolytes in relation to the physiological health of infants. We need your help here."

In addition, on May 15, 1979, the Syntex medical department received a letter from a professor of pediatrics at the University of Oregon. This doctor tells of his study of the Syntex formula and asks, "I wonder where there have been any reports of electrolyte disturbances using Neomulsoy as a result of the low chloride content in this infant formula."

In another matter, I also wrote to you that Syntex misled their employees and, in turn, physicians who would recommend their formula. In an employee training manual dated November 1978, Syntex claimed that their formulas meet the guidelines established by the American Academy of Pediatrics "in respect to all nutrients."

I have to say to you, Mr. Willard, that simply was not true, and that information was available to you. And Dr. Saperstein, as a member of the AAP's Committee on Nutrition, had to know that.

Mr. Willard, I presented all these facts to you when you first announced that you would not prosecute. I asked you to reconsider in light of these facts. You wrote me and said, "In assessing the evidence in the context of our burden of proof in a criminal prosecution, I determined that the litigation risks were substantial."

Please note that in all your correspondence you do not talk any about Mr. Jensen; you do not talk anything about all the other lawyers. You say that "I did it." You accept the responsibility.

And you closed your letter by saying, "The authority of the executive to prosecute carries with it a heavy burden to weigh carefully the cases it chooses to bring. The momentous consequences to the accused and the societal interests in ensuring that the laws are faithfully and effectively enforced require that the decision to prosecute in every case be based not on expediency of emotion, but on a conviction that society will benefit from that decision. In light of these considerations, I decline to reverse my decision in this case."

My question to you as a father is, what do you mean society will benefit from that decision to close this case? What do you mean that protecting a manufacturer that has violated the law—somehow, that is going to benefit society. And you in your own earlier communication recognized how many children were involved.

Yet, you decide to close the file, and you come before us for approval to be the head of all civil cases brought by the U.S. Government. Now you are going to get confirmed; you are going to have the votes.

But my question to you is what kind of man are you? Why? What really motivated you? What caused you to turn your back on it? Sure, you were not positive you would win the case, but why did you not try the case? Why did you not go forward with the case?

Was there somebody who told you to get off it? Were you not worried about the children? Were you not worried about your own children and all the other children who had been taking that infant formula?

What kind of human being are you that could turn your back and talk to us about societal concerns? Society will benefit from that decision. I do not know what segment of society, Mr. Willard, but I have spent a lot of years in this Congress trying to do something about infant formula.

And after we passed the law, this administration has failed to do anything about it. But before it, there were violations as well and you failed to do anything about it and you let many of us down. Tell us why.

Mr. **Willard**. Well, Senator, you have asked a number of questions and I will try, if I can remember all of them, to respond to them.

First, I would like to say that this year we did bring the first criminal prosecution under the Infant Formula Act of 1980 against Wyeth Laboratories as a result of a deficiency in their formulation of infant formula involving, I believe it was, vitamin B_6. That was a criminal prosecution. The corporation pleaded guilty. The case was thus resolved.

So we take seriously our responsibilities under the Infant Formula Act.

Senator **Metzenbaum**. And you let them off with a plea of guilty and a fine, is that it—money? No imprisonment?

Mr. **Willard**. Well, Senator, we reviewed the case and determined that a case could only be made under those circumstances against the corporation. That was the resolution.

In other food and drug cases where we think we have been able to build an adequate case, we have gone after individuals as well. For example, within the last year, again, since I have been involved in these matters, we brought the first criminal prosecution against a major pharmaceutical company for failure to report adverse drug reactions, and that was the prosecution of Smith-Kline Corp. and three of its employees on criminal charges in Pennsylvania.

Senator **Metzenbaum**. What level of employees?

Mr. **Willard**. These included three fairly substantial employees in the company.

Senator **Metzenbaum**. Executives?

Mr. **Willard**. I do not recall their exact positions, but they were a chain of command and they did run as far up as we thought we had the evidence to prove against them.

But we have not hesitated, where we think we have an appropriate case, to prosecute under the Food, Drug and Cosmetic Act or the Infant Formula Act. There are other investigations that are currently in progress that I obviously cannot comment upon.

But we have taken our responsibilities seriously, Senator, with regard to the protection of safety of Americans. In the area of the Wyeth Laboratories prosecution, it was again the consensus of all involved, including the recommendation of the Food and Drug Administration, that prosecution of the corporation was appropriate and that there were not any individuals that should have been prosecuted in that case.

We have currently ongoing an investigation in another infant formula case. So it certainly is not our policy to ignore this area. I think what we have here is a disagreement, and people certainly can legitimately disagree, about the appropriate way to resolve a particular case in light of all of the facts.

The Syntex case was a difficult one because it did involve a lot of evidence. There were some facts which you have pointed to which did point in favor of prosecution. And as I stated in my memo to Lowell Jensen, the Acting Deputy Attorney General, it was a close case. It was not an easy one to resolve because of the complexity and the difficulty of it.

On balance, though, I felt that there was litigation risk in the case. It is certainly not helpful in this kind of situation to bring a criminal case and lose. That cannot only create adverse precedent legally; it can also prejudice the cases of private individuals who may have private damages or product liability suits if the Government gets in and tries to bring a case and fails.

So there are a lot of responsibilities that go into the decision about prosecution. With regard to the question you raised about warnings to Syntex, one of the warnings you mentioned, the 1977 warning with regard to miscoding, I do not believe had anything to do with the infant formula and the salt issue. I think that was prior to that and dealt with some other matter.

Senator **METZENBAUM**. It was a warning having to do with their poor quality control procedures, was it not?

Mr. **WILLARD**. It was with regard to miscoding of cans, I believe, and I am not sure that there is any evidence that that problem bore any causal relationship to the salt formulation problem.

Senator **METZENBAUM**. I do not question what you are saying about that.

Mr. **WILLARD**. Right.

Senator **METZENBAUM**. But they had been warned about their miscoding.

Mr. **WILLARD**. That is certainly correct, Senator. The reaction of Syntex, once they learned about the problem, also was a factor that entered into this because they did voluntarily recall and destroy all existing infant formula without requiring the Food and Drug Administration to initiate any kind of litigation or enforcement action.

They went out of the business of making an infant formula. One of the things in some cases we might consider as an alternative to criminal prosecution would be civil injunctive action to try to prevent the problem from recurring. Here, that was not an available remedy to us because they had gone out of the business, and so an injunction to clean up their practices would not have had any effect.

I am trying to see if I can remember everything else that you had mentioned. Basically, this was a difficult decision, one that had been pending in the Department since 1980. When I assumed my responsibilities as acting head of the Civil Division, it was a case that I had to deal with.

I used my best judgment to try to resolve it, in light of all the considerations that I think ought to go into it. I do not mean to evade my responsibility, but it is a judgment that was concurred in by the U.S. attorney for Chicago, Mr. Webb; by Lowell Jensen, then the Acting Deputy, now the Deputy Attorney General; and by the staff career lawyers who work for me who had spent a great deal of time working on the case, who had been to the grand jury sessions, had heard the witnesses and reviewed the evidence personally.

It was a decision contrary to the recommendation of the Food and Drug Administration, but I think——

Senator METZENBAUM. But you made your——

Mr. WILLARD. If I could just conclude, Senator, I think that I tried to make the decision in good faith, in light of the facts and the analysis before me. I think reasonable people could certainly disagree about whether that was the right decision, and I respect that you may disagree with that.

But I will say it was a decision that was made in good faith and on the basis of the facts and the proper considerations before me, as I saw them.

Senator METZENBAUM. Well, when you first made your inclination not to prosecute Syntex known to FDA, they responded to you, did they not?

Mr. WILLARD. I believe there were several responses back and forth between FDA regarding this.

Senator METZENBAUM. Well, let me be more specific. I have a copy of FDA's response and I would like to go over parts of it with you. While it is no secret that I have many differences with this administration and the decisions they arrive at, I find it quite interesting that this kind of disagreement existed within the administration.

FDA's general counsel took issue with every argument that you made in justification of your decision. I would like to go over each point raised in his letter and get your comments on them.

First, you argued that because the Syntex action was not solely motivated by profit that prosecution was not warranted. FDA countered and said, while that is correct, it overlooks the principal basis for FDA's recommendation. "The focus of our concern is not that Syntex made a formulation change which was ultimately discovered to have been a mistake, but that it failed to have in place a quality control system capable of detecting the problem. We think it is immaterial that Syntex was not motivated by direct economic gain.

"Most food sanitation cases and more than a few clinical investigation cases have been brought to punish conduct that was the result more of calculated indifference to regulatory standards than of a conscious desire for material gain."

The FDA continued by saying, "Moreover, the Syntex referral involves an economic motive, for Syntex chose not to incur the expense and time and effort of instituting an adequate quality control system."

So, first they are saying that, A, they do not know anything in the law that says you have to have an economic motive in order to bring a prosecution. And, second, they are saying if that really does bother you that much, that they did have an economic motive in that they were unwilling to spend the funds in order to institute an adequate quality control system.

What is your reaction to that?

Mr. **WILLARD**. Well, Senator, the food and drug laws are fairly unique in our criminal jurisprudence in that they do not require the same kind of showing of intent or scienter as many criminal laws. They have been described as basically strict liability crimes, where under the law it is not necessary to show that someone intended to do evil; someone can be, in effect, criminally prosecuted essentially for negligent-type behavior.

The Supreme Court, though, in the *Park* case, said that in upholding that kind of a criminal statute, that it expected that the Department of Justice would exercise sound prosecutorial discretion in deciding which cases to bring, in light of the heavy standard that is imposed by the statute.

Under the facts of this case, the views of the Department and my own views were influenced by the facts that gave rise to the chloride deficiency in the infant formula. Syntex was apparently motivated by recommendations that salt be deleted from—or the amount of sodium in infant diets be reduced and that the deletion of salt from the formula was not designed to do anything other than improve their formulation.

Normally, that, by itself, would not have made a big difference because chloride, which is the deficiency that resulted here, is fairly common as an element. And it was really the confluence of several events, as I recall, that contributed to the chloride deficiency in the formulation here.

One event was the fact that the supplier of soy concentrate, Ralston Purina, changed the way that they made the soy concentrate in a way that reduced the chloride content; also the fact that new water processing facilities had been put in and that that had an impact.

And so what we have here is a situation where it was not that there was a conscious decision by Syntex to do something that they knew was creating a risk in changing the formulation to delete salt, but it was rather that that decision, taken in conjunction with a couple of other events that happened to occur at the same time, produced this tragic result.

And while that might not have amounted to a total legal exculpation under the Food, Drug and Cosmetic Act, that was certainly a factor we thought it was appropriate to consider in the exercise of prosecutorial discretion.

Senator **METZENBAUM**. Mr. Willard, I apologize to you for not listening intently, but there was some fellow up here who was interrupting me and he wanted my ear. I hear a baby out there that is probably concerned about this infant formula issue as well. The chairman wants to know if that baby intends to be a witness for or against your confirmation.

Senator SPECTER. I simply was asking Senator Metzenbaum how long he would be in the questioning, Mr. Willard—an inquiry which might not be totally irrelevant and one that you might not mind too much.

Senator Thurmond commented about the baby crying. I said, call your next witness.

Senator METZENBAUM. I am Senator Metzenbaum.

Senator SPECTER. Senator Metzenbaum.

Senator METZENBAUM. You also argued, Mr. Willard, that Syntex inherited the inadequate quality control system from the previous manufacturer of infant formula. To that, FDA responded:

> Had Syntex purchased the plant and product line only shortly before the formulation change in question, we might agree that this was a mitigating circumstance. But the acquisition took place in April 1971. We believe that seven years is more than enough time for Syntex to be charged with the responsibility of the adequacy of the manufacturing procedures of an acquired facility.

Do you understand their point?

Mr. WILLARD. I do, Senator, and I cannot say I disagree with it. It seems to me, though, that what they are responding to are statements out of a memo prepared by my staff and sent to them for comments, as opposed to responding to something that I said in one of my memos. But I am not sure.

I think this is an exchange—I believe what happened was that our staff prepared a recommendation here and sent it over to FDA for their comments before the case went to me for my views.

Senator METZENBAUM. We do not know the answer to that because we only have the FDA response; we do not have your actual letter, so I cannot comment on it.

Now, your rationale also included the observation that Syntex had no prior notice of formulation problems with the products. To that, FDA stated:

> It is not unprecedented to prosecute responsible persons for violations that resulted in serious public health risks despite their lack of forewarning that violative conditions existed.
>
> In view of the serious public health consequences of Syntex' violations of the Act, prosecution is justified in this instance even if the situation is viewed as one in which the company had no prior warning.

Would you care to comment on that statement of theirs?

Mr. WILLARD. Well, I certainly agree that prior warning is not an element of the statutory offense, but it is a factor that has for a number of years been taken into account in exercising prosecutorial discretion. I think it is a factor that is appropriate to consider, but not necessarily dispositive, as FDA said.

Senator METZENBAUM. You mentioned the fact that Syntex acted responsibly after the problem became known. To that, FDA says:

> There is no question that Syntex acted in a responsible fashion following discovery of the problem, but there was also no question that it was in Syntex' own interests to do so.
>
> As a major corporation marketing brand name products—drugs and medical devices, for example—Syntex had significant financial interest in protecting its public reputation and limiting its exposure to product liability suits.

Did you agree with that comment of the FDA?

Mr. WILLARD. I am sure that Syntex acted from a variety of motives and did have a self-interest in doing what they did. On the other hand, FDA did agree with us that Syntex had acted responsibly and avoided the necessity of our instituting some kind of civil enforcement action to compel a recall by doing it voluntarily.

Senator METZENBAUM. At that point, they did not have much choice, did they? Otherwise, they would subject themselves to potential lawsuits and they would be flagrantly violating the law if they had not acted responsibly at that point. Is that not the fact?

Mr. WILLARD. Well, it certainly would have created more serious problems for them; that is true.

Senator METZENBAUM. So that when you and FDA say they acted responsibly, they did so because, as they say, it was in their self-interest to do so. And as you would have to agree, they had really no choice but to do so, unless they wanted to stand up and flagrantly flaunt the law.

Mr. WILLARD. Well, it was certainly in their interest to act responsibly in this case, although it is not always our experience that the companies will act responsibly in these situations.

Senator METZENBAUM. Now, you told FDA that you felt the financial losses suffered by Syntex would be an adequate deterrent throughout the industry against similar negligence. However, FDA argued:

> We do not believe the possibility of serious financial loss deters violations such as those that Syntex committed.
>
> In early 1982, FDA learned of the omission of Vitamin B_6 from large quantities of infant formula manufactured by another firm. The firm, a major infant formula manufacturer, had available to it a mechanism for the prevention of such a problem. The firm, aware of the Syntex situation, Syntex' forced departure from the infant formula industry, and Syntex' substantial losses, consciously decided not to take the precautions known to be available even though it risked and sustained financial losses apparently well in excess of those suffered by Syntex.

What they are really saying is that once this other firm learned how Syntex had been treated, they thought that they could afford to take a similar risk and not really be that much at risk, which is some indication that your actions not only affected Syntex and the infants that had used their formula, but indirectly had an impact upon another firm which had also failed to conform with the law.

Mr. WILLARD. Well, Senator, first of all, the other firm's actions, I believe you said, were in 1982, which was two years before I made my decision with regard to Syntex.

Senator METZENBAUM. You are correct.

Mr. WILLARD. And so it would have been hard for that to have been caused by my decision. Furthermore, the other firm referred to there is Wyeth Laboratories, which we did criminally prosecute this year for those acts referred to in the memo.

Senator METZENBAUM. Appropos that, is it the Department's position generally, where it is convenient or where it makes sense to do so, just to prosecute the corporations, whether it has to do with E.F. Hutton or whether it has to do with Wyeth or whether it has to do with any one of a number of other companies?

And does the Department, in its big talk about eliminating white-collar crime—does it not feel some obligation both in its Civil and Criminal Division to go after the individuals themselves?

Mr. **Willard**. Well, first, Senator, let me say that I cannot speak on behalf of most of the criminal work of the Department. The only criminal work that I deal with directly is in this food and drug area where we do both the civil and the criminal litigation because of the way that function has historically been combined in one office. I was not involved in the *E.F. Hutton* case, for example.

The policy we follow within the office as part of the Civil Division is when a case against an individual can be made consistent with our standards, we expect to do so. And as I mentioned earlier, in the *Smith Kline* case last year, which was the first prosecution of a major pharmaceutical company for failure to report adverse drug reactions, we did prosecute three, I believe it was, responsible individuals within that firm, as well as the corporation. And we have other pending cases where we are expecting to look at individuals as well as corporations, too.

In the *Wyeth* case, as I recall, the Food and Drug Administration did not recommend that any individuals be prosecuted, and we concurred with their judgment on that matter.

Senator **Metzenbaum**. Mr. Willard, you said you were also inclined not to prosecute because FDA did not require the labeling of chloride at the time. FDA argued:

> We do not consider this factor to be significant. By 1978, the nutritional importance of chloride was well known as a result of the 1976 recommendations of the Committee on Nutrition of the American Academy of Pediatrics. In fact, Dr. Saperstein served as the Syntex liaison with that Committee.

In view of that FDA statement to that effect and your claim that it did not require labeling, how do you respond to the FDA on this point?

Mr. **Willard**. Senator, we were concerned and the reason we considered this factor is that it would provide an argument that could be used by the defense in an effort to embarrass the FDA.

In fact, the FDA came in for a great deal of congressional criticism at the time of the Syntex incident because they had not updated their regulatory standards to include chloride. And the concern was that if this case were prosecuted that that fact would be used as a factor in litigation.

I agree that that does not amount to a total legal defense in this kind of situation, but it is one of the many facts that went into the overall decision and it was a factor that was considered because it would have made prosecution more difficult here.

Senator **Metzenbaum**. Were there any outside conversations that you had or that anybody in the Department had concerning the question of prosecution? Did you talk with anybody? Did Mr. Jensen talk with anybody that you know about that sort of urged that prosecution not go forward? Can you tell us anything about that?

Mr. **Willard**. As far as I can recall, the only outside communications we had regarding this case came in the form of communications encouraging us to prosecute from you and from some other groups, I believe, that tried to encourage us to prosecute Syntex.

I do not recall personally having, and I am not aware of any such outside contacts, and I am not aware of any that Mr. Jensen would have had. As I said, we did consult with the Food and Drug Administration. We did consult with the U.S. attorney's office in

Chicago, and our attorneys, of course, dealt with their opposing counsel, but that is——

Senator **Metzenbaum**. What is that?

Mr. **Willard**. Our attorneys, of course, dealt with counsel for the various witnesses and for the company.

Senator **Metzenbaum**. The attorneys dealt with the counsel for Syntex while you were deciding whether or not to prosecute, is that what you are saying?

Mr. **Willard**. I assume they did in terms of obtaining documents and serving subpoenas and things of that nature. There were——

Senator **Metzenbaum**. Did you have any discussions with Syntex counsel?

Mr. **Willard**. I do not recall having any.

Senator **Metzenbaum**. Do you know whether Mr. Jensen did, or any——

Mr. **Willard**. I am not aware that he did.

Senator **Metzenbaum**. Did you have any discussions with any executives of the company?

Mr. **Willard**. I do not recall having any.

Senator **Metzenbaum**. Would your answer be no or you do not recall?

Mr. **Willard**. Senator, I am fairly sure that I did not. I have gone over this matter in some detail recently. There was nothing in my files to indicate that I did and I do not remember having any.

Senator **Metzenbaum**. Another argument you offer as far as Syntex is concerned is your belief that this was a result of an improbable convergence of events. But FDA, in response, pointed out to you that the reason why companies are required to have reliable quality control procedures is to guard against the consequence of improbable events.

"Information available to us indicates," said they, "that at the time of the Syntex formulation change, the industry norm was to test for all nutrients after major formulation changes. There appears to be no dispute that deletion of salt from an infant formula recipe was a major formula change.

"The purpose of such testing was to detect and prevent unforeseen problems, such as those that Syntex experienced. Despite the accepted industry practice, Syntex did not check chloride levels after the formulation change."

Obviously, the FDA really took very sharp exception to your conclusion and argued back as to why you should go forward with the prosecution. Did you reevaluate your decision after you heard from the FDA?

Mr. **Willard**. We certainly did, and as I think I indicated, Senator, I believe that this information arrived from the FDA prior to the time that I made my decision and was certainly taken into account.

And as I have said, there were a lot of facts in this case. Some of them pointed in favor of prosecution; some, the other way. And there was no one dispositive factor that went into the decision. It was based on a consideration of all of those in an attempt to apply to it a sound prosecutorial judgment.

With regard to the factor you have just mentioned, the confluence of facts, what that refers to is that the low chloride levels in this formula, as I recall, were a result of several things happening at once.

One was the deletion of salt from the formula, which was done at the time apparently because a lot of people were saying there was too much salt in infant food and formulas and sodium levels were excessive.

In addition, a formulation change was made by the supplier of soy concentrate—I believe it was Ralston Purina—that caused the chloride levels in that concentrate to go down. And then, finally, a change in the water processing equipment at the plant also reduced the chloride levels.

So it was really a confluence of several facts that produced the low chloride level. Now, certainly, FDA is right that there should have been testing and that should have been discovered anyway, even though it was a fairly improbable confluence of factors that produced the result.

But, still, that was a fact in the case. It is one that could have been expected to have been presented to the jury if the case had been prosecuted, and I think it was appropriately considered in weighing all of the evidence in deciding whether the case is one that should be brought.

Senator **Metzenbaum**. Mr. Willard, you finally concluded, as you indicated previously, that the Infant Formula Act, which was passed in response to the Syntex incident, would prevent future violations of this type.

But as I told you at that time, that just was not the case. The regulations that were subsequently written to accompany that law are totally inadequate, but that is frankly another matter for another committee.

FDA also voiced the same concerns about your relying upon the new act and they concluded that conviction of Syntex and Dr. Saperstein would stand for the proposition that carelessness is not to be tolerated, and should therefore have as significant a deterrent effect on company and individual conduct generally as would any other conviction for permitting substandard manufacturing procedures.

I just have to say to you that it is a tremendous disappointment to me that you found some sort of great risk involved in taking this to court, and you saw some sort of societal concerns.

And even as I sit here now, Mr. Willard, I say to myself why did this man not go forward? What really motivated him? What slowed him down? And I am at a loss to answer it. Sure, you might have lost, but lawyers file lots of cases, whether it is for the Justice Department or for individuals or for corporations, and they are not always certain they are going to win.

But this involved 20,000 babies who had ingested this infant formula. You yourself referred to the number that had been affected, yet somehow you said that prosecution was not good for society. I just do not understand.

I practiced law before I came to the Senate. I took cases that I was not always certain I could win. But, to me, the societal concerns in this matter were all on the side of the infants. They did not have anybody else to look out for them and some of them were adversely affected.

Your societal concerns were somewhere else. You are going on to a higher responsibility and I am not sure what purpose this hearing serves, but maybe if I could shake you a little bit, maybe next time you might just think of the infants and think of their societal concerns. Maybe I would think that I had not totally wasted my time this afternoon.

It concerns me and it disturbs me because when babies are involved, they do not have anybody else to look out for them other than you and I and the rest of us who are in Government, as well as their own parents.

I have nothing else.

Senator SPECTER. Thank you very much, Senator Metzenbaum. Thank you very much, Mr. Willard. Due to the lateness of the hour, I will not ask any questions at this time, but some will be submitted in writing and we would appreciate it if you would respond to those questions in writing.

Mr. WILLARD. Yes, Senator.

[Committee insert:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 31, 1985

R.J. Duke Short
Chief Investigator
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Duke:

Enclosed is the transcript of testimony for Richard K. Willard and Douglas H. Ginsburg, on July 24, 1985, concerning their nomination to be Assistant Attorneys General for the Civil and Antitrust Divisions respectively. Pursuant to your request the transcript has been reviewed for typographical and grammatical corrections.

Also enclosed for the record is a July 30, 1985 letter from Richard Willard to Senator Thurmond.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

Enclosures

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 30, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the transcript of my testimony of July 24, 1985, concerning my nomination to be Assistant Attorney General for the Civil Division. Pursuant to your request, it has been reviewed for typographical and grammatical corrections.

In reviewing the transcript, I note that on page 31, line 3, I stated that the Grand Jury heard testimony from a number of witnesses. In reviewing this matter with my staff after the hearing, I learned that the Grand Jury actually heard testimony from one witness. However, the attorneys assigned to the case interviewed more than twenty witnesses and reviewed thousands of documents as part of the Grand Jury process.

Sincerely,

Richard K. Willard

RICHARD K. WILLARD
Acting Assistant Attorney General

Enclosure

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

August 22, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The following is in response to written questions submitted to me by Senator Specter in connection with my nomination as Assistant Attorney General for the Civil Division.

1. Will you support and work for the continued existence of the Office of Juvenile Justice and Delinquency Prevention?

2. Will you support continued funding for the Office of Juvenile Justice and Delinquency Prevention of at least its current level?

Answer (to questions 1 and 2): If confirmed as Assistant Attorney General for the Civil Division, I will have no control over the operations of the Office of Juvenile Justice and Delinquency Prevention. I understand that the Attorney General, in his confirmation hearings, expressed support for the continued operation of this office.

3. Would you support reform of Immigration and Naturalization procedures to provide that INS not physically seize and detain aliens when there is no reasonable ground to believe the alien will flee?

Answer: If confirmed as Assistant Attorney General for the Civil Division, my responsibilities in the immigration area will be limited to supervising the civil litigation for the Immigration and Naturalization Service. The Immigration and

Naturalization Service is responsible for the procedures to be followed in the enforcement of the immigration laws. I would, however, agree with the Attorney General in his comments made at his confirmation hearing on this point -- that a summons should be used in lieu of arrest in the absence of some reason to believe that the individual will flee. This assumes that the individual poses no physical threat to the community and has broken no other laws.

4. Would you support creation of a private cause of action in federal court for violation of existing anti-dumping and anti-subsidy laws? For violations of customs regulations?

Answer: Primary responsibility for determining Administration policy on the structure of the trade laws and the enforcement of the customs laws resides with the Commerce Department and the United States Trade Representative. The role of the Civil Division is limited to representing the United States in civil litigation involving the trade laws including the enforcement of the civil portions of the customs laws. In considering this idea, I would want to consider how private remedies would work in the context of regular government enforcement of the trade and customs laws. Private enforcement is often suggested when the government's enforcement of particular statutes is thought not to be sufficiently vigorous. To the extent that we need stronger enforcement of these laws, I am interested in doing what I can to insure that the laws are vigorously enforced and I would be pleased to have the benefit of your thoughts on this point.

I appreciate having the opportunity to answer these questions.

Sincerely,

Richard K. Willard

RICHARD K. WILLARD
Acting Assistant Attorney General

cc: The Honorable Arlen Specter

Senator SPECTER. At this time, I would like to call Mr. Douglas H. Ginsburg. Mr. Ginsburg, I understand you have already been sworn.

STATEMENT OF DOUGLAS H. GINSBURG, OF MASSACHUSETTS, TO BE ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. GINSBURG. Yes, I have, Senator.

Senator SPECTER. Would you introduce your family members who are with you at this time, please?

Mr. GINSBURG. Thank you very much. My wife, Hallee Morgan, is with me, sitting in the front row here, and we thought it better not to bring the baby.

Senator SPECTER. Very good.

Mr. Ginsburg, you may proceed at this moment to make any opening statement that you might care to make.

Mr. GINSBURG. Thank you very much. I would just like to take the opportunity to say that I am extremely gratified to have been nominated by the President to the position at the Department of Justice, and pleased that the committee has been willing to meet today to hear me.

I am here to answer your questions and I would be happy to answer whatever you would like to discuss.

Senator SPECTER. All right. Thank you, Mr. Ginsburg.

Since 1981, the Antitrust Division has focused substantial attention and resources on horizontal restraints of trade, which are agreements among direct competitors. Examples of these restraints include the numerous bid-rigging cases brought by the Department of Justice.

In your view, is it appropriate to continue to place the emphasis of antitrust enforcement on price fixing and other agreements among direct competitors?

Mr. GINSBURG. Senator, I think that the emphasis given to horizontal activities over the last 4 years has been appropriate, but it is also important to bear in mind that it has not been the exclusive focus of activity within the Department.

Horizontal price-fixing cases have received a great deal of attention, and appropriately so. The number of criminal cases brought each year in the last 4 has been quite high; the number of convictions of individuals and corporations also very high.

At the same time, the Department has concerned itself with vertical activities in the form of issuing vertical restraints guidelines, as it did recently, and in investigating complaints of resale price maintenance as they are referred to the Department.

I think that both horizontal and vertical activities are receiving appropriate attention and I would propose to continue to do just that if I am confirmed.

Senator SPECTER. Well, would you expand activities on the line of resale price maintenance actions?

Mr. GINSBURG. Senator, I believe it was last year, Mr. McGrath assured a committee of the Senate that the Division would investigate all complaints dealing with resale price maintenance and would take appropriate enforcement action on the basis of the evidence that it found.

I would intend to continue that policy and to make the same assurances to this committee.

Senator SPECTER. What actions have been initiated by your predecessor on the resale price maintenance line, Mr. Ginsburg?

Mr. GINSBURG. The Antitrust Division reported in a letter to the chairman and Mr. Biden on July 1 a summary of its activities over the last 6 months, as it had on February 1 reported a summary of its calendar year 1984 activities involving resale price maintenance.

Those letters reflect that the Division received 18 complaints in 1984 and another 8 in the 6 months of 1985 that were covered, and the disposition of those complaints was laid out.

They were investigated informally, and where formal investigations were warranted, they were opened. Some of the investigations are still pending. Those complaints have not yet resulted in bringing a lawsuit, but I think it is important to understand that the evidence required in a resale price maintenance case makes it difficult to come across instances that are appropriate for enforcement.

In 1980, I think it was, or perhaps 1979, Assistant Attorney General Litvack announced his intention to bring as many such cases as possible, and caused the Division to investigate vigorously in this area and was able, as a result, to bring only one case; that was the Cuisinart instance.

I think the reason is fairly straightforward. The activity of resale price maintenance is unlawful where it is conducted through a vertical agreement and there is evidence that goes beyond mere dealer complaints about price cutting by some other dealer. That is the recent holding in Monsanto.

A manufacturer that wants to maintain resale prices, however, can, under the Colgate doctrine, unilaterally terminate dealers that discount its products. And a firm that is well-counseled should find it relatively easy to accomplish its objectives without, in fact, violating the law.

If it were to engage in the unlawful activity, it would have to do so in combination with a dealer so someone would be aware of its activities, and the threat of treble damages certainly deters that sort of thing from happening very frequently.

Senator SPECTER. Well, Mr. Ginsburg, without unduly dwelling on the subject now, I would recommend to you some of the hearings which have been held by this committee. There is quite a lot of concern among quite a number of Senators about the Department of Justice's conclusion as to the law on resale price maintenance.

Suffice it to say at this point that I would urge you to take a look at that and at least consider the views which have been expressed by quite a number of Senators on that subject.

Mr. GINSBURG. I would be happy to do so, Senator.

Senator SPECTER. Mr. Ginsburg, recently the Justice Department issued a set of enforcement guidelines describing the Antitrust Division's enforcement intentions with respect to both mergers and vertical restraints.

In your view, is it appropriate for the Department to publish such guidance for businessmen and legal counselors?

Mr. GINSBURG. Mr. Chairman, I think it is not only appropriate, but highly commendable when a law enforcement agency is in a position to give that sort of guidance to those affected by its activities.

Prosecutorial discretion is necessarily broad, but it does seem to me really a necessity in a democratic society, to the extent it is possible, to advise the public of the enforcement posture of the law enforcement agencies.

It is important to bear in mind that those guidelines are just that, guidelines to enforcement policy, and not statements of what the Department believes the law is or should be.

Senator SPECTER. It has been suggested by some outside the Department of Justice that merger laws should be cut back. What is your overall view of current merger laws, and do you favor reform in this area?

Mr. GINSBURG. Mr. Chairman, I think that the current merger laws are certainly adequate to deal with the anticompetitive mergers that arise. But it has recently been proposed, particularly by Secretary Baldrige of the Department of Commerce, that the laws are perhaps more than necessary or appropriate, with the result that section 7 of the Clayton Act is, he has asserted, inhibiting business behavior that is not at all anticompetitive and that could adequately be dealt with if it does lead to later problems under the standards of section 1 of the Sherman Act.

Secretary Baldrige is certainly in better communication with the business community and perhaps in a better position to make that statement than I am to deny it. But I have no personal basis for knowing whether that is, in fact, the case, let alone whether we could adequately deal with merger law in the absence of section 7.

Senator SPECTER. Attention has been focused recently on hostile tender offers and takeovers. This committee held a hearing on the competitive implications of hostile tender offers on May 1, and at that hearing the administration witnesses expressed the view that any antitrust problems arising from hostile tender offers are being handled adequately under current law.

Do you agree with that assessment?

Mr. GINSBURG. Mr. Chairman, I agree with that entirely. I think that a hostile tender offer has no special significance from a competitive point of view simply because it is hostile or simply because it is accomplished by a tender offer rather than a negotiated merger. They should be treated, as are friendly or negotiated transactions, under the same standards, which I think are fully adequate.

Senator SPECTER. Mr. Ginsburg, this committee hears a great deal about antitrust exemptions. Under what circumstances would you say, as a general proposition, should exemptions from antitrust laws be conferred, if any?

Mr. GINSBURG. Mr. Chairman, if we begin with the proposition, as I do and I think we should, that the antitrust laws are meant to protect free, open and competitive markets, then I think we would very quickly conclude that any exemptions from the antitrust laws should be approached with caution and drawn narrowly to fit the needs of the case.

The Congress has exempted various activities by statute from the full reach of the antitrust laws, particularly regulated industries, labor unions, and some others, and has before it now a proposal to immunize certain activities of professional sports teams, particularly franchise relocations.

I think that is one of those narrow instances in which an immunity or exemption may be appropriate, or indeed is appropriate in the case of the relocation clause. But they should be, as I say, approached quite cautiously.

Senator SPECTER. In referring to the football relocation bill, have you reviewed Senate bill 172, which I introduced, to provide an antitrust exemption for the relocation of professional football teams, providing it is done under standards set by the league and approved by the Congress, such as leaving if there is an inadequate stadium or loss of money for a 3-year period?

Mr. GINSBURG. Senator, I have read the testimony that Mr. Rule delivered on the general subject, including, I believe, that particular bill, and I do think it possible to address the issues raised by your bill on that basis.

The difficulty that I see there is in the formulation of a standard for judicial application—a standard that can attend to the consumer welfare implications of any particular relocation.

Senator SPECTER. Well, Mr. Rule said that the Department of Justice agreed that that limited antitrust exemption would be appropriate. Do you concur with Mr. Rule's conclusion?

Mr. GINSBURG. Yes; I do.

Senator SPECTER. Mr. Ginsburg, you and I met yesterday and talked at some length about a number of subjects. One of them I would like to make a matter of record today, and that is the subject of Conrail.

You have provided to me a letter dated July 23, 1985, from Acting Assistant Attorney General Charles F. Rule. This letter, without objection, will be made a part of the record.

[Committee insert:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affa.

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 01 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During his confirmation hearing on July 24, 1985, Assistant Attorney General-Designate Douglas H. Ginsburg agreed to make available to the Senate Judiciary Committee the February and July 1985 reports by the Department of Justice to the Congress concerning the Department's resale price maintenance enforcement activities. I enclose copies of these reports so that they can be made part of the record of the hearing.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

Enclosures

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 1, 1985

2

Honorable Mark O. Hatfield
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Conference Report on H.R. 5712, P.L. 98-411, the Department of Justice's Fiscal Year 1985 Appropriations Act, states that the conferees expect the Antitrust Division and the Federal Trade Commission to report to the Senate and House Appropriations Committees by February 1 and July 1, 1985, concerning our resale price maintenance enforcement programs. This letter sets forth the enforcement policy of the Department of Justice regarding resale price maintenance and summarizes the complaints received and the investigations pursued during calendar year 1984 regarding that practice.

Shortly after I assumed my current duties, I clearly stated the Department of Justice's commitment to enforce existing legal precedent regarding resale price maintenance unless and until the Supreme Court changed its interpretation of the Sherman Act as it relates to that practice. I have repeated this position several times in testimony before both the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary and before the Senate Small Business Committee in February 1984, in speeches and in correspondence with members of Congress. The Supreme Court has held that resale price maintenance -- that is, an agreement between a supplier and its distributors regarding the price at which the supplier's products or services are to be resold -- is *per se* unlawful. In its March 1984 decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 1/ the Court declined to reconsider that position. The *Monsanto* decision, however, reiterated the important distinction between concerted and independent action and held that mere complaints from retailers to a manufacturer,

---

1/ 52 U.S.L.W. 4341 (U.S. March 20, 1984).

followed by termination of a price-cutting retailer, do not establish an agreement to maintain retail prices. Rather, the Court held that there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently in order to establish the existence of an antitrust violation. 2/

In addition to my public statements concerning the Division's policy regarding resale price maintenance, I have, on several occasions, expressed to the Division's senior staff that we will consider all complaints of vertical price fixing that come to our attention, investigate such complaints that are adequately supported, and prosecute under existing legal precedent those instances in which we find the practice to be occurring. In making these decisions, we will take into account, as we do in making all prosecutorial decisions, such factors as the factual circumstances presented, the sufficiency of the evidence, the amount of commerce involved, and the likelihood that we would prevail at trial.

During calendar year 1984, the Division received and considered a total of eighteen complaints involving possible resale price maintenance. Although the Division filed no cases during calendar year 1984 alleging resale price maintenance, we have to date authorized three formal investigations into possible occurrence of that practice. Because these matters are the subject of pending investigations, I cannot publicly comment on them. In addition, we are currently pursuing two other complaints that may involve resale price maintenance, one of which was referred to us by the FTC.

Most of the complaints we received involved disputes between retailers and their suppliers and involved threatened or actual termination of the complaining retailer. As might be expected, however, not all these complaints concerning possible resale price maintenance actually involved that practice. Some complaints involved enforcement of a non-price restraint or company policies unrelated to price and provided no basis to believe that resale price maintenance was involved. For example, two complaints involved disputes about customer or territorial resale restrictions rather than price restraints. Another complaint involved the inability of a so-called 'grey market' importer to receive repair services from authorized domestic dealers and was eventually resolved as a result of a change in the authorized U.S. importer's warranty repair policy.

With respect to the remaining complaints in which resale price maintenance might possibly have been involved, there was,

---

2/ Id. at 4344.

in some situations, some evidence of complaints by other distributors addressed to the manufacturer about alleged discounting practices of the complaining dealer. In none of those situations, however, did either the dealer or our own review provide sufficient basis to justify opening a formal investigation. For example, a clothing retailer complained that it had been terminated by a clothing manufacturer pursuant to an agreement between the manufacturer and other dealers because of its discounting practice. We determined not to institute a formal investigation of this complaint because the available evidence was consistent with independent action by the manufacturer and nonterminated distributors. Moreover, the FTC had already investigated the meeting of the manufacturer and its distributors which was the primary focus of the complaint and had concluded that there was not sufficient evidence to suggest that the antitrust laws had been violated. In addition, because of this FTC investigation, the Justice Department would have deferred to the FTC for any further consideration of the matter pursuant to our long-standing liaison arrangement with that agency.

Another complaint about possible resale price maintenance made by a discount clothing chain was referred to the FTC pursuant to this arrangement because that agency was already investigating the same or related complaints. Another complaint alleged that certain parties were planning to engage in a resale price maintenance scheme and that termination of an uncooperative retailer had been threatened. The information indicated, however, that the planned scheme was not put into effect and the complainant agreed to contact us if it appeared that further activity in this regard might be occurring.

The remaining complaints of possible resale price maintenance appeared to involve legitimate, independent business decisions of the suppliers rather than unlawful agreements between the suppliers and their distributors. For example, a fast-food franchisee complained to both the Division and the FTC that his franchisor had directed him to lower his price on a certain item. Our review of this complaint indicated that the franchisor was encouraging its franchisees to offer a breakfast item at a special uniform low price in order to promote that item in its advertising campaign.

To summarize, the Division received eighteen complaints about possible resale price maintenance during calendar year 1984. Each of these complaints was pursued in accordance with the clear policy of the Department to enforce existing legal precedent declaring resale price maintenance to be *per se* unlawful. While no cases were filed by the Antitrust Division in 1984 alleging resale price maintenance, three formal investigations have been authorized and two other complaints are still under review.

It is not surprising that relatively few complaints about possible resale price maintenance have come to our attention. This is probably because the law in this area is clear and the per se rule and treble damage remedy have strong deterrent effects. Unlike horizontal price fixing agreements, unlawful vertical pricing agreements in general cannot be effectively concealed by the parties, so that adversely affected firms will almost certainly be aware of their existence and can seek relief by instituting a private lawsuit. Indeed, at least five of the complainants have filed private antitrust suits seeking judicial resolution of their grievances. In any event, we have followed through on our commitment to pursue all complaints of possible resale price maintenance that come to our attention, and we will continue to do so in the future. If manufacturers engage in such conduct despite its clear illegality, they do so at their own risk.

I trust this information will be useful to the Committee.

Sincerely,

J Paul McGrath

J. Paul McGrath
Assistant Attorney General
Antitrust Division

Antitrust Division

Office of the Assistant Attorney General
Washington, D.C. 20530

1 JUL 1985

Honorable Mark O. Hatfield
Chairman
Committe on Appropriations
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

This letter constitutes the final report of the Department of Justice on its resale price maintenance enforcement activities from January 1 through June 10, 1985. The Department of Justice submitted a report to Congress on February 1, 1985, regarding its resale price maintenance enforcement program during calendar year 1984. In that report, then Assistant Attorney General McGrath restated the Department's commitment to enforce existing legal precedent declaring resale price maintenance to be per se unlawful unless and until the Supreme Court changes its interpretation of the Sherman Act as it relates to that practice. He further stated the Department's policy to consider all complaints of vertical price fixing that come to its attention, to investigate such complaints that are adequately supported, and to prosecute under existing legal precedent those instances in which we find the practice to be occurring. The report stated that during 1984, a total of eighteen complaints about possible resale price maintenance had been received by the Department, that three formal investigations had been authorized, and that two other complaints were under review.

The Justice Department's policy with respect to this practice remains the same as set forth in its February 1, 1985 report. Although the Department has filed no cases from February 1, 1985, to date alleging resale price maintenance, four formal investigations are currently pending and three complaints involving possible resale price maintenance are under review. Because these matters are under review, I cannot publicly comment on them. Three of the four pending investigations into possible occurrences of resale price maintenance were authorized by the Antitrust Division prior to February 1, 1985, and, therefore, were reported in the February report. Of the two complaints that the February report stated were under consideration, one is now the subject of a formal investigation; the other is still under review, along with related materials obtained from a prior investigation by the Federal Trade Commission. A private civil action has been filed in the same matter and the Division is monitoring its course.

From February 1, to June 10, 1985, the Department received eight complaints about possible resale price maintenance. Of these, two remain under review. After reviewing the other six complaints, we concluded that there was insufficient evidence of resale price maintenance to support formal investigation by the Division. Each of those complaints involved actual or threatened termination of a distributor by a supplier, or a refusal to supply a retailer allegedly because of planned or actual discount pricing. In some situations, there was some evidence that termination followed discount pricing by the terminated dealer and complaints about low pricing by suppliers or competitors. In none of those situations, however, was there sufficient evidence of the concerted action required under *Monsanto* 1/ to find the existence of resale price maintenance. Instead, the evidence suggested that the termination or refusal to supply a given product was a unilateral, independent business decision by the supplier as opposed to the result of agreements between a manufacturer or franchisor and one or more distributors or franchisees.

One of the complaints appeared to have involved non-price restraints or company policies unrelated to resale price. That complaint was withdrawn when the firm that had allegedly refused to supply the complainant reversed its position. Accordingly, the Division decided it would not be appropriate to pursue the matter. Another of the complainants had never actually purchased products from the supplier about whom he complained. In at least one of these matters, we understand that the complainant has filed a private civil suit. In another, the complainant is attempting to supply additional information, and the Division is prepared to review that complaint in light of any new information.

As stated in our February report, it is not suprising that relatively few complaints about possible resale price maintenance have come to our attention. The law in this area is clear, and the *per se* rule and treble damage remedy have strong deterrent effects. In addition, the difficulty of concealing unlawful vertical agreements enable adversely affected firms to seek relief through private lawsuits. In any event, consistent with our announced policy, we have continued to pursue all complaints of possible resale price maintenance that have come to our attention, and we will continue to do so.

Sincerely,

Charles F. Rule
Acting Assistant Attorney General
Antitrust Division

1/ Under the Supreme Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984), mere complaints from retailers to a manufacturer, followed by termination of a price cutting retailer, do not establish an agreement to maintain resale prices. Rather, the Court held that in order to establish a violation of the antitrust laws, the evidence must tend both to prove that the manufacturer and others were acting in concert and to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.

Senator **Specter**. The concern that I expressed to you was on the timing of the Justice Department determination as to whether or not a prospective sale of Conrail to Norfolk would violate the antitrust.

In my view, the Congress ought to have the Justice Department's conclusion on that before voting on that proposed sale, or at least ought to know all the details of what the divestiture proposal would be.

As you and I discussed yesterday, there is an extensive letter from the Department of Justice on this subject in January of 1985 saying that the acquisition of Conrail by Norfolk would violate the antitrust laws unless divestiture were to be accomplished which would maintain competition.

As yet, the full details of the divestiture plan have not been discussed or disclosed; at least they have not been to this Senator. In the letter which you provided to me from Mr. Rule, it says, in part—and as I say, the full letter will be made a part of the record:

> In short, the Division has made a good start on its competitive analysis of the divestiture and is devoting a great deal of time and resources to ensuring that the analysis is complete and accurate.
>
> At the same time, however, I cannot say when the Division will complete its work and make a report to the Attorney General that will enable him to determine whether the proposed divestiture to GTI"—

That is Guilford Transportation Industries—

> And P and LE—

That is Pittsburgh and Lake Erie Railroad—

> Will address the competitive problems identified by the Department with respect to the Norfolk Southern/Conrail transaction.

Mr. Ginsburg, that is not quite what I had in mind. I think it is really insufficient just to say that you do not know when the work will be completed. And I can hardly ask you to express a judgment or an opinion as to when the work will be completed, since you have not gotten into the work.

But I would urge you that you make the Norfolk Southern/ Conrail issue a priority matter and that you do your best to bring the matter to a conclusion, if you are confirmed, at as early a date as possible so that the Congress will have the benefit of the Department of Justice conclusion.

Of even perhaps greater importance, your conclusion will compel the parties—Norfolk Southern and the other rail lines, P and LE and Guilford—to come forward with all the details as to what the divestiture is, so that we will know that prior to the time we have to vote.

It may well be that the ability of some of us to consider this matter and debate this matter may even exceed the amount of time you need to study the matter. I would ask you for your undertaking to make it a priority matter and give us your judgment as early as possible.

Mr. **Ginsburg**. Senator, I would like to say for the record something along the lines I said yesterday to you in private, and that is that I intend to give this transaction, if I am confirmed, the attention that I think a matter of this complexity and importance requires.

But I will undertake to do that, as you have just suggested, as rapidly as possible. And I was pleased to be able to confirm in that letter that the Division has indeed begun doing such work as it can without having received all of the details from the parties to the transaction yet.

Senator SPECTER. Well, do you know why it has not received all the details from the parties to the transaction? It seems to me that if the Department pressed for the details, the Department could get those details.

Mr. GINSBURG. Well, I understand that at least one aspect of the outstanding information relates to the financing of the transaction, and I do not know whether the arrangements have actually been finalized so that the information could be made available at all.

The financing is, of course, important because the sources of the financing must themselves be without a competitive interest in the outcome.

Senator SPECTER. Well, would you follow up on that and ask Mr. Rule to let me know if that information could be obtained at this time, if financing arrangements are sufficiently far along, because if they are not, that is also germane as to whether P and LE and Guilford can get the financing?

Mr. GINSBURG. I would be happy to have that done.

Senator SPECTER. All right. I would appreciate that.

Mr. Ginsburg, will you respond to requests to appear and testify before all duly constituted committees of the Senate if you are confirmed?

Mr. GINSBURG. I will do so.

Senator SPECTER. And I would restate what I said to you yesterday about the desirability of responding to requests from Senators as promptly as you can.

Mr. Ginsburg, as I said to you privately yesterday, I think you have a very fine academic background and an excellent work background. I compliment the Attorney General and the Department of Justice on securing your willingness to serve as Assistant Attorney General in the Department.

I think that your credentials are extraordinarily fine—the University of Chicago Law School and Harvard law faculty and other background which you bring. And as I have said to Mr. Willard, his credentials are also impeccable; perhaps a super abundance of Harvard backgrounds, with his being a magna cum laude from the Harvard Law School.

But it ~~is, I th~~ink, very good that the Department of Justice is attracting men of your caliber—young men with fine academic backgrounds and good work experience to tackle these very important and difficult jobs.

Mr. GINSBURG. Thank you very much, Mr. Chairman.

Senator SPECTER. And there are questions to be made a part of the record, with response by Mr. Willard and Mr. Ginsburg, from Senator Biden.

[Committee insert:]

Douglas Ginsburg
2326 20th Street, N.W.
Washington, D.C. 20009

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
218 Russell Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to submit the attached answers to written questions submitted to me at the conclusion of yesterday's hearings on my nomination to the position of Assistant Attorney General for the Antitrust Division, U.S. Department of Justice.

With the hope that these answers respond fully to your concerns, I remain yours

Sincerely,

Douglas Ginsburg
Assistant Attorney General-Designate

QUESTIONS AND ANSWERS

1. Q: Will you recuse yourself from matters involving those companies which you formerly represented? Do you believe such recusal will affect your ability to direct the Antitrust Division?

A: When I joined the Antitrust Division as a Deputy Assistant Attorney General in 1983 I recused myself from participation in various matters involving former consulting clients of mine, as reflected in the documents appended to this letter at Tab A. If confirmed as Assistant Attorney General, I would recuse myself to the same extent. I do not believe that such recusal will affect my ability to direct the Antitrust Division.

2. Q: I notice that you have done a great deal of writing on the subject of interstate banking. Last year, I expressed some concern to the Chairman regarding legislation--which is pending again in this Congress--to authorize regional interstate banking compacts. I am very concerned about the effects of this legislation on competition in the financial services industry. Are the big banks eventually going to swallow up all the small local banks? What effect will this have on consumers? What effect will such a trend have on the economy and the stability of our national banking system? Do you intend to focus on these issues as head of the Antitrust Division? Do you believe that much greater concentration in the banking industry will be beneficial or detrimental in the long run?

A: I have indeed written a good deal on the subject of interstate banking, and I remain of the opinion that an orderly transition to interstate banking, accompanied by appropriate antitrust safeguards, would be in the public interest. I certainly do not believe that "the big banks [are] eventually going to swallow up all the small local banks," however, nor would such a development be desirable. While not free from doubt, available data suggests that economies of scale are exhausted at a relatively small level in commercial banking. Banks of a larger size do not seem to realize measurable operating efficiencies and, indeed, tend to have a lower return on assets than do smaller and regional sized banks. To the extent that economies are available, however, barriers to their realization impose a deadweight loss to consumers. Banks and bank holding companies may find it efficient to expand across state lines in order to take advantage of economies of scale or scope or, more likely, new market opportunities. To the extent that they are allowed to do so, they will bring additional competition to those new markets, which should have a beneficial effect on consumers, whilst the antitrust laws should be adequate to prevent any competitive problems that might otherwise arise from interstate banking. Based on the numerous studies of this industry's economic characteristics, I would expect that large and small banks will survive and prosper side by side in an interstate banking environment, as they have in the past within a single state, much as large and small retail enterprises coexist and compete. Moreover, if interstate banking is allowed, I believe it will bring additional stability to our national banking system by allowing institutions to diversify their portfolios on a geographical basis. These considerations are dealt with at length in the articles of mine to which you referred, particularly the article appearing at 9 Hoftra Law Review 1133 (1981).

If I am confirmed as head of the Antitrust Division, I would focus on these issues primarily in two contexts. First, as you know, the Division reviews a very large number of bank mergers and acquisitions each year, and informs the relevant banking agencies when a merger threatens to have a significant adverse effect on competition. When necessary, the Division challenges in court acquisitions that violate the antitrust laws. Insofar as the states, through regional banking arrangements, authorize interstate bank mergers or bank holding company acquisitions, I would review them in the normal course of my work. Second, insofar as the Congress continues to debate the possibility of federal legislation on the subject of interstate banking, I will be available at the request of this or any other committee of the Congress to testify on the competitive issues raised by such legislation.

3. (a) To your knowledge, what is the Antitrust Division doing with regard to the analysis of the divestiture agreements which are an intrinsic part of this transaction [the proposed sale of Conrail to Norfolk Southern]?

(b) Will you and the staff who has worked on this matter be prepared to appear before this Committee and justify your analysis that this transaction merits the protection from the antitrust laws that is being requested?

(c) The Northeast Rail Service Act removed the Interstate Commerce Commission from its traditional role in analyzing the anticompetitive effects of rail mergers with regard to the sale of Conrail. As a result, that assignment fell to the Justice Department. What do you believe the scope of the Department's review ought to be? Do you believe it ought to be as comprehensive as an ICC review? If not, what should be the focus? How can the public be assured that this proposed sale is actually in the public interest without a full-scale antitrust review?

(a) At my request, Acting Assistant Attorney General Charles F. Rule wrote to Senator Spector on this general subject. From his letter (attached at Tab C), I understand that the Division has received a substantial amount of divestiture-related information from Norfolk Southern, Conrail, Guilford, and Pittsburgh & Lake Erie, and it expects to receive more information from those companies over the next several weeks. The Division is currently engaged in its investigation now of the divestiture agreements in order to resolve the outstanding issues at the earliest possible date. The Division staff has had many meetings and conversations with state and local government officials and shippers from Pennsylvania, New York, Ohio, and Indiana. In addition, the staff has made field visits to Buffalo, Toledo, Canton, and Indianapolis, where they have discussed the divestiture with affected shippers. Finally, the Division recently retained the transportation consulting firm of R.L. Banks and Associates, Inc. to assist it in making a preliminary analysis of the competitive consequences of the proposed divestiture.

(b) When the Division has completed its analysis and made its recommendation, I will be prepared to provide such testimony as this or any other Committee of Congress may request on the subject. I note that former Assistant Attorney General J. Paul McGrath has already explained the Department's analysis in testimony before this Committee, and Acting Assistant Attorney General Charles F. Rule has testified at length on the same subject before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce. The Division has also provided extensive written answers to questions about its analysis that have been posed by this Committee and individual Senators and by House committees and subcommittees and individual Members of Congress. I have been assured that Mr. Rule and the Division staff continue to work hard on this matter in order to provide the thorough analysis that the public deserves. If and when I am confirmed, one of my immediate priorities will be thoroughly to familiarize myself with the Norfolk Southern/Conrail merger, the Department's analysis of the transaction, and the divestiture proposals as soon as possible. I intend to be actively involved in the analysis of the proposed divestitures so that I personally can make a fully informed recommendation to the Attorney General about whether the proposed divestitures to Guilford and Pittsburgh & Lake Erie adequately addresses the competitive problems that the Department has identified.

(c) The Department of Justice's mandate in this matter was--as it should have been--limited to analyzing the competitive effects of the proposed merger. That was the request the Department received from the Department of Transportation, and that is the area of the Department's expertise that is relevant to this transaction.

Because the Department has far greater experience and expertise in competition analysis than the ICC has, I do not believe the ICC could have performed a better competitive analysis than the Department. It is also my understanding that the Division obtained much more relevant information on the merger's probable competitive effects--e.g., from shipper surveys and pre-existing planning documents--than the ICC obtains from reviewing operating plans custom-tailored by merging railroads for litigation purposes. On the other hand, the Department did not purport to consider non-competitive aspects of the merger, such as labor or environmental concerns. To the extent that the Department of Transportation has examined such matters, I would defer to that Department.

The Department of Justice made a lengthy, careful, and full-scale review of this proposed merger prior to advising Secretary Dole of its views on January 29 and March 26, 1985. In the coming months, I personally will see to it that the Department continues its thorough review of the competitive implications of the proposed divestitures, so as to provide the public with best possible competitive analysis of this very important transaction.

4. Do you believe that treble damages should be eliminated in all antitrust cases? Do you advocate this principle for all of antitrust or for just the so-called "rule of reason" cases? Can you explain to me how American consumers benefit from this change, if in fact the less severe penalty will strike at the heart of the deterrent effect of the antitrust laws and make it less likely that private individuals will bring legitimate antitrust claims?

Before answering your questions concerning treble damages, I must disagree with the suggestion in your preamble that the Antitrust Division has ignored and thus has failed to enforce the per se rule against resale price maintenance. On this point, I would refer you to the Antitrust Division's reports on its resale price maintenance enforcement activities during 1984 and during approximately the first half of this year, copies of which are attached at Tab B. At the hearing today, I expressed my firm intention to enforce current law, in the same manner that Paul McGrath made such a commitment early in his tenure at the Antitrust Division.

I do not believe that treble damages should be eliminated in antitrust cases involving activities that are per se illegal. In such cases, defendants have adequate knowledge that they are engaging in unlawful activity. In addition, the necessarily covert nature of such activity suggests that a rule of multiple damages is warranted. Moreover, there is simply no reason to believe that "hard core" per se illegal price fixing is overdeterred by the current treble damages rule. With respect to cases decided according to the rule of reason, however, I think that treble liability is questionable, and in some cases quite inequitable. Moreover, the threat of treble damage liability for openly engaging in business conduct that may later be held unlawful, notwithstanding a good faith effort to abide by the requirements of the law, undoubtedly deters procompetitive business arrangements, to the detriment of our economy.

The degree to which such inefficient over-deterrence occurs, however, is inherently difficult to assess. Nonetheless, I believe that Congress and the Administration should reevaluate the role of treble damages, and on the basis of that reassessment, determine whether and in what circumstances treble damages should be eliminated. Our mutual objective should be to maintain a strong deterrent for clearly anticompetitive conduct, while not "chilling" innovative conduct that may enhance consumer welfare. If this objective is met, the competitiveness of our economy would necessarily benefit.

5. Do you intend to recommend prosecution of individuals for violation of the antitrust laws? What kinds of cases do you believe merit this kind of treatment?

A: I believe that high-ranking corporate officers and others that engage personally in price fixing, bid-rigging, market allocation and other per se violations of the antitrust laws should be vigorously prosecuted. While I was a Deputy Assistant Attorney General, I recommended such prosecutions to the Assistant Attorney General wherever appropriate. There are, of course, reasons to exercise prosecutorial discretion not to prosecute individuals, and for this reason each case much be decided on its merits.

During this Administration, the Antitrust Division has initiated more than 350 criminal prosecutions, involving about 400 individual defendants in cases of the sort mentioned above. During that period, the Division has consistently recommended that jail sentences be imposed, and convicted price-fixers have served more than 20,000 days in jail. In addition, the Treasury has received almost $100 million in fines as a result of successful Antitrust Division prosecutions. I believe that this policy of vigorous enforcement is appropriate, and if confirmed, I would continue it.

Memorandum

Subject: Conflicts of Interest

Date: July 25, 1983

To:
Assistant Attorney General
Deputy Asst. Attorneys General
Directer of Operations
All Section Chiefs
and Field Office Chiefs
Antitrust Division

From:
Douglas H. Ginsburg
Deputy Assistant Attorney General - Designate
Antitrust Division

I disqualify myself from acting in any of the following matters:

1. All matters in which any of the following firms or their affiliates is directly involved:

    Chase Manhattan Corporation
    Fidelity Management & Research Corp.
    Rogers Cablesystems, Inc.
    State Street Boston Corporation

2. Any matter arising out of the dispute between General Telephone of Florida and Southern Bell Telephone Company over the appropriate holding time study period on which to base the division of interstate toll revenues.

3. Any matter involving the current controversy over the decision of the Federal Reserve Board and the Federal Reserve Banks to require same day payment of items presented before noon.

4. Any particular matter as required by 18 U.S.C. § 208.

Please refer any matter falling into any of these categories to another Deputy Assistant Attorney General or, if appropriate, to the Assistant Attorney General directly.

U.S. Department of Justice

Antitrust Division

ant Attorney General
Washington, D.C. 20530

July 1, 1985

Honorable Joseph W. Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Enclosed is a copy of the Antitrust Division's report I have sent today to the Senate Committee on Appropriations concerning enforcement of the law against resale price maintenance, which may be of interest to you and the other members of the Committee.

Sincerely,

Charles F. Rule
Acting Assistant Attorney General
Antitrust Division

Enclosure

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 23, 1985

Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

Assistant Attorney General-Designate for the Antitrust Division, Douglas H. Ginsburg, has told me that you wish to know the status of the Division's investigation of the proposed divestiture of certain rail assets by Norfolk Southern Corporation ("NS") to Guilford Transportation Industries ("GTI") and Pittsburgh & Lake Erie Railroad ("P&LE"), in connection with NS' proposed acquisition of Consolidated Rail Corporation ("Conrail").

The Division has received a substantial amount of divestiture-related information from NS, Conrail, GTI and P&LE, and we expect to receive more information from those companies over the next several weeks. The Division, however, is not awaiting receipt of all the information before investigating the divestitures. Indeed, we are fully engaged in that investigation now in order to resolve the outstanding issues at the earliest possible date. The Division staff has had many meetings and conversations with state and local government officials and shippers from Pennsylvania, New York, Ohio, and Indiana. In addition, the staff has made field visits to Buffalo, Toledo, Canton, and Indianapolis, where they discussed the divestiture with affected shippers. Finally, the Division recently retained the transportation consulting firm of R.L. Banks and Associates, Inc. to assist us in making a preliminary analysis of the competitive consequences of the proposed divestiture.

In short, the Division has made a good start on its competitive analysis of the divestiture and is devoting a great deal of time and resources to ensuring that the analysis is complete and accurate. At the same time, however, I cannot say when the Division will complete its work and make a report to the Attorney General that will enable him to determine whether the proposed divestitures to GTI and P&LE will address the competitive problems identified by the Department with respect to the NS/Conrail transaction.

I trust that this letter is fully responsive to your concerns about the status of the Division's work in this matter.

Sincerely,

Charles Rule

Charles F. Rule
Acting Assistant Attorney General
Antitrust Division

U.S. Department of Justice

Antitrust Division

ffice of the Assistant Attorney General

Washington, D.C. 20530

February 1, 1985

Honorable Joseph W. Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Enclosed is a copy of the Antitrust Division's report I have sent today to the Senate Committee on Appropriations concerning enforcement of the law against resale price maintenance, which may be of interest to you and the other members of the Committee.

Sincerely,

J. Paul McGrath
Assistant Attorney General
Antitrust Division

Enclosure

U.S. Department of Justice

Antitrust Division

ice of the Assistant Attorney General

Washington, D.C. 20530

February 1, 1985

Honorable Mark O. Hatfield
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Conference Report on H.R. 5712, P.L. 98-411, the Department of Justice's Fiscal Year 1985 Appropriations Act, states that the conferees expect the Antitrust Division and the Federal Trade Commission to report to the Senate and House Appropriations Committees by February 1 and July 1, 1985, concerning our resale price maintenance enforcement programs. This letter sets forth the enforcement policy of the Department of Justice regarding resale price maintenance and summarizes the complaints received and the investigations pursued during calendar year 1984 regarding that practice.

Shortly after I assumed my current duties, I clearly stated the Department of Justice's commitment to enforce existing legal precedent regarding resale price maintenance unless and until the Supreme Court changed its interpretation of the Sherman Act as it relates to that practice. I have repeated this position several times in testimony before both the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary and before the Senate Small Business Committee in February 1984, in speeches and in correspondence with members of Congress. The Supreme Court has held that resale price maintenance -- that is, an agreement between a supplier and its distributors regarding the price at which the supplier's products or services are to be resold -- is per se unlawful. In its March 1984 decision in Monsanto Co. v. Spray-Rite Service Corp., 1/ the Court declined to reconsider that position. The Monsanto decision, however, reiterated the important distinction between concerted and independent action and held that mere complaints from retailers to a manufacturer,

---

1/ 52 U.S.L.W. 4341 (U.S. March 20, 1984).

followed by termination of a price-cutting retailer, do not establish an agreement to maintain retail prices. Rather, the Court held that there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently in order to establish the existence of an antitrust violation. 2/

In addition to my public statements concerning the Division's policy regarding resale price maintenance, I have, on several occasions, expressed to the Division's senior staff that we will consider all complaints of vertical price fixing that come to our attention, investigate such complaints that are adequately supported, and prosecute under existing legal precedent those instances in which we find the practice to be occurring. In making these decisions, we will take into account, as we do in making all prosecutorial decisions, such factors as the factual circumstances presented, the sufficiency of the evidence, the amount of commerce involved, and the likelihood that we would prevail at trial.

During calendar year 1984, the Division received and considered a total of eighteen complaints involving possible resale price maintenance. Although the Division filed no cases during calendar year 1984 alleging resale price maintenance, we have to date authorized three formal investigations into possible occurrence of that practice. Because these matters are the subject of pending investigations, I cannot publicly comment on them. In addition, we are currently pursuing two other complaints that may involve resale price maintenance, one of which was referred to us by the FTC.

Most of the complaints we received involved disputes between retailers and their suppliers and involved threatened or actual termination of the complaining retailer. As might be expected, however, not all these complaints concerning possible resale price maintenance actually involved that practice. Some complaints involved enforcement of a non-price restraint or company policies unrelated to price and provided no basis to believe that resale price maintenance was involved. For example, two complaints involved disputes about customer or territorial resale restrictions rather than price restraints. Another complaint involved the inability of a so-called "grey market" importer to receive repair services from authorized domestic dealers and was eventually resolved as a result of a change in the authorized U.S. importer's warranty repair policy.

With respect to the remaining complaints in which resale price maintenance might possibly have been involved, there was,

---

2/ Id. at 4344.

in some situations, some evidence of complaints by other distributors addressed to the manufacturer about alleged discounting practices of the complaining dealer. In none of those situations, however, did either the dealer or our own review provide sufficient basis to justify opening a formal investigation. For example, a clothing retailer complained that it had been terminated by a clothing manufacturer pursuant to an agreement between the manufacturer and other dealers because of its discounting practice. We determined not to institute a formal investigation of this complaint because the available evidence was consistent with independent action by the manufacturer and nonterminated distributors. Moreover, the FTC had already investigated the meeting of the manufacturer and its distributors which was the primary focus of the complaint and had concluded that there was not sufficient evidence to suggest that the antitrust laws had been violated. In addition, because of this FTC investigation, the Justice Department would have deferred to the FTC for any further consideration of the matter pursuant to our long-standing liaison arrangement with that agency.

Another complaint about possible resale price maintenance made by a discount clothing chain was referred to the FTC pursuant to this arrangement because that agency was already investigating the same or related complaints. Another complaint alleged that certain parties were planning to engage in a resale price maintenance scheme and that termination of an uncooperative retailer had been threatened. The information indicated, however, that the planned scheme was not put into effect and the complainant agreed to contact us if it appeared that further activity in this regard might be occurring.

The remaining complaints of possible resale price maintenance appeared to involve legitimate, independent business decisions of the suppliers rather than unlawful agreements between the suppliers and their distributors. For example, a fast-food franchisee complained to both the Division and the FTC that his franchisor had directed him to lower his price on a certain item. Our review of this complaint indicated that the franchisor was encouraging its franchisees to offer a breakfast item at a special uniform low price in order to promote that item in its advertising campaign.

To summarize, the Division received eighteen complaints about possible resale price maintenance during calendar year 1984. Each of these complaints was pursued in accordance with the clear policy of the Department to enforce existing legal precedent declaring resale price maintenance to be per se unlawful. While no cases were filed by the Antitrust Division in 1984 alleging resale price maintenance, three formal investigations have been authorized and two other complaints are still under review.

It is not surprising that relatively few complaints about possible resale price maintenance have come to our attention. This is probably because the law in this area is clear and the per se rule and treble damage remedy have strong deterrent effects. Unlike horizontal price fixing agreements, unlawful vertical pricing agreements in general cannot be effectively concealed by the parties, so that adversely affected firms will almost certainly be aware of their existence and can seek relief by instituting a private lawsuit. Indeed, at least five of the complainants have filed private antitrust suits seeking judicial resolution of their grievances. In any event, we have followed through on our commitment to pursue all complaints of possible resale price maintenance that come to our attention, and we will continue to do so in the future. If manufacturers engage in such conduct despite its clear illegality, they do so at their own risk.

I trust this information will be useful to the Committee.

Sincerely,

J Paul McGrath

J. Paul McGrath
Assistant Attorney General
Antitrust Division

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 24, 1985

Honorable Strom Thurmond
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman

Attached are my answers to written questions submitted to me at the conclusion of today's hearing on my proposed confirmation as Assistant Attorney General for the Civil Division.

Sincerely,

Richard K. Willard

Richard K. Willard
Acting Assistant Attorney General
Civil Division

Enclosure

ANSWERS TO QUESTIONS FOR RICHARD WILLARD

1. ORGANIZATION: Mr. Willard, when Ed Schmults was at the Justice Department he had oversight responsibility for the Civil Division, the Antitrust Division, the Office of Legal Policy and most if not all other parts of the Justice Department that do not involve criminal law. William Bradford Reynolds would have assumed those responsibilities if he had been confirmed.

- With that slot vacant for over a year, to whom have you reported in your position as Acting Assistant Attorney General in charge of the Civil Division? Do you report directly to the Attorney General?

  Answer: Since Edward Schmults departed, I have reported to Lowell Jensen, who served as Acting Deputy Attorney General and currently serves as Deputy Attorney General, and to Carol Dinkins when she served as Deputy Attorney General. I do not ordinarily report directly to the Attorney General.

- Do you expect your responsibilities, or your ability to effect Administration policy, to change in any way once you are confirmed as Assistant Attorney General?

  Answer: If confirmed, I expect my responsibilities to remain essentially the same. Of course, the change from acting to confirmed status would enhance my ability to make a contribution to the Administration.

- Are you aware of any plans at the Justice Department to nominate someone else for the position of Associate Attorney General to which Brad Reynolds had been nominated?

  Answer: No.

2. LIE DETECTOR TESTS FOR GOVERNMENT EMPLOYEES: Mr. Willard, according to news accounts you were the "chief architect" of National Security Decision Directive 84, ("NSDD 84"), which was titled "Safeguarding National Security Information." That order from the President, issued in 1983, directed: (1) expanded use of lie detector tests and (2) increased use of "prepublication review" agreements for government officials.

- Was the press accurate in its characterization of you role as the "chief architect?"

Answer: NSDD-84 resulted from an interagency working group convened to address the problem of unauthorized disclosures of classified information. I chaired that group as a representative of the Justice Department, but its conclusions were the product of a consensus among the agencies represented.

The provision of NSDD 84 relating to polygraphs was withdrawn by the President in 1984 after Congress delayed its implementation and threatened to kill it, but it would appear that you are going to get your way, at least partially, concerning increased use of lie detectors, or "polygraphs" as a result of the much-publicized Walker spy case. According to today's news, the Conference Committee on the Defense Department Authorization Bill is expected to include a provision, to take effect in 1987, authorizing the Pentagon to subject to lie detector tests all of the military and civilian employees cleared to see classified information, which according to today's Washington Post would be about 4 million people.

-- Is 4 million people an accurate approximation?

Answer: It is my understanding that there are approximately 4 million civilian and military employees of the Department of Defense and contractor employees who have access to some level of classified information. Presumedly if the Congress authorizes the Secretary of Defense to utilize the polygraph as a condition of access to classified information, then any of those employees could be asked to take a polygraph examination.

However, as a practical matter, its use will be much more limited. DOD currently employs a fairly small number of polygraph examiners, and thus has a limited capacity to implement this proposed authority. It is my understanding that DOD has informed the Congress that it envisions utilizing this authority in no more than 10,000 cases each year.

-- How does the Defense Authorization Conference Committee's provision differ from what you were trying to achieve with NSDD 84? Will the effect of the conference committee's provision be broader, or more narrow? If it's more narrow, do you intend as Assistant Attorney General for the Civil Division, to push for the broader authorization contained in NSDD 84?

Answer: The DOD conference committee's provision would authorize the Defense Department to utilize the polygraph much as the NSA and CIA currently use it--as a condition of access to classified information.

NSDD-84 on the other hand was directed at the problem of investigating unauthorized disclosures of classified information, a somewhat different, although not less serious, problem.

With respect to your final question, if confirmed as Assistant Attorney General for the Civil Division, I do not expect to have responsibility for designing solutions to the problem of unauthorized disclosure of classified information. While the Civil Division may be involved in litigation concerning these matters, policy will be set by other agencies of the government, most notably, the National Security Council and the Information Security Oversight Office of the General Services Administration. NSDD-84 itself has of course been indefinitely suspended by the President to permit consultations with Congress on these matters.

- You were quoted in the Washington Post in 1983, when the issue of polygraphs was very active, as saying: "We think that the use of polygraphs will have a deterrent impact -- that is, the prospect of the polygraph will discourage people from leaking classified information."

-- What do you see as the primary purpose of the lie detector; is it to assist government agents in specific investigations of security leaks, or is it to scare, or intimidate, the federal bureaucracy from leaking in the first place?

Answer: The authorization for the use of the polygraph in leak investigations contained in NSDD-84 was designed to facilitate the investigation of leak cases. Often the polygraph is the only tool available to investigators in attempting to determine the source of an unauthorized disclosure of classified information.

Of course, it is hoped that the ability to detect unauthorized disclosures will deter government employees from engaging in this practice. Government employees have no right to "leak" classified information.

-- Do you believe that the intimidation approach in any way goes against this nation's historical distaste for prior restraint? Doesn't such a policy threaten to chill the free speech rights of employees who do not intend to divulge classified information, but are afraid to say anything about their jobs because of the risk that something they say may contain classified information?

Answer: Encouraging government employees to fulfill their fiduciary obligation to safeguard classified national security information does not constitute a prior restraint. The purpose of this policy is to discourage disclosure of classified information and not to interfere with the free speech rights of employees to disclose unclassified information. There are established procedures for employees to find out whether a particular piece of information is classified before it is disclosed.

- I'm sure you'll agree that the polygraph, or lie detector, is not perfectly reliable. Studies of the polygraph have reached every conceivable conclusion, from findings that it is almost 100% reliable to findings that it is almost no better than chance. The Office of Technology Assessment in the Congress issued a "Technical Memorandum" in 1983 in which it analyzed the myriad studies that have been done on the polygraph, and found that "the available research evidence does not establish the scientific validity of the polygraph test for personnel security screening," and that such testing "would probably incorrectly identify significant numbers of innocent persons as deceptive."

-- Is the fact that you continued to push for increased lie detector testing after OTA issued its report an indication that you disagree with those findings, or an indication that you believe that even if it is correct that is a price we must pay for national security?

Answer: As your question recognizes, there are legitimate scientific differences over the reliability of the polygraph as an investigative tool. The portion of the OTA study quoted in this question referred to the use of the polygraph in security screening, not in narrowly focused investigations of past misconduct such as unauthorized disclosures. In any event, although I do not entirely agree with the OTA findings, I do agree that the polygraph is not perfectly reliable. However, for many years our government has recognized that use of the polygraph is appropriate for security screening at highly sensitive intelligence agencies, such as CIA and NSA. The possibility that an innocent person may be incorrectly precluded from working at one of these agencies, is, in a sense, a price that we pay for the use of this security screening technique.

- There can't be a definitive answer to this question, but I'd like to hear your opinion: Do you think that if the polygraph requirements you were seeking in NSDD 84 had been in effect for the past 20 years we would have caught alleged Navy spy John Walker, and his three alleged accomplices, before they were able to do significant damage to the national security?

  Answer: The authorization for the use of the polygraph contained in NSDD-84 was primarily directed toward investigating leaks of classified information and not at espionage cases. However, it seems likely that a greater use of the polygraph in screening individuals for continued access to highly classified information could help to identify individuals who are abusing their trust.

3. PREPUBLICATON REVIEW: Mr. Willard, the second aspect of NSDD 84 concerned "prepublication review." It would have required all persons with access to "sensitive compartmented information" to sign an agreement that would include a provision requiring them to submit, for life, all writings that might contain classified information, so that classified information could be censored.

- Jeane Kirkpatrick, former U.S. Ambassador to the United Nations, was asked by the State Department to sign a prepublication review agreement which would have required her to submit all her future writings to the State Department for censorship. She refused to sign it, later saying: "It is an extraordinary document. You could never write after signing it." Do you believe that she should have to sign such a form? Do you think all high-ranking officials should have to?

  Answer: I cannot speak for Ambassador Kirkpatrick on this issue. However, I believe that it is appropriate for her and other high-ranking officials who have had access to extremely sensitive classified information to submit for prepublication review future writings that may contain classified information to which they had access in the course of their government service. The constitutionality of such agreements for CIA employees was upheld by the Supreme Court in Snepp v. United States (1980). Although the prepublication review agreement developed as a result of NSDD-84 has been withdrawn, similar agreements promulgated prior to NSDD-84 remain in effect. A number of former high-ranking officials have submitted their memoirs or portions thereof for prepublication review, including Secretaries of State Kissinger, Vance, and Haig, National Security Adviser Brzezinski and Attorney General Bell.

° How high into the government would it reach? Would George Shultz have to submit his future writings to the Secretary of State in the administration that comes into office in 1989? Would President Reagan have to submit his writings to future presidents?

Answer: The requirement would extend to all employees with access to sensitive compartmented information, including Secretary of State Shultz. It would not include elected officials such as the President, who obtain access to information as a consequence of their election to office rather than as a condition of employment.

° As Assistant Attorney General in the Civil Division will you try again to implement the prepublication review provision of NSDD 84?

Answer: As noted above, this would be a decision for the National Security Council and would not fall within my authority if I am confirmed as Assistant Attorney General for the Civil Division.

Senator **Specter**. I will have to absent myself at this time. I had come at about 2:30 for a very short period of time and was asked by Senator Thurmond to preside at this hearing because he has been committed to a markup in the Armed Services Committee.

These are very important hearings, but as it is now 4:16 and I have quite a number of commitments which have awaited my attention, I cannot stay beyond this point. Mr. Short assures me that it is in conformity with our committee practice to leave the balance of the proceeding to Senator Metzenbaum, who may possibly, perchance, have a question or two. [Laughter.]

Senator **Metzenbaum**. I do not have many, as a matter of fact.

Senator **Specter**. Then my speculation was correct; he does have a question or two.

Senator **Metzenbaum** [presiding]. A question or two is correct.

Mr. Chairman, first I would like to make a statement. Today's hearing focuses on President Reagan's third nominee to head the Justice Department's Antitrust Division. To date, I have not received any information which would cast a cloud over Mr. Ginsburg, the nominee.

Your academic background is outstanding; you meet the qualifications for the position. But I continue to be concerned, Mr. Chairman that the President has again chosen a devotee of the so-called Chicago School of Antitrust.

Indeed, I note that Mr. Ginsburg is a graduate of that school, which believes that their own theories should replace Supreme Court decisions and common sense about enforcing the antitrust laws for the benefit of consumers.

Since we do have free speech in this country, I respect their right to have their point of view even if they may be wrong.

But, antitrust, before this administration, was a bipartisan endeavor. Republican Senator John Sherman of my own State authored the first antitrust laws. The first President to vigorously enforce the laws was Republican President Theodore Roosevelt.

Richard McLaren, Thomas Kauper, and Donald Baker rendered fine service under Presidents Nixon and Ford. I am at a loss to see why the bipartisan spirit that Congress has toward effective antitrust enforcement cannot carry over to the Justice Department.

Record numbers of mergers, attempts to overrule Supreme Court decisions against pricefixing, and not a single case challenging a vertical restraint, frankly should be an embarrassment to an administration committed to free enterprise.

We may disagree about tough environmental or labor regulations and their effect on society, but I see no reason to view antitrust as a regulatory burden on consumers. Rather, effective antitrust is pro, not anti-free enterprise, as I see it.

Now, President Reagan's first nominee to enforce the antitrust laws, William Baxter, took the position that he simply was not going to enforce laws, such as the per se prohibition on vertical pricefixing, with which he personally disagreed.

The next nominee, Paul McGrath, publicly stated that he would enforce these laws and abide by the Supreme Court's per se rule. Although the record shows no cases actually brought, I thought that, Mr. Ginsburg, we ought to have you on the record concerning your position with respect to vertical pricefixing.

Mr. **Ginsburg**. Senator Metzenbaum, I addressed that briefly before and would be happy to expand on the issue. Let me begin by embracing and reiterating as my own Paul McGrath's assurances that the Department will and would, if I am confirmed, continue to enforce the law as it is handed down by the courts, including the law against resale price maintenance which was most recently interpreted and implictly affirmed in the Monsanto case last term.

As I said earlier on, the Department submitted to the chairman and to Senator Biden a report—a copy of a report sent to Senator Hatfield on July 1 of this year, and earlier on February 1 of this year, relating to its resale price maintenance enforcement activities during the period January 1 to July 1, 1985, and in the instance of the prior report, for the calendar year 1984.

Those reports state the number of complaints relating to resale price maintenance that the Division received, the degree to which they were investigated or pursued, and their ultimate disposition.

The letters—and I would be happy to make one a part of the record in this hearing if you will allow me to submit it—the letters will indicate that 26 complaints were received; that a number are still pending at the Division. None has resulted in a case being brought by the Department, although a couple of private cases have been brought, I believe, and one of the complaints was withdrawn by the complainant when the manufacturer in question agreed to deal with it after all.

That sort of report is, I think, useful in highlighting the degree to which the Division has been active in the area of resale price maintenance in the time since Paul McGrath made that commitment, and I would certainly continue that level of commitment to enforcement.

Senator **Metzenbaum**. Thank you.

Now, I am unaware of a single case which your 2 immediate predecessors filed challenging a vertical restraint of trade. Yet, I understand the Department has been looking for over 2 years at the practice of the major beer companies demanding the networks give them exclusive rights on popular sports programming.

Without prejudicing the investigation, can we expect a prompt decision from you on this?

Mr. **Ginsburg**. Senator, if that matter is pending at such time as I may be confirmed, I will give it my prompt attention, I assure you.

Senator **Metzenbaum**. And if you decide not to prosecute, can we have a full explanation of your reasons?

Mr. **Ginsburg**. Senator, before I have seen the nature of the case or any of the factual information involved, I am reluctant to make explicit commitments about the degree to which the Department goes on record.

I think, in general, it is a good practice in cases of great public interest for the Division to explain its enforcement decisions, for the same reasons that I think it is a good practice to have enforcement guidelines available to the public.

The Division does, from time to time, do that, as it did in the international oil investigation and in other cases. And if this is an appropriate case for that sort of treatment, I would be certain to do it.

Senator **Metzenbaum**. I was just inquiring as to your position with respect to the antitrust aspects of legislation pertaining to the sports teams and leagues, et cetera. But I gather you have already responded to that, indicating your support for a limited antitrust exemption for some portions of the sports industry.

Mr. **Ginsburg**. With respect to the question of franchise relocation, in particular, and I associated myself with the testimony that Mr. Rule gave on behalf of the Department earlier.

Senator **Metzenbaum**. I may have some additional questions. You and I almost got together in a private meeting.

Mr. **Ginsburg**. Yes, sir.

Senator **Metzenbaum**. And just by reason of a time conflict, I was unable to meet with you, but I may find it desirable to do so. When do you expect this to come before the committee?

Mr. **Short**. Senator, it is on the agenda for a vote tomorrow morning at 10.

Senator **Metzenbaum**. Well, I am not certain as to whether I will want to lay it over; I am not saying that I will. I would like to think about that, but if I do or even if I do not, I might ask you to come in to see me for some further questions.

Mr. **Ginsburg**. Senator, I would be delighted to see you at any time.

Senator **Metzenbaum**. Thank you, sir.

Does the Monsanto case make it more difficult for victims of vertical pricefixing to prove the antitrust violation?

Mr. **Ginsburg**. Senator, I think that the Monsanto case upheld a finding that there had been a violation of the prohibition on resale price maintenance on the basis of very slight evidence indeed.

And while the court said that evidence beyond mere dealer complaints would be required, its finding that the evidence in that case was sufficient indicated to me that very little is necessary beyond a dealer complaint.

The company seemed to have solicited an agreement by expressing itself conditionally. Someone on behalf of Monsanto apparently said that if the dealer in question did not charge the list price, it would find itself short of supply during the peak season.

Well, that sort of conditionality goes beyond what a manufacturer is allowed to do under the Colgate doctrine, which is unilaterally to terminate a dealer, but not to elicit an agreement to charge a list price.

Senator **Metzenbaum**. As I understand, you do not have any position with respect to the pending S. 1300?

Mr. **Ginsburg**. That is correct, Senator. I believe the administration will be testifying on Monday. I am not even sure who is appearing; I think it is Mr. Rule for the administration. I have not looked at the issue myself.

Senator **Metzenbaum**. Mr. Chairman, I have no further questions. I may want to submit some in writing and I may want Mr. Ginsburg—is it Dr. Ginsburg or Mr. Ginsburg?

Mr. **Ginsburg**. Mr. Ginsburg.

Senator **Metzenbaum**. Mr. Ginsburg to meet with me, but at this point I have no further questions. And under those circumstances, this committee stands adjourned.

Thank you.

Mr. **Ginsburg**. Thank you.

[Whereupon, at 4:27 p.m., the committee was adjourned.]

[The following material was subsequently supplied for the record:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 01 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During his confirmation hearing on July 24, 1985, Assistant Attorney General-Designate Douglas H. Ginsburg agreed to make available to the Senate Judiciary Committee the February and July 1985 reports by the Department of Justice to the Congress concerning the Department's resale price maintenance enforcement activities. I enclose copies of these reports so that they can be made part of the record of the hearing.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

Enclosures

U.S. Department of Justice

Antitrust Division

ice of the Assistant Attorney General *Washington, D.C. 20530*

February 1, 1985

2:

Honorable Mark O. Hatfield
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Conference Report on H.R. 5712, P.L. 98-411, the Department of Justice's Fiscal Year 1985 Appropriations Act, states that the conferees expect the Antitrust Division and the Federal Trade Commission to report to the Senate and House Appropriations Committees by February 1 and July 1, 1985, concerning our resale price maintenance enforcement programs. This letter sets forth the enforcement policy of the Department of Justice regarding resale price maintenance and summarizes the complaints received and the investigations pursued during calendar year 1984 regarding that practice.

Shortly after I assumed my current duties, I clearly stated the Department of Justice's commitment to enforce existing legal precedent regarding resale price maintenance unless and until the Supreme Court changed its interpretation of the Sherman Act as it relates to that practice. I have repeated this position several times in testimony before both the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary and before the Senate Small Business Committee in February 1984, in speeches and in correspondence with members of Congress. The Supreme Court has held that resale price maintenance -- that is, an agreement between a supplier and its distributors regarding the price at which the supplier's products or services are to be resold -- is per se unlawful. In its March 1984 decision in Monsanto Co. v. Spray-Rite Service Corp., 1/ the Court declined to reconsider that position. The Monsanto decision, however, reiterated the important distinction between concerted and independent action and held that mere complaints from retailers to a manufacturer,

---

1/ 52 U.S.L.W. 4341 (U.S. March 20, 1984).

followed by termination of a price-cutting retailer, do not establish an agreement to maintain retail prices. Rather, the Court held that there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently in order to establish the existence of an antitrust violation. 2/

In addition to my public statements concerning the Division's policy regarding resale price maintenance, I have, on several occasions, expressed to the Division's senior staff that we will consider all complaints of vertical price fixing that come to our attention, investigate such complaints that are adequately supported, and prosecute under existing legal precedent those instances in which we find the practice to be occurring. In making these decisions, we will take into account, as we do in making all prosecutorial decisions, such factors as the factual circumstances presented, the sufficiency of the evidence, the amount of commerce involved, and the likelihood that we would prevail at trial.

During calendar year 1984, the Division received and considered a total of eighteen complaints involving possible resale price maintenance. Although the Division filed no cases during calendar year 1984 alleging resale price maintenance, we have to date authorized three formal investigations into possible occurrence of that practice. Because these matters are the subject of pending investigations, I cannot publicly comment on them. In addition, we are currently pursuing two other complaints that may involve resale price maintenance, one of which was referred to us by the FTC.

Most of the complaints we received involved disputes between retailers and their suppliers and involved threatened or actual termination of the complaining retailer. As might be expected, however, not all these complaints concerning possible resale price maintenance actually involved that practice. Some complaints involved enforcement of a non-price restraint or company policies unrelated to price and provided no basis to believe that resale price maintenance was involved. For example, two complaints involved disputes about customer or territorial resale restrictions rather than price restraints. Another complaint involved the inability of a so-called "grey market" importer to receive repair services from authorized domestic dealers and was eventually resolved as a result of a change in the authorized U.S. importer's warranty repair policy.

With respect to the remaining complaints in which resale price maintenance might possibly have been involved, there was,

---

2/ *Id*. at 4344.

in some situations, some evidence of complaints by other distributors addressed to the manufacturer about alleged discounting practices of the complaining dealer. In none of those situations, however, did either the dealer or our own review provide sufficient basis to justify opening a formal investigation. For example, a clothing retailer complained that it had been terminated by a clothing manufacturer pursuant to an agreement between the manufacturer and other dealers because of its discounting practice. We determined not to institute a formal investigation of this complaint because the available evidence was consistent with independent action by the manufacturer and nonterminated distributors. Moreover, the FTC had already investigated the meeting of the manufacturer and its distributors which was the primary focus of the complaint and had concluded that there was not sufficient evidence to suggest that the antitrust laws had been violated. In addition, because of this FTC investigation, the Justice Department would have deferred to the FTC for any further consideration of the matter pursuant to our long-standing liaison arrangement with that agency.

Another complaint about possible resale price maintenance made by a discount clothing chain was referred to the FTC pursuant to this arrangement because that agency was already investigating the same or related complaints. Another complaint alleged that certain parties were planning to engage in a resale price maintenance scheme and that termination of an uncooperative retailer had been threatened. The information indicated, however, that the planned scheme was not put into effect and the complainant agreed to contact us if it appeared that further activity in this regard might be occurring.

The remaining complaints of possible resale price maintenance appeared to involve legitimate, independent business decisions of the suppliers rather than unlawful agreements between the suppliers and their distributors. For example, a fast-food franchisee complained to both the Division and the FTC that his franchisor had directed him to lower his price on a certain item. Our review of this complaint indicated that the franchisor was encouraging its franchisees to offer a breakfast item at a special uniform low price in order to promote that item in its advertising campaign.

To summarize, the Division received eighteen complaints about possible resale price maintenance during calendar year 1984. Each of these complaints was pursued in accordance with the clear policy of the Department to enforce existing legal precedent declaring resale price maintenance to be *per se* unlawful. While no cases were filed by the Antitrust Division in 1984 alleging resale price maintenance, three formal investigations have been authorized and two other complaints are still under review.

It is not surprising that relatively few complaints about possible resale price maintenance have come to our attention. This is probably because the law in this area is clear and the per se rule and treble damage remedy have strong deterrent effects. Unlike horizontal price fixing agreements, unlawful vertical pricing agreements in general cannot be effectively concealed by the parties, so that adversely affected firms will almost certainly be aware of their existence and can seek relief by instituting a private lawsuit. Indeed, at least five of the complainants have filed private antitrust suits seeking judicial resolution of their grievances. In any event, we have followed through on our commitment to pursue all complaints of possible resale price maintenance that come to our attention, and we will continue to do so in the future. If manufacturers engage in such conduct despite its clear illegality, they do so at their own risk.

I trust this information will be useful to the Committee.

Sincerely,

J. Paul McGrath

J. Paul McGrath
Assistant Attorney General
Antitrust Division

Antitrust Division

Office of the Assistant Attorney General
Washington, D.C. 20530

1 JUL 1985

Honorable Mark O. Hatfield
Chairman
Committe on Appropriations
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

This letter constitutes the final report of the Department of Justice on its resale price maintenance enforcement activities from January 1 through June 10, 1985. The Department of Justice submitted a report to Congress on February 1, 1985, regarding its resale price maintenance enforcement program during calendar year 1984. In that report, then Assistant Attorney General McGrath restated the Department's commitment to enforce existing legal precedent declaring resale price maintenance to be per se unlawful unless and until the Supreme Court changes its interpretation of the Sherman Act as it relates to that practice. He further stated the Department's policy to consider all complaints of vertical price fixing that come to its attention, to investigate such complaints that are adequately supported, and to prosecute under existing legal precedent those instances in which we find the practice to be occurring. The report stated that during 1984, a total of eighteen complaints about possible resale price maintenance had been received by the Department, that three formal investigations had been authorized, and that two other complaints were under review.

The Justice Department's policy with respect to this practice remains the same as set forth in its February 1, 1985 report. Although the Department has filed no cases from February 1, 1985, to date alleging resale price maintenance, four formal investigations are currently pending and three complaints involving possible resale price maintenance are under review. Because these matters are under review, I cannot publicly comment on them. Three of the four pending investigations into possible occurrences of resale price maintenance were authorized by the Antitrust Division prior to February 1, 1985, and, therefore, were reported in the February report. Of the two complaints that the February report stated were under consideration, one is now the subject of a formal investigation; the other is still under review, along with related materials obtained from a prior investigation by the Federal Trade Commission. A private civil action has been filed in the same matter and the Division is monitoring its course.

From February 1, to June 10, 1985, the Department received eight complaints about possible resale price maintenance. Of these, two remain under review. After reviewing the other six complaints, we concluded that there was insufficient evidence of resale price maintenance to support formal investigation by the Division. Each of those complaints involved actual or threatened termination of a distributor by a supplier, or a refusal to supply a retailer allegedly because of planned or actual discount pricing. In some situations, there was some evidence that termination followed discount pricing by the terminated dealer and complaints about low pricing by suppliers or competitors. In none of those situations, however, was there sufficient evidence of the concerted action required under Monsanto 1/ to find the existence of resale price maintenance. Instead, the evidence suggested that the termination or refusal to supply a given product was a unilateral, independent business decision by the supplier as opposed to the result of agreements between a manufacturer or franchisor and one or more distributors or franchisees.

One of the complaints appeared to have involved non-price restraints or company policies unrelated to resale price. That complaint was withdrawn when the firm that had allegedly refused to supply the complainant reversed its position. Accordingly, the Division decided it would not be appropriate to pursue the matter. Another of the complainants had never actually purchased products from the supplier about whom he complained. In at least one of these matters, we understand that the complainant has filed a private civil suit. In another, the complainant is attempting to supply additional information, and the Division is prepared to review that complaint in light of any new information.

As stated in our February report, it is not suprising that relatively few complaints about possible resale price maintenance have come to our attention. The law in this area is clear, and the *per se* rule and treble damage remedy have strong deterrent effects. In addition, the difficulty of concealing unlawful vertical agreements enable adversely affected firms to seek relief through private lawsuits. In any event, consistent with our announced policy, we have continued to pursue all complaints of possible resale price maintenance that have come to our attention, and we will continue to do so.

Sincerely,

Charles F. Rule
Acting Assistant Attorney General
Antitrust Division

1/ Under the Supreme Court's decision in Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984), mere complaints from retailers to a manufacturer, followed by termination of a price cutting retailer, do not establish an agreement to maintain resale prices. Rather, the Court held that in order to establish a violation of the antitrust laws, the evidence must tend both to prove that the manufacturer and others were acting in concert and to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.

BIOGRAPHIES

RICHARD K. WILLARD

NOMINEE, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Birth: September 1, 1948, Houston, TX.

Legal Residence: Virginia.

Marital Status: Married to Leslie Harral Hopkins, 2 children.

Education: 1965-1969—Emory University, B.A. degree. 1972-1975—Harvard Law School J.D. degree.

Bar: 1975—Georgia. 1978—Texas.

Military Service: 1969-1972—United States Army.

Experience: 1975-1976—Law Clerk, Honorable Anthony M. Kennedy, U.S. Court of Appeals, Ninth Circuit, Sacramento, CA. 1976-1977—Law Clerk, U.S. Supreme Court Justice Harry A. Blackmun. 1977-1981—Baker & Botts, Houston, TX. 1980-1981—Consultant, Office of the President-Elect and Office of the Counsel to the President. 1981-1982—Counsel for Intelligence Policy, Department of Justice. 1982-1983—Deputy Assistant Attorney General, Civil Division, Department of Justice. 1983-present—Acting Assistant Attorney General, Civil Division, Department of Justice.

DOUGLAS H. GINSBURG

NOMINEE, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Birth: May 25, 1946. Chicago, IL.

Legal Residence: Massachusetts.

Marital Status: Married to Hallee P. Morgan, M.D., 2 children.

Education: 1964-1965—Cornell University, 1968-1970—B.A. degree. 1970-1973—The University of Chicago Law School. J.D. degree.

Bar: 1973—Illinois.

Experience: 1965-1968—Vice President, Marketing "Operation Match," Compatibility Research, Inc. 1973-1974—Law Clerk to the Honorable Carl McGowan, U.S. Court of Appeals. 1974-1975—Law Clerk to U.S. Supreme Court Justice Thurgood Marshall. 1975-1981—Assistant Professor of Law Harvard University. 1981-1983—Professor of Law Harvard University. 1983-1984—Deputy Assistant Attorney General for Regulatory Affairs, Antitrust Division. 1984-present—Administrator for Information and Regulatory Affairs, Office of Management and Budget.

CONFIRMATION HEARING ON FERDINAND F. FERNANDEZ

WEDNESDAY, JULY 31, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:11 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell and Simon.

Staff present: Duke Short, Chief Investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

The purpose of the meeting today is to consider the confirmation of Judge Ferdinand F. Fernandez, of California, to be United States district judge for the Central District of California.

I see the distinguished and able Senator from California here, Mr Wilson. Would you care to make some comments about this nomination?

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. I am very grateful for the courtesy that you have extended, the privilege, of introducing to you and the distinguished members of this committee, Judge Ferdinand Fernandez, who has been nominated to be United States district judge for the Central District of California.

Judge Fernandez was appointed to the California Superior Court 5 years ago. In that brief time, he has earned the admiration of all who have come before him.

I think there is absolutely no doubt on the part of those who have observed his performance as to his determination to see justice done. The committee should know he is very highly regarded by both the county prosecutors in San Bernardino County and the sheriff of that county.

He has been a member of the California State Bar for the past 22 years. Judge Fernandez practiced law with the firm of Allard, Shelton and O'Connor, in Pomona, from 1964 to 1980. So he has had extensive experience in private practice.

He is well known for his involvement in professional and community organizations, including the California Judges Association, the California Center for Judicial Education and Research, and a number of special section committees of those organizations.

He has been certified by the California Board of Legal Specialization as a specialist in Taxation, and is also widely known as a student of the law, having been published in a number of scholarly publications.

He has received his LL.B. degree from the University of Southern California, where he also received his bachelor's. He then took a master in laws from Harvard Law School in 1963. He has been a clerk to a very able member of the judiciary, of the Federal bench that he will, in fact, be joining, the Honorable Matt Burne, a district court judge for the Central District of California, who thinks very, very highly of him.

Judge Fernandez holds the personal and professional attributes necessary to make him, I think, an outstanding Federal judge. He has been an outstanding judge in the State courts.

Of great importance is the fact that he recognizes the role of a judge to be that of law enforcer rather than lawmaker. He is a strict constructionist. He has willingly sacrificed the rewards of a successful private practice to dedicate himself to improvement of the judicial system.

Mr. CHAIRMAN, I will not take more time. This is an appointment that I am proud to recommend, first to the President and then to the members of this committee. I think that Judge Fernandez will be very great credit to what is already a very fine bench in the Central District of California.

His appointment will be a distinct plus to law enforcement in the true sense of that term, and a very great benefit to the Nation. So I would respectfully urge the committee to move quickly to recommend his confirmation to the full Senate so that he may begin his service on the Federal bench.

I am grateful to the committee for having acted so promptly. The committee has acted promptly. The process that got Judge Fernandez here, as we both know, has not, which is a subject I would be happy to discuss with the full committee at another time.

But, today, your sole business is with Judge Fernandez, and I recommend him to you very heartily. Thank you, sir.

The CHAIRMAN. Thank you very much, Senator. We are very pleased to have you here.

I would say to Judge Fernandez, I congratulate you upon the President appointing you, and I congratulate you upon the high endorsement of Senator Wilson here, who is held in such high esteem here by his colleagues in the Senate.

Judge FERNANDEZ. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Thank you, Mr. Chairman.

I might say, Judge Fernandez, I listened with interest to the introductory remarks of my friend from California, Senator Wilson. You certainly come highly recommended. I typically try to come by these hearings and congratulate the nominees on making it through the selection process and getting it this far, and from what I have heard about your credentials, I think the likelihood of your confirmation is great and I look forward to supporting it. Congratulations.

Judge **Fernandez**. Thank you.

The **Chairman**. Senator Wilson, we would be glad to have you remain, if you have time. If not, you feel free to leave whenever you want to.

Senator **Wilson**. Thank you very much, Mr. Chairman.

The **Chairman**. Now, Judge, if you will stand up and be sworn? Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Judge **Fernandez**. I will.

The **Chairman**. Do you have any family or friends here you wish to introduce?

STATEMENT OF FERDINAND F. FERNANDEZ, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge **Fernandez**. No, sir, I do not.

The **Chairman**. Judge Fernandez, at present you are a superior court judge for the county of San Bernardino, California. This court, I believe, is a trial court of general jurisdiction.

Judge **Fernandez**. Yes, sir.

The **Chairman**. It is the highest trial court in the State. Do you have the power of death in criminal cases?

Judge **Fernandez**. Yes, sir.

The **Chairman**. And you have served in this capacity for approximately 5 years, I believe, and I am confident you are knowledgeable of your State laws. The only question I was asking is if you foresee any difficulty in shifting from the State court to the Federal court.

Judge **Fernandez**. Well, Mr. Chairman, my graduate work in law was in the Federal system and constitutional law. I also did clerk for a Federal judge. In addition, I have tried to stay somewhat current on Federal issues and was, as the Senator has mentioned, a certified taxation specialist.

I am sure that, nevertheless, I am going to have to work very hard over the next few months and years, and I am quite ready to do that.

The **Chairman**. Judge Fernandez, would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Judge **Fernandez**. Well, Mr. Chairman, at this point I am not expecting to see any significant conflicts of interest. However, if any did develop and they turned out to be serious conflicts of interest, I would frankly intend to recuse myself.

If there were conflicts that were of a considerably less serious nature, it would be my intent to bring together the parties to the litigation and, in a nonthreatening and noncoercive manner, explain the situation to them and obtain their feelings regarding my sitting on their case.

The **Chairman**. Judge Fernandez, in his famous dissent in *Plessey* v. *Ferguson* in 1893, Justice John Harlan referred to our Constitution as a color-blind Constitution. Would you agree with this characterization?

Judge **Fernandez**. Yes, sir.

The **Chairman**. Judge Fernandez, there is frequently a conflict between deeply-felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Judge **Fernandez**. Well, Mr. Chairman, I truly feel that my personal beliefs and views are irrelevant to my decisions as a judge. My expectation would be to follow the statutes and the precedents as I find them and as I believe I must.

I might say that I have done that in my tenure as a superior court judge and I do not see any reason why I would change at this time.

The **Chairman**. Judge Fernandez, in response to a portion of the committee's questionnaire on judicial activism, I believe you stated, in part,

> I believe what is sometimes called judicial activism arises when courts attempt to rely on their own notions of policy when they make a law. Decisions based on policy should be left to the political branches of government. This does not mean that courts never properly make law, since it is clear they must do so in some instances.

Judge, when is it appropriate for the courts to make law when deciding a case?

Judge **Fernandez**. Mr. Chairman, I think that the language I used in answering that question may have been somewhat misleading. I would like to clarify it. I do not believe that a judge ever has the discretion to just choose an answer that he likes when he comes to face a legal issue.

What I believe is that a judge's obligation in every case is to seek and to give the right answer to any legal question that comes before him. When I said that I felt judges made law and gave the example of a moped and whether a moped that was being peddled was a motor vehicle, what I was really driving at was that a court, of necessity, is going to have to answer that question one way or the other; it is or it is not a motor vehicle.

When a court does that, it will be establishing a rule that ought to apply to cases in the future, and I meant make law in that sense only.

The **Chairman**. In other words, what you would really be doing would be interpreting the law rather than making the law?

Judge **Fernandez**. That is really accurate, Mr. Chairman.

The **Chairman**. That is a function of the judicial branch of the government, to interpret the law.

That is about all the questions I had in mind. I hope you enjoy your service on the bench and I am sure you will make Senator Wilson proud of you and that you will make an excellent judge.

Judge **Fernandez**. Thank you.

The **Chairman**. Now, if Senator Wilson can get these Republican Senators here for a meeting tomorrow, I will get you confirmed at that time.

Senator **Wilson**. Mr. Chairman, that is a deal. Thank you, sir.

Judge **Fernandez**. Mr. Chairman, I would like to thank Mr. Wilson and the President, and also thank you for bringing on this hearing so fast and not leaving me on tenterhooks all through August. I do appreciate it.

The CHAIRMAN. Senator Simon has just sent word he is on his way. If you do not mind waiting a few minutes, he may want to ask you a few questions.

Judge FERNANDEZ. I will.

The CHAIRMAN. I have another engagement, if you will just let Senator Simon question him. We will be in recess until Senator Simon arrives.

[A brief recess was taken.]

Senator SIMON [presiding]. How do you do, judge? My apologies for keeping you waiting.

My staff tells me you have an excellent background. As members here know, nominees who have judicial backgrounds and who have experience on the bench, while we may hope that the others will make good judges, we know you will make a good judge.

Judge FERNANDEZ. Thank you.

Senator SIMON. Let me just ask two questions. First, has anyone asked you any questions that you consider at all improper in the process of being nominated or since the nomination?

Judge FERNANDEZ. No, sir.

Senator SIMON. And then the second question is canon 2 of the American Bar Association's Code of Professional Responsibility says, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

It is important not only for a lawyer—but also for a judge to be sensitive to the disadvantage. What have you done in this area?

Judge FERNANDEZ. Well, Senator, my practice was mainly in what was called estate planning type of work. I did an awful lot of work in that area for folks at virtually no charge, often no charge at all.

One of the last jobs I did was for a couple who owned one of the California adobes, which is an historic monument, basically. They needed some very complex estate planning and had no money. And I put together the necessary papers and necessary wills and trusts so that they could preserve that for posterity, and at the same time not leave the family with nothing at all. So I did a good deal of that.

I also did a good deal of work for various charities in our area, among them Pilgrim Place in Claremont, which is a community of retired Christian workers; Casa Colina, a hospital for rehabilitative medicine; work for Harvey Mudd College and the School of Theology at Claremont. Those are the ones I think of right offhand.

Senator SIMON. You have answered my question adequately and I thank you very, very much. I have no further questions. We wish you the very best. I do not think you will have any problems with your nomination.

The hearing stands adjourned.

[Whereupon, at 2:31 p.m., the committee was adjourned.]

BIOGRAPHY

JUDGE FERDINAND F. FERNANDEZ

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: May 29, 1937, Pasadena, CA.

Legal Residence: California.

Marital Status: Married to Priscilla McMillen Fernandez, 2 children.

Education: 1954-1958—University of Southern California, B.S. degree. 1958-1962—University of Southern California, LL.B. degree. 1962-1963—Harvard Law School, LL.M. degree.

Bar: 1963—California.

Experience: 1963-1964—Law Clerk to Hon. Wm. M. Byrne, U.S. District Judge, Central District of California. 1964-1980—Allard, Shelton & O'Connor Associate (1964-1968), Partner (1968-1980). 1980-present—Judge, Superior Court State of California for the County of San Bernardino.

CONFIRMATION HEARING ON: STEPHEN H. ANDERSON, BRIAN B. DUFF, RALPH B. GUY, JR., GLEN H. DAVIDSON, ROBERT B. MALONEY, AND DAVID BRYAN SENTELLE

WEDNESDAY, SEPTEMBER 11, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch, McConnell, and Simon.

Staff present: Duke Short, Chief Investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We are meeting today to consider the confirmation of two U.S. circuit judges and four U.S. district judges.

First on the agenda is Circuit Judge Stephen H. Anderson of Utah to be circuit judge for the tenth circuit.

Senator Garn and Senator Hatch will be with us.

Senator Hatch, we are pleased to have you testify. Of course, you gentlemen sit up here, but today I believe you are advocating this gentleman, and I am sure you want to speak in his behalf.

And as members of this committee, of course, you are welcome to come up after you introduce him, if you want to, and join us here.

STATEMENT OF HON. ORRIN HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you so much, Mr. Chairman.

Mr. Chairman, I am delighted to be in attendance here today to be able to recommend to this committee, our committee, the name of Stephen H. Anderson for the Tenth Circuit Court of Appeals.

Steve is one of the pre-eminent lawyers in all of Utah. He is a partner in Ray, Quinney & Nebeker, a 60-plus lawyer firm. He is the director and member of the executive committee there. He is considered a lawyer's lawyer in Utah. He has made a tremendous name for himself, and in reviewing his FBI report and bar association report, I was pleased to find that there was not a person who was confidentially interviewed who did not highly recommend Steve for this position as a person of outstanding moral character, outstanding ability and outstanding ethics, to fill this position as a member of the Tenth Circuit Court of Appeals, one of the most important judicial positions in our country today.

Steve has had a vast experience in the Utah State Bar. He has been an active participant in the American Bar Association. He was president of the Utah State Bar and during his tenure did one of the finest jobs anybody has ever done in the history of our State.

I could go on and on, but I will just say this: I do not believe there is a better nominee for any circuit court of appeals judgeship position in this country than our own Steve Anderson. We are very proud to recommend him, and I personally feel very deeply about it because he is a very close, personal friend. Steve has a very strong endorsement by the President of the United States. He deserves the respect and admiration of this committee and of the entire U.S. Senate.

So, Mr. Chairman, with great pleasure I present to you Stephen Anderson.

The CHAIRMAN. Thank you very much, Senator. We are glad, of course, to have you with us.

Senator Garn, we will be pleased to hear from you.

STATEMENT OF HON. JAKE GARN, A U.S. SENATOR FROM THE STATE OF UTAH

Senator GARN. Thank you very much, Mr. Chairman. I have a brief statement. I would first ask unanimous consent that it be placed in the record.

The CHAIRMAN. Without objection, the entire statement will go in the record. Do you wish to add anything to it?

Senator GARN. I would just prefer to not take the time of the committee to reiterate what Senator Hatch has said, or to read from the statement, but just want to say that I have known Steve for a number of years and am very proud that he has been nominated by the President.

In a State like Utah, being a small State, it is very easy to know those who are the up and coming, those who are the most competent in all of the fields and all of the professions. And Steve Anderson has certainly been that in the practice of law in our State for a long number of years. And when you know people personally, it is much easier to give a hearty recommendation than when it is just a name.

I just simply wanted to be here to indicate to you, Mr. Chairman, and the committee that this is not a perfunctory nomination of support by me at all. It is one that I am extremely proud of. The President has made an excellent choice, and I am just proud to be here to tell the committee that, that he will make an excellent judge.

[Statement follows:]

PREPARED STATEMENT OF SENATOR JAKE GARN

Mr. Chairman, I am delighted to have the opportunity to be here this afternoon and offer a few comments on the nomination before this committee of Mr. Stephen H. Anderson, for appointment to the U.S. Court of Appeals.

Mr. Anderson's nomination reflects the continuation of a process of judicial selection of which I believe we can all be very proud. Furthermore, his excellent qualifications reflect the fact that the judicial nominating commissions we have used in

Utah for the purpose of recommending nominees for vacancies on the federal bench have proven extremely successful in identifying the very best among a host of very qualified individuals to be proposed for nomination.

I am pleased to say that I would be able to say the same thing about any one of the three individuals recommended by the Utah Commission for this appointment. I hope you will forgive a little parochial pride in the ability of my home state to produce such superbly qualified individuals as Mr. Anderson to offer for consideration as federal judge appointees.

Everything I know about Stephen Anderson represents the very epitome of the skilled litigator, the judicious nature, the community concern and involvement, the personal and professional integrity and community stature that one would naturally hope to find in a federal judge.

He is as highly regarded by his professional colleagues as any attorney I have known. My files are filled with their letters of support and commendation for his skill and abilities, not only in his practice of law, but in his leadership roles within the profession, and especially his tenures as the President of the Salt Lake County Bar Association and the Utah State Bar Association.

Civic and business leaders have offered their overwhelming support for this man who has looked beyond the demands of his profession to the needs of his community. He has been actively engaged in helping to meet those needs and make a significant contribution, through such activities as serving on the Salt Lake County Executive Compensation Committee, and active service in the United Way campaign.

He is a man who values his family and the moral basis of our free society, and can be expected to approach his new responsibilities not only with vigor and enthusiasm but also with great concern and thoughtfulness.

I am very proud to join with my colleague, Senator Hatch, today, in introducing Steve Anderson to you and encouraging your positive action in recommending that the Senate advise and consent to his confirmation as a member of the Tenth Circuit Court of Appeals.

The CHAIRMAN. Thank you very much. I want to thank you gentlemen for appearing on behalf of Mr. Anderson.

Mr. Anderson, all the States do not have a Senator who is a chairman. Your State has two Senators who are chairmen. So you have very strong support here in these fine, able men. And we will hear from you in a few minutes. And I want to excuse them now, if they wish to go. Of course, you may stay if you want to.

However, next on the agenda is Judge Ralph B. Guy, Jr., of Michigan, and Senator Levin is here.

I will call you back in a few minutes, Mr. Anderson, for questions.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Mr. Chairman, I am delighted to be here to introduce to the committee Judge Ralph Guy of District Court, the Eastern District of Michigan, who is a nominee for the Sixth Circuit Court of Appeals.

Judge Guy has been a district judge for 9 years and before that was U.S. attorney for 6 years. In addition to being an extraordinarily competent trial judge, Judge Guy teaches trial advocacy at the Attorney General's Trial Advocacy Institute. He is president of the District Judges Association for the sixth circuit. When he was U.S. attorney, he indicated an unusual interest in appellate advocacy by personally arguing as a U.S. attorney 100 appeals or so at the Sixth Circuit Court of Appeals in Cincinnati. It is rather unusual for our U.S. attorneys to be arguing any appeals themselves, because of the heavy workload that they carry, but when Judge Guy was the U.S. attorney, he argued about a hundred appeals personally in Cincinnati.

I happen to know Judge Guy well. As a lawyer, I argued matters against him about 20 years ago, and you learn a lot about somebody when you oppose them in court. Judge Guy is a person of great integrity, great scholarship and great decency. He has proven to be an extraordinarily able trial judge; indeed, he is famous for his ability to deliver a virtually publishable oral opinion from the bench. And I know that Don Riegle, Senator Riegle, joins me in recommending him to this committee.

The CHAIRMAN. Thank you very much, Senator.

I understand Senator Riegle has also approved him.

Senator LEVIN. He does, indeed.

The CHAIRMAN. Thank you very much, Senator. We are very pleased to have you appear. I want to say, Mr. Guy, you have the strong recommendation here from an able and outstanding Senator, and, of course, that is of benefit to you. We will call you back in a few minutes to question you.

Senator Levin, you may be excused, if you wish to leave.

Senator LEVIN. Thank you.

The CHAIRMAN. Our next nomination is U.S. district judge. The first is Glen H. Davidson of Mississippi to be judge of the northern district of Mississippi. Senator Cochran is here. I will be pleased to hear from you.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Thank you very much, Mr. Chairman.

Mr. Chairman, I am delighted to be here today to introduce my very good friend, Glen Davidson, to you and to the members of the Judiciary Committee, and to compliment President Reagan on his nomination of Glen Davidson to serve as U.S. district judge for the northern district of Mississippi.

I have known Glen almost all of his life. He is a fine, outstanding person. He is a person of great intellect and moral character. And I know he will reflect credit on the Federal Judiciary in his service on the Federal bench.

He is a bright legal mind, and he has served as U.S. attorney for the northern district of Mississippi since 1981. It was my pleasure to recommend him to President Reagan for that position.

He has demonstrated, Mr. Chairman, by reason of his performance in that position, by his practice of law in the private sector, and by his service as a prosecutor in the State court system, that he is one of the finest lawyers in Mississippi.

So I commend him to you and recommend his confirmation to the Judiciary Committee.

Senator Stennis has asked me to indicate to you, also, that he strongly supports Glen Davidson's confirmation.

The CHAIRMAN. Thank you very much and we appreciate your being here. Mr. Davidson, you have the approval of both of your Senators, both of whom are held in high esteem here and Senator Cochran has recommended you, I believe, for this position. And so if things can go right, we will try to get you on the agenda as soon as possible.

Senator COCHRAN. Thank you very much, Mr. Chairman.

[Prepared statement of Senator Stennis follows:]

Prepared Statement of Senator John C. Stennis

Mr. Chairman, I am pleased to endorse the nomination of Glen H. Davidson to be U.S. district judge for the northern district of Mississippi. I have known Mr. Davidson for a number of years. He has extensive experience with the Federal courts in Mississippi, and I know that he is highly regarded by the legal community in my State.

Mr. Davidson has an excellent background of law enforcement and trial experience. Since 1981 he has served as the U.S. attorney for the northern district of Mississippi, and I have very favorable reports of his conduct in that office. He also has experience in the State court system, having served 5 years as a chief assistant district attorney and 1 year as district attorney. I think this kind of active experience in judicial matters is important preparation for service on the Federal bench. It gives him a good day-to-day feel for the kinds of matters he will be called upon to consider as a Federal judge.

Mr. Davidson also has a good background of work as a private lawyer with a general practice in north Mississippi. This, too, will help him be considerate of the needs of the private bar in his dealings with the lawyers that come before him.

Of course, Mr. Chairman, we know that while an adequate experience in certain types of legal matters is important in making a good Federal judge, there are other factors that are equally important—things such as character, integrity, a willingness to work hard. I am persuaded that Mr. Davidson fully measures up in these areas.

I have had an opportunity to talk with Mr. Davidson lately and discuss with him the importance of the position for which he has been nominated. Being a judge, at any level, is a serious matter. But being a Federal judge is particularly demanding. Our Federal judges are now called upon to handle so many cases in such a wide variety of fields and controversies. It requires a great deal of work simply to keep up with the new major decisions in all these areas.

I am persuaded that Mr. Davidson recognizes the responsibilities of being a Federal district judge, the requirements for fairness, for evenhandedness, and for hard work.

Because of his background of experience with Federal trial work, his reputation for honesty and fairness, his commitment to hard work, and his character, I believe Mr. Davidson is fully qualified to serve in the position for which he has been nominated. I am confident he will live up to the high standards we set for our Federal judges and will contribute to the advancement of the legal profession. I commend him to the committee highly.

The **Chairman**. Next on the agenda is Judge Brian B. Duff of Illinois. Are Senator Dixon, Senator Simon, or Congressman Folley here? Senator Simon may come later.

Senator Dixon, we will be glad to hear from you.

STATEMENT OF HON ALAN J. DIXON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator **Dixon**. Mr. Chairman, it is my great pleasure to testify before you today in support of the nomination of Judge Brian B. Duff to be U.S. District Judge for the Northern District of Illinois.

I have known Judge Brian Duff for a great many years. He has been a fine public servant for more than a decade. In 1971 he was elected to the Illinois General Assembly where he served ably until 1976. Senator Simon and I were both privileged to serve in State government with Judge Duff. In 1976 Judge Duff became a judge for the circuit court of Cook County, and he has served in that capacity to the present day.

Judge Duff is a distinguished jurist, just as he was an outstanding member of the Illinois General Assembly. He received his B.A. from the University of Notre Dame and his J.D. from DePaul University in Chicago.

Judge Duff was admitted to the Illinois and Massachusetts bars in 1962, and prior to that he served in the U.S. Navy as a lieutenant from 1953 to 1956. One of Judge Duff's great attributes, I think, Mr. Chairman, is that he has a great deal of experience in the private sector. In the early 1960's he was the assistant to the chief executive of Bankers Life & Casualty Co. in my State, as well as liaison to the legal department. From 1965 to 1968 he was associated with the law firm of Sloan & Bragiel, and in the late 1960's Judge Duff was the executive vice president and general counsel of R.H. Thorn & Co.

Finally, Judge Duff had his own private practice from 1969 to 1976. Mr. Chairman, it is clear to me that Judge Duff has what it takes to be a solid U.S. District Judge. He is already a distinguished jurist; he has served his country in the military and in public service; he has extensive experience in the private sector, and in addition to his professional credentials, Judge Duff is blessed with a good family. His wife Florence and his five children are a great source of strength to him.

Mr. Chairman, on behalf of my distinguished colleague, Paul Simon, who I am sure will be here shortly, I urge the Judiciary Committee to report favorably the nomination of Judge Brian Duff to be U.S. District Judge for the Northern District of Illinois. I thank the Chair.

The CHAIRMAN. Judge Duff, I congratulate you on having the high endorsement of both your Senators, Senator Dixon and Senator Simon. I understand Senator Simon will be here a little later. And also, Congressman Porter. Does he happen to be in the hall at this time?

Mr. PORTER. Yes, Mr. Chairman; I am here.

The CHAIRMAN. Congressman Porter, we will be glad to hear from you.

STATEMENT OF HON. JOHN EDWARD PORTER, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. PORTER. Mr. Chairman, it is an honor to appear before you today and to add my recommendation to my esteemed colleague from Illinois, Senator Dixon, of Judge Brian Duff to serve as a Federal District Judge for the Northern District of Illinois.

I have been a close, personal friend of Judge Duff's for over 20 years and served with him as a colleague in the Illinois General Assembly.

You would be pleased, Mr. Chairman, to know that his service in the general assembly included leadership in our party, and in addition to that, he was chairman of the judiciary committee and served very ably for 6 years as a member of the general assembly before his election to the circuit court of Cook County.

He has been a judge for 9 years, has served in many different divisions from criminal to equity, and has a very distinguished record as a judge at the State level. He brings to the Federal bench an extraordinary degree of integrity, knowledge of the law, and judicial restraint by reason of his service on the legislative branch and an understanding of the relationships between the two.

He has a wonderful, lovely wife, Florence, and five children that we know and are very proud of. It gives me a great deal of pleasure to present to you and commend to you for confirmation to serve our Nation as a member of the Federal judiciary, Judge Brian Duff of Illinois.

The CHAIRMAN. Thank you very much, Congressman Porter. And in just a few minutes we will return to him again for questions.

Thank you, gentlemen, for appearing here on his behalf, and I am sure it will be of great benefit to him.

Mr. PORTER. Thank you, Mr. Chairman.

The CHAIRMAN. Next on the list is Judge Robert B. Maloney of Texas. Is Senator Gramm here?

We will go ahead, then, with the next one, David Bryan Sentelle of North Carolina. I see Senator Helms is here, the senior Senator from North Carolina. Senator, come around.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Mr. Chairman, I thank you very much for the privilege of appearing here today. I have a prepared statement which I would ask to be put in the record. But let me just——

The CHAIRMAN. Without objection, that will be placed in the record in full, and if you want to add any comments.

Senator HELMS. Thank you very much, sir.

Every so often, Mr. Chairman, in our life we run across a citizen who is unique, distinguished and full of promise. I met the Honorable David B. Sentelle when he was a few years younger, about 10 or 12 years ago, and I do not think I ever told him this, but I made up my mind that if I ever had an opportunity to do so, I would do whatever I could to make sure that this young man's integrity and talent, principles and courage would be used by this country.

Therefore, I was very pleased when the President of the United States, using his customary perspicacity, nominated Mr. Sentelle to serve on the court for the western district of North Carolina. He will succeed, Mr. Chairman, a distinguished Democrat, a friend of mine for many, many years who has served ably the western district, Woodrow W. Jones. Judge Jones has previously served in the House of Representatives with distinction, so this will be a case of a fine judge succeeding a fine judge.

I would say, Mr. Chairman, that I could not be happier with this nomination. I have known Dave Sentelle for a long time, and he is exactly the type of individual that President Reagan has been looking for to serve on the Federal bench.

He has been in active in worthwhile endeavors all across the board. He has been active in his church. As a practicing attorney, he has achieved the highest rating given by his peers, an A rating, in Martindale-Hubbell.

His wife is a delightful lady; he has three daughters. They are members of Providence Baptist Church in Charlotte, and Dave has been a Sunday schoolteacher and a deacon. He is a member of the Lions Club and has been an active advocate of treatment for convicted drug users and women inmates and so many other things that I could mention.

But, in short, Mr. Chairman, and members of this distinguished committee, Dave Sentelle is precisely the kind of young man whom we ought to be seeking for service in the public sector. And I am very proud to present him to this committee as a nominee of President Reagan, and I do so on behalf of Senator East as well.

I thank the Chair and I appreciate the opportunity to appear here today.

[Statement follows:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

Mr. Chairman, it is a pleasure and a privilege to appear before this distinguished committee today to recommend for your consideration David B. Sentelle, whom the President has nominated as United States Judge for the Western District of North Carolina. Mr. Sentelle has been nominated to fill a vacancy created February 1 when the Honorable Woodrow W. Jones assumed senior status.

Mr. Chairman, I could not be happier with this nomination. I have known David Sentelle for quite some time, and in my view he is exactly the type of individual President Reagan has been looking for to serve on the federal bench.

Mr. Sentelle is a native of Canton, North Carolina. He was a partner in the respected Charlotte, North Carolina, law firm Tucker, Hicks, Sentelle, Moon and Hodge until earlier this year, when he resigned to become available for service as a United States District Court judge. Prior to entering private practice, he served as Assistant United States Attorney, and later as a state district court judge.

As a practicing attorney, Mr. Sentelle has achieved the highest rating given by his peers, an "A" rating in Martindale-Hubbell.

Mr. Sentelle has been active in local church and civic affairs. He, his wife, and three daughters are members of the Providence Baptist Church in Charlotte, where Mr. Sentelle serves as adult Sunday school teacher and Deacon. He is a member of his local Lions Club, and has been an active advocate of treatment for convicted drug users and women inmates.

Mr. Sentelle was educated in the public schools of Buncombe County, North Carolina. He received a B.A. in Political Science from the University of North Carolina at Chapel Hill in 1965. In 1968 he was graduated with honors from the School of Law at the University of North Carolina, where he had been Research Editor of the Law Review, recipient of the Dameron Fellowship, and a member of the Order of the Coif.

Mr. Sentelle has continued his academic interest by serving as a visiting instructor in criminal justice at the University of North Carolina at Charlotte, and by authoring a number of legal articles.

Mr. Chairman, I could go on and on like Tennyson's brook extolling Mr. Sentelle's outstanding achievements and his fine reputation as a lawyer and citizen. I will not impose further on the committee's time, however.

I will end by urging you again to give Mr. Sentelle's nomination your prompt, favorable consideration.

The CHAIRMAN. Thank you very much.

I understand Senator East has a statement, too, endorsing him.

Senator HELMS. That is correct.

The CHAIRMAN. And I ask that it be placed in the record at this time.

[Statement follows:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I deeply regret that I am unable to attend David Sentelle's hearing before the Judiciary Committee this afternoon. I would not want my absence, however, to be interpreted as indicating a lack of support for Mr. Sentelle's nomination to be United States District Judge for the Western District of North Carolina, for in my view he is eminently qualified.

Mr. Sentelle's academic achievements and professional experience show him to be an excellent candidate for judicial office. As a student at the University of North Carolina School of Law, Mr. Sentelle was awarded the Dameron Scholarship, graduated with honors, and was admitted to the Order of the Coif. After a short time in private practice, Mr. Sentelle became an Assistant United States Attorney for the

Western District of North Carolina. In that position he was principally responsible for conducting Federal prosecutions, but also engaged in civil and appellate litigation. After four years in that office, David Sentelle was appointed District Judge for the 26th Judicial District of the State of North Carolina. As a judge within the state judicial system, Mr. Sentelle had jurisdiction over a wide range of criminal, juvenile, and civil matters. Since 1977, Mr. Sentelle has been in private practice, where he has since specialized in Federal criminal cases.

Not only does David Sentelle possess a fine record of academic and professional accomplishments, but he also has an exemplary record of community service. Since resuming his private practice, Mr. Sentelle has donated much of his time to representing indigent clients in criminal proceedings, undertaken volunteer activities with United Christian Prison Ministries, and has served as the Chairman of the Charlotte Treatment Facility for Women.

Mr. Chairman, David Sentelle's service as a prosecutor, a defense counsel, and as a judge, as well as his experience in helping those released from detention to create new lives for themselves as law abiding citizens, certainly will qualify him to sit on the Federal bench. Mr. Sentelle's academic record attests to his understanding of the law and his record of professional achievement and community service demonstrates experience with its practical application. I believe that he will make an excellent Federal judge. I am pleased to express my enthusiastic support for Mr. Sentelle's nomination, and I urge my colleagues on the Senate Judiciary Committee to approve it expeditiously.

Thank you.

The CHAIRMAN. Judge Sentelle, I want to congratulate you, having the endorsement of both of your able Senators. They are powerful men here, and that means a lot to you.

We are glad to have you, and you can stay or you can leave, if you wish.

Senator HELMS. Thank you, sir. I wish I could stay, but we have got an Agricultural Committee meeting in just a few minutes. Thank you, Mr. Chairman, very much.

The CHAIRMAN. I understand Senator Gramm has come in. Is he here?

Senator Gramm, come around. Senator Gramm is speaking on behalf of Judge Maloney, if you will bring him around.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Thank you, Mr. Chairman.

I am delighted to have the opportunity to be here today with a friend of mine whom I recommended to the President. The President has sent the appointment forward to this committee. Bob Maloney is currently an associate justice of the Court of Appeals, Fifth Supreme District of Texas. He served five terms in the Texas Legislature with distinction. He is highly regarded by his peers. In every bar poll taken to assess the quality of the jurists in his home country, he had consistently been rated as a superior judge. He shares with you and me a belief in the Constitution and strict construction of that Constitution. He shares our belief that it is the duty of the courts to interpret the laws, not to make them. He is the kind of quality jurist that I believe will strengthen the court system.

I am pround of his nomination, and I wanted to come here personally and commend him to you.

The CHAIRMAN. Thank you very much. We are very pleased to have your statement. And I understand Senator Bentsen is also recommending to approve him.

I congratulate you on being recommended by Senator Gramm, who is held in high esteem here, and he has the approval of Senator Bentsen too. And so with both your Senators backing you, there should be no problem unless something comes up we do not foresee.

I am hoping we can get all these nominations heard this afternoon and get them on the agenda for tomorrow and get quick action.

Senator Cochran, I guess that suits you all right and Senator Gramm.

Senator **Cochran**. I have no objection to that, Mr. Chairman.

The **Chairman**. I notice Senator Riegle has come in. Senator Riegle, would you care to speak on behalf of your man?

Senator Gramm, I know you are busy. You are excused, unless you want to stay.

Senator **Gramm**. Thank you, sir.

The **Chairman**. Senator Riegle is here on behalf of Judge Guy, I presume.

Senator **Riegle**. Yes, Mr. Chairman.

The **Chairman**. Senator Levin has just spoken on his behalf.

STATEMENT OF HON. DONALD W. RIEGLE, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator **Riegle**. I appreciate the chance to be able to speak as well, Mr. Chairman. I know we have a vote coming up soon on the Senate floor. I think it is significant in the case of this nominee that he enjoys bipartisan support from his home State, not just from the Senate delegation in the Senate and the House Members in both parties, but generally from the people who are most concerned about the working of our judicial system that is centered in the State of Michigan.

Judge Guy has an outstanding record on the district bench, and his experience and record demonstrate that he is fully equipped to move up to this next and most important level of judicial responsibility. He previously served as a U.S. attorney with distinction, and I think that he is the kind of person that can bring many qualifications to this bench at a relatively young age including the experience, temperament and support across a broad spectrum that will enable him to serve in an outstanding fashion.

I am here to day to make this statement for the record and to appear in support of Judge Guy's candidacy.

The **Chairman**. Thank you very much, Senator Riegle.

I want to congratulate the nominee here on having the endorsement here of both you and Senator Levin. When you get the endorsement of both senators, of course, that is very important, it means a lot.

Senator Riegle, you can leave or you can remain, whichever you would prefer.

Now, we will ask all of you to stand and be sworn at one time, all six of you.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Mr. **Anderson**. I do.

Judge **Guy**. I do.

Judge **Davidson**. I do.

Judge **Duff**. I do.

Judge MALONEY. I do.

Mr. SENTELLE. I do.

The CHAIRMAN. Now, I am going to take them in the order they are listed on the agenda. The first is Stephen H. Anderson of Utah. If you will come around, Mr. Anderson.

TESTIMONY OF STEPHEN H. ANDERSON, OF UTAH, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE 10TH CIRCUIT

The CHAIRMAN. Mr. Anderson, would you care to introduce your family or friends that you have here.

Mr. ANDERSON. With great pleasure, Mr. Chairman. I take special and affectionate pleasure in introducing my wife Shirlee who is here.

The CHAIRMAN. Very pleased to have you.

Mr. ANDERSON. And my two friends from the U.S. Tax Court, among other friends on that court, Judge Stephen Swift and Judge Moxley Featherston are here.

The CHAIRMAN. Thank you very much.

Mr. Anderson, in 1978 when you were president of the Salt Lake County Bar Association, I believe you cofounded the Volunteer Lawyer in Night Small Claims Court Program.

Mr. ANDERSON. That is correct.

The CHAIRMAN. As a result of this action, you were given the American Bar Association's award of merit for single project excellence. Would you tell the committee how successful this program has been over the years and the status of the court at the present time.

Mr. ANDERSON. Mr. Chairman, that program was designed to improve public access to the justice system. Hundreds of lawyers at the call of the bar volunteered to serve without pay as judges pro tem on the Night Small Claims Court. The objective was to allow litigants their day in court for a modest price, which has always been under $20, in a speedy fashion, which has always been approximately 3 weeks. That program now is clearing something like 8,000 cases a year.

The CHAIRMAN. It sounds like it has been a big success from what you say.

Mr. ANDERSON. It has been not only a success, but so much so that it has spread to surrounding jurisdictions, and the Utah State Legislature has taken legislative notice of the status of the judges pro tem and has increased the limit for small claims court matters.

The CHAIRMAN. This is a volunteer program, as I understand it.

Mr. ANDERSON. It is an entirely volunteer program.

The CHAIRMAN. Not supported by the State or the county?

Mr. ANDERSON. It is without any burden on the government, Mr. Chairman, and the lawyers of Utah are to be commended for their public service in that regard.

The CHAIRMAN. Mr. Anderson, would you give the committee your views on penalties that should be imposed for second- and third-time drug violators.

Mr. ANDERSON. Mr. Chairman, on the Court of Appeals, of course, we will not impose sentences. Where permitted by law and justified on the facts of the cases brought before us, severe penalties imposed by lower court judges against repeat drug offenders should and ought to be affirmed.

The CHAIRMAN. Mr. Anderson, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Mr. ANDERSON. I am well aware, Mr. Chairman, of the test by fire that Congressmen and Senators go through to get where they are as representatives of the people. Judges, being appointed not only ought because of the constitutional separation of powers, but ought for numerous other reasons, to defer to the elected representatives in the people in all matters not expressly covered by law.

The CHAIRMAN. There are some judges who feel that it is incumbent upon them to act if the legislature has failed to act. After all, we have three branches of Government. The legislative body makes the laws; the executive body enforces the laws; and the judiciary interprets the laws. And if we can just impress that on these people and get them to stay in their own sphere of activity and not try to exercise the power they really do not have, it would be very helpful in many cases. Do you agree?

Mr. ANDERSON. I surely agree with that.

The CHAIRMAN. Senator Simon?

Senator SIMON. I have just one brief question for Judge Anderson. One, has anyone in an official position asked you any questions you thought were improper?

Mr. ANDERSON. Senator, I can tell you in all candor how pleasantly surprised and impressed I have been by the quality of the interviews I have been accorded. Insofar as I have been able to tell, from the beginning of the process to the present time, the overriding concern of Senators, of the executive branch, of everyone in authority who has approached me, has been that of competence and proper service to the public. I have in no respect been asked to go beyond matters relating to my professional credentials.

Senator SIMON. Thank you. I have no further questions.

The CHAIRMAN. Thank you very much. I hope you enjoy your service on the bench.

Senator HATCH. Mr. Chairman, let me just add a couple of things here. I want to personally express my appreciation for Senator Simon. He has had the assignment on the Democratic side of this committee to examine the judgeships as they have come up. He is on my Committee on Labor and Human Resources, and I think he is a very diligent, active person.

I have been interviewed a number of times about foot dragging and the slowdown of the selection of these judges, and each time I have told the interviewers that I feel Senator Simon is doing a super job, a very diligent, dedicated job of trying to examine these judgeships. And I just want you to know, Senator Simon, that I respect you for that and even though I have criticized the Judiciary Committee from time to time for foot dragging on Federal judgeship nominations, in no way have I ever felt that Senator Simon has been part of that.

Let me just call to the attention of my colleagues a few things I did not mention in my introduction of Steve Anderson, and I do not want to delay this hearing, but I just want you to be aware of this, Senator Simon, and other members, especially our chairman. Mr. Anderson has the bipartisan support of virtually everybody in Utah; two former Democratic Governors have spoken very favorably of this nomination, as have Democratic former Congressmen and other Democratic leaders, including the former State chairman.

One could go on and on about Steve's accomplishments. I believe that, after all, in this service we have to serve everybody, and we have to do it with integrity and with the greatest amount of ability. And I just do not know anybody that possesses finer credentials and qualifications than Mr. Anderson. I want to commend him to the whole committee, Mr. Chairman.

The CHAIRMAN. Coming from Senator Hatch, that is a very high compliment. He is an able and fine member of this committee.

Senator SIMON. If the chairman would yield, I agree that coming from Senator Hatch, that is a great tribute to you, sir.

Mr. ANDERSON. Thank you, Senator.

Senator SIMON. So you are starting off well.

Mr. ANDERSON. If it is appropriate, I would like to express my gratitude to the President and to the Senators, both Senator Hatch and Senator Garn, for this nomination. I would also like to thank Senator Hatch's staff, Dee Benson, Randy Rader, Steve Markman, Frank Madsen, and Stan Parrish, for all of their help. I do want to thank you, and this committee, Mr. Chairman, for the opportunity to be here, and for your courtesy to me.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Mr. Chairman, as I frequently do, I wanted to just congratulate all of the nominees on their selection by the administration, and pending the outcome of the hearing, expect to be able to enthusiastically support all of them.

Mr. ANDERSON. Thank you, Senator.

The CHAIRMAN. Thank you. Thank you very much.

Mr. ANDERSON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simon has got to leave, so we are going to call up Judge Brian B. Duff of Illinois next.

If you will come around, Judge Duff. Have a seat.

TESTIMONY OF BRIAN B. DUFF, OF ILLINOIS, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

The CHAIRMAN. Judge Duff, do you have any members of your family here or friends you would like to introduce?

Judge DUFF. I would like to introduce my wife Florence Duff, who deserves any honor that would be with respect to me more than I do. My son, Kevin, who is a new freshman at Georgetown here in town. And my sister, Ellen Pickering, one of the Democrat half of my family. And my nieces, Diane and Eileen Duff who are living in Washington and whose dad has been an elected Democrat as well. You did not know that about me, Senator Simon.

Senator SIMON. I did not know that.

The CHAIRMAN. Judge Duff, at the present time I believe you are judge for the Circuit Court of Cook County, IL.

Judge DUFF. Yes, sir.

The **Chairman**. This, I believe, is a court of general jurisdiction, is it not?

Judge **Duff**. Yes, sir.

The **Chairman**. Do you foresee any difficulty in the transition from your present position to that of a Federal district judge?

Judge **Duff**. No, sir, I do not. I frankly look forward to it as an expansive experience. I have thoroughly enjoyed 9 years on the bench. I leave 15 years of public service with a 100-percent attendance record, both on the bench and the legislature. I have enjoyed the work, the thought, the concern, but I think this is a great honor to serve in a court of limited jurisdiction for the United States.

The **Chairman**. Judge, when you were assigned to the bench, there were over 330 criminal defendants awaiting trial, I believe, in your courtroom. You informed the committee that within 2 years you disposed of all these cases. Your courtroom became the first in Cook County where every criminal defendant was brought to trial within a 12-month period, is that correct?

Judge **Duff**. Yes, sir.

The **Chairman**. Judge, what do you attribute your success to in reducing the case workload so drastically, and is this something that could be done by other judges?

Judge **Duff**. Senator, when I was in the legislature as chairman of the House Judiciary Committee in Springfield, one of my principal activities was to move for speedy trials. I did effect some legislation to that effect, and when I went on the bench in Cook County, I was given a felony criminal assignment, and I was told that I was going to find it a lot harder to effect speedy trial as a judge than I did as a legislator. And I took it as a challenge, if you will.

Frankly, I think the principal answer was hard work. I worked long hours. I did not have a public defender assigned to that courtroom, which made it a little hard to bring the lawyers to respond, but I did expect performance from them and I got it. I was firm. I think I have a reputation of having been fair. We worked as a team with everybody. Everybody was involved in trying to get it done. We did reach the point where there were no cases on the calendar that were more than 12 months old. The average time to trial in my courtroom was less than 6 months on a felony, sometimes as short as 6 weeks from indictment. I do not think there is any substitute for hard work, concentration and, frankly, Senator, I think enthusiasm.

The **Chairman**. Thank you very much. Judge, in the committee questionnaire you stated that the Constitution contains an enduring set of principles, one of which is a judge should act as an arbiter and a thinker and not as a legislator. Where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what approach would you use in resolving whether or not a decision was a type that should be made by a judge as opposed to an elected legislative body?

Judge **Duff**. Perhaps one of the most important insights that I gained, Senator, was in my first 6 months as a State court judge back in 1976 and 1977 when I discovered, and I say this now humbly and sincerely, that I had carried some of my sense of advocacy onto the bench with me. I had been an ardent advocate of certain points of view in the legislature, and if I made mistakes, most of them were made in that sense in the first 6 months.

By that I am trying to say to you, sir, that I feel a judge should judge the problem in front of him or her. I feel that the Federal court is a court of limited jurisdiction, and I do believe in delegated powers.

I do not believe that I should try to effect my personal philosophy of legislative ideas beyond the bench. I do think that the people are coming to me for a fair and thoughtful decision, and I would try to limit each case to that.

The CHAIRMAN. Thank you.

Senator Simon?

Senator SIMON. Thank you very much. Let me say in advance, Mr. Chairman, I will be going to the floor for debate on the immigration bill and so, unfortunately, I will not have a chance to hear the other judges.

Judge Duff has been an outstanding legislator, an outstanding judge, and will make a superior Federal judge by any standard. I am very, very pleased that he has been nominated, I have known him a long time. It is with no hesitancy whatsoever that I recommend him to my colleagues as a man who will make a fine Federal judge.

The CHAIRMAN. Thank you very much.

The distinguished senator from Kentucky.

Senator MCCONNELL. I have nothing to add, Mr. Chairman, other than to extend my congratulations to the nominee.

The CHAIRMAN. Thank you.

Judge DUFF. Thank you, Senator.

The CHAIRMAN. We just have 5 minutes to go and vote, and I have some appointments I could not change. I am going to ask the able senator from Kentucky if he will complete this hearing. And thank you so much.

Senator MCCONNELL. I will, Mr. Chairman. I too would like to go vote, though.

The CHAIRMAN. We will take a recess now and be back in a few minutes.

[Short recess.]

Senator MCCONNELL [presiding]. We reconvene the hearing. Sorry for the delay, but we had to go vote.

Our next witness is Judge Ralph B. Guy of Michigan.

TESTIMONY OF RALPH B. GUY, JR., OF MICHIGAN, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Senator MCCONNELL. Do you have any family or friends you want to introduce, Judge Guy?

Judge GUY. I am here alone today, Senator. Thank you.

Senator MCCONNELL. Senator Thurmond has several questions he would like for me to propound to you, if I may, Judge, so I will do that at this point.

You have been a U.S. District Court Judge for the Eastern District of Michigan since 1976. As a district court judge, you have had to make rulings after careful consideration of facts as presented at trial. As an appellate judge, you will be reviewing decisions of district court judges. What criteria do you intend to use in reviewing those decisions and trial records?

Judge GUY. Well, I think that in many of the areas there are some pretty firmly established ground rules as to whether you review for plain error or whether you have the de novo review, but I think that deference should be given to the trial judge's view in situations in which she or he was on the scene and was able to be present when the action was happening, was in the trenches, so to speak. And I would expect, just as I did as a district judge, to enforce the law and the Constitution as it is written as my standard of review for the district judge action.

Senator MCCONNELL. The Comprehensive Crime Control Act of 1984 provides for a sentencing commission to establish uniformity in sentencing. Do you believe that such a commission would have been helpful to you in your present position as a district court judge?

Judge GUY. Well, I think it would be very helpful. I was very pleased to see the passage of that legislation. In our district for a number of years we have had what we call sentencing councils in which we meet with other judges prior to sentencing to try to achieve uniformity within our own district. But in order to have the kind of uniformity that is meaningful in a Federal system, something in the nature of the commission that was established is very essential, and I think it will definitely improve the system once they meet and promulgate their guidelines.

Senator MCCONNELL. Are there ever any circumstances under which you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Judge GUY. No; I do not think that I have done that in the 9 plus years I have been on the bench, and I believe that it is not appropriate to do that.

Senator MCCONNELL. Judge Guy, those are all the questions the chairman had for you. Unless you have anything to add?

Judge GUY. No, other than I am pleased to have the opportunity to be here, and I am pleased that the acting chair is from a State that I will be serving in terms of the sixth circuit. So it is a pleasure to appear before you, Senator.

Senator MCCONNELL. I am glad to meet you, Judge Guy. Congratulations on your nomination.

Judge GUY. Thank you, sir. May I be excused?

Senator MCCONNELL. You may. We have yet another vote, but we are going to do a little more here before that.

I would like to call Glen H. Davidson, of Mississippi.

TESTIMONY OF GLEN H. DAVIDSON, OF MISSISSIPPI, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Senator MCCONNELL. Do you have any family or friends here?

Judge DAVIDSON. Senator, I do not. I am alone today.

Senator McCONNELL. All right. Judge Davidson has been nominated to be U.S. District Judge for the Northern District of Mississippi.

Mr. Davidson, I would like to ask you the questions the chairman would have asked had he been here.

You have served as the U.S. Attorney for the Northern District of Mississippi since 1981, and prior to that you were the district attorney for the First Judicial District of Mississippi. Do you feel this experience will be beneficial to you as a Federal district judge, and if so, how?

Judge DAVIDSON. Yes, Senator, I certainly do. Primarily these two positions have made me a litigator, in my opinion. Of necessity I have had to appear in court on a regular basis. I certainly feel that the U.S. Attorney's position has given me an opportunity to familiarize myself with the Federal Rules of Evidence, the policies and procedures, of judicial proceedings as well as a thorough knowledge of practically all of the Federal criminal statutes, including the RICO statute, the Comprehensive Crime Control Act of 1984, the rather complicated criminal conspiracy cases that are tried in Federal District Court; also the U.S. Attorney's Office handles many civil matters, probably 50 percent of the work in that office involves civil cases. I think by serving 4 years in that office, I have had an opportunity to become familiar with Federal practice.

Senator McCONNELL. What kind of guidelines, if any, do you feel a judge should follow in determining the propriety of Federal intervention in State affairs?

Judge DAVIDSON. State affairs? Senator, I think the one key word insofar as my judicial philosophy is concerned in this area, is probably caution. I feel that the Federal courts are certainly not the only agency of Government capable of governing. I feel that the Federal courts should be hesitant to undertake to run State schools, hospitals, prisons, and various institutions unless it is an absolute necessity.

I feel that the policy matters should be left to the legislative bodies, including the State governments, unless there is some clear constitutional violation or something that is being done contrary to a superior Federal statute or clear judicial precedent.

So in summation, I would say that in intervening in State matters, the courts should proceed cautiously.

Senator McCONNELL. Mr. Davidson, are there ever circumstances under which a judge should attempt to establish new judicial precedent, and if so, what criteria would you consider in order to determine the propriety of reversing existing precedent?

Judge DAVIDSON. Mr. Chairman, I, of course, adhere to the doctrine of stare decisis. I think that the district court, the trial court is bound by precedent as established by the U.S. Supreme Court and, in my case, the fifth circuit court of appeals. But clearly, if an existing precedent is unconstitutional and is contrary to the United States Constitution, which is the supreme document, the supreme law of the land, and it is clear that it is, I think that is proper time for a precedent to be overturned.

Senator McCONNELL. Mr. Davidson, those are all the questions the chairman has for you; unless you have anything else to add, I would like to congratulate you on your nomination.

Judge DAVIDSON. Well, thank you, Senator. It is a distinct pleasure and a privilege to be here under these circumstances, and I appreciate the nomination and I appreciate the opportunity to appear before you.

Senator MCCONNELL. Thank you. Judge Robert B. Maloney of Texas to be district judge for the northern district for that State.

TESTIMONY OF ROBERT B. MALONEY, OF TEXAS, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS

Senator MCCONNELL. Judge, do you have any people here you would like to——

Judge MALONEY. No, I do not, Senator.

Senator MCCONNELL. OK. I hate to do this to you, but I think we are going to have to hold right there and let me go over and vote, and I will be right back.

[Short recess.]

Senator MCCONNELL. The hearing will reconvene. Let us try it one more time.

We have before us Judge Robert B. Maloney of Texas, to be U.S. district judge for the northern district of that State. I think we have already inserted his résumé in the record, and I have three questions that the chairman would like for me to ask you, Judge Maloney.

He considers the judicial temperament to be a prerequisite for a Federal judge. In terms of that difficult to define quality of judicial temperament, would you give us your thoughts on that subject.

Judge MALONEY. Well, I think that certainly patience has to enter into it, but probably the most important thing in judicial temperament is that the judge is willing to listen to counsel in the controversy, he is willing to take the time and trouble to study those areas of the law, either in preparation for the case or during the trial of the case, not only for courtesy for the litigants but to minimize as much as possible any errors on appeal.

Senator MCCONNELL. Article 5 of the Constitution establishes the procedures by which the Constitution is to be amended or altered. Do you believe that article 5 specifies the only means by which the Constitution should be amended?

Judge MALONEY. I do not believe that the court should amend the Constitution.

Senator MCCONNELL. The phrase judicial activism is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase judicial activism mean to you?

Judge MALONEY. That to me is either the encouragement by the courts to take on controversies that are not actually controversies, which were anticipated by the framers of the Constitution. I believe that the courts are there for existing controversies and not just a controversy because a plaintiff brings the case to a court for a court to make the decision. I think judicial restraint requires that the court not take on controversies for which it was not intended.

Senator **McConnell**. Judge Maloney, that concludes the questions the chairman has for you. Do you have anything further to add?

Judge **Maloney**. No, Senator, and thank you very much. I appreciate the time of the committee.

Senator **McConnell**. Congratulations on your nomination and good luck to you.

Judge **Maloney**. Thank you.

Senator **McConnell**. The next witness is David Bryan Sentelle.

TESTIMONY OF DAVID BRYAN SENTELLE, OF NORTH CAROLINA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Senator **McConnell**. I have a lot of relatives in North Carolina. Where is Canton?

Mr. **Sentelle**. Canton is just west of Asheville, about a half-hour's drive west of Asheville.

Senator **McConnell**. So you are in the mountains.

Mr. **Sentelle**. Yes, sir. I am back in the mountains now.

Senator **McConnell**. We have a few of those in Kentucky.

Mr. **Sentelle**. Yes, sir. I have been in them.

Senator **McConnell**. Mr. Sentelle is being nominated to be district judge for the Western District of North Carolina. Mr. Sentelle, the chairman has three questions for you.

Would you tell the committee what procedures you will follow in determining any potential conflicts of interest as well as the actions you will take to resolve them.

Mr. **Sentelle**. Senator, I would review the pleadings and the case file for any familiarity or material contact I might have had with the litigants or the facts. If I found any to exist in the nature of a conflict, I think the only potential resolution for conflict by a trial judge is recusal.

We have two other active judges and a very vigorous senior judge so that that would create no hardship to swap out. Once there is a conflict, the public is entitled to see that conflict done away with by recusing from that case.

Senator **McConnell**. In his famous dissent in Plessey against Ferguson in 1893, Justice John Harlen referred to our Constitution as a "color blind" Constitution. Would you comment on this characterization?

Mr. **Sentelle**. Senator, I believe that there is one Constitution and one set of constitutional rights and body of laws for all people in America without regard to their color. I take that to be what Harlen meant, and I think he accurately described the intent of the equal protection clause of the Constitution.

Senator **McConnell**. One of the criticisms of judicial activism is a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of farreaching orders extending to broad classes of individuals. Do you feel that this criticism is valid, and would you explain your answer?

Mr. **Sentelle**. Yes, I do. I think the courts are there by their constitutional and traditional purpose to resolve cases and controversies for the citizens. If the courts are not doing it, then it is not being done. Those cases and controversies are the litigation that is brought with real legal and factual difference existing at the time. And when judges step outside that role, they are usurping the role either of the legislature or the executive. I think it is a valid criticism.

Senator McConnell. Thank you, Mr. Sentelle. I think that completes all of our nominees. Also Duke had mentioned to me that Sheila Joy from the Department of Justice is in the audience and has been extremely helpful to the committee, and we wanted to thank you for all of your assistance, and again, let me congratulate all of the nominees. And I believe, unless anyone else has anything to add, that that completes the hearing.

Mr. Sentelle. Thank you, Senator.

[Whereupon, at 3:30 p.m., the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

Stephen H. Anderson

NOMINEE, U.S. CIRCUIT JUDGE, 10TH CIRCUIT

Birth: January 12, 1932, Salt Lake City, UT.

Legal Residence: Utah.

Marital Status: Married to Shirlee Gehring Anderson, 2 children.

Education: 1949-1951—Eastern Oregon, College of Education. 1955-1956—Brigham Young University. 1956—University of Utah. 1957-1960—University of Utah, Law School, LL.B. degree.

Bar: 1960—Utah.

Military Service: 1953-1955—United States Army, Corporal.

Experience: 1960-1964—U.S. Department of Justice, Tax Division, Trial Attorney. 1964-present—Ray, Quinney & Nebeker Associate (1964-1966), Partner (1976-present).

Judge Brian B. Duff

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: September 15, 1930, Dallas, TX.

Legal Residence: Illinois.

Marital Status: Married to Florence Buckley Duff, 5 children.

Education: 1948-1953—University of Notre Dame, A.B. degree. 1958-1962—DePaul University, J.D. degree.

Bar: 1962—Illinois.

Military Service: 1953-1956—United States Navy, Lt. jg.

Experience: 1962-1967—Bankers Life & Casualty Co., Assistant to Chief Executive and Liaison with Legal Department. 1965-1968—Sloan and Bragiel Associate. 1968-1969—R.H. Gore Company, Executive Vice-President and General Counsel. 1969-1976—Brian B. Duff and Associates, Partner. 1971-1976—Illinois General Assembly, member. 1976-present—Judge, Circuit Court of Cook County.

Judge Ralph B. Guy, Jr.

NOMINEE U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Birth: August 30, 1929, Detroit, MI.

Legal Residence: Michigan.

Marital Status: Divorced, two children.

Education: 1947-1953—University of Michigan, B.A. degree (1951), LL.B. degree (1953).

Bar: 1954—Michigan.

Experience: 1954-1955—Guy & Guy. 1955-1958—Assistant Corporation Counsel. 1958-1969—Corporation Counsel, City of Dearborn, Michigan. 1969-1970—Assistant U.S. Attorney, Eastern District of Michigan. 1976-present—United States District Judge, Eastern District of Michigan.

GLEN H. DAVIDSON

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF MISSISSIPPI

Birth: November 20, 1s941, Pontotoc, MI.

Legal Residence: Mississippi.

Marital Status: Married to Bonnie Gayle Payne, 2 children.

Education: 1959-1962—University of Mississippi, B.A. degree. 1962-1965—University of Mississippi, School of Law, J.D. degree.

Bar: 1965—Mississippi.

Military Service: 1965-1968—United States Air Force. Judge Advocate General's Corps

Experience: 1965—Frank A. Riley, Attorney at Law, Associate. 1969-—1973—Riley, Davidson & Weir, Associate andPartner. 1969-1974—Chief Asst. District Attorney, First Judicial District of Mississippi. 1973-1981—Carnathan, Davidson & Wright, Partner. 1975—District Attorney, First Judicial District of Mississippi. 1981-present—United States Attorney, Northern District of Mississippi.

JUDGE ROBERT B. MALONEY

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF TEXAS

Birth: January 31, 1933, Dallas, Texas.

Legal Residence: Texas.

Marital Status: Married to Frances R. Johnson (Marlow) Maloney.

Education: 1950-1956—Southern Methodist University, B.B.A. degree. 1956-1960—Southern Methodist Law School.

Bar: 1960—Texas.

Experience: 1961-1962—Dallas County District, Attorney's Office, Assistant District Attorney. 1962-1965—Watts, Stallings & Maloney. 1966-1974—Maloney, Milner & McDowell. 1973-1982—State Representatives. 1976-1979—Maloney & McDowell, Partner. 1979-1980—Maloney & Hardcastle Partner. 1981-1982—Maloney & Maloney, 1983-1984—Partner. 1983—Associate Justice. 1985-present—Court of Appeals,—Fifth Judicial District of Texas.

DAVID BRYAN SENTELLE

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF NORTH CAROLINA

Birth: February 12, 1943 Canton, N.C.

Legal Residence: North Carolina.

Marital Status: Married to Jane L. Oldham Sentelle, 3 children.

Education: 1961-1965—University of North Carolina, B.A. degree. 1965-1968—University of North Carolina, School of Law, J.D. degree.

Bar: 1968—North Carolina.

Experience: 1968-1970—Uzzell and DuMont, Associate. 1970-1974—Assistant U.S. Attorney, Western District of No. Carolina. 1974-1977—District Judge, 26th Judicial District, State of North Carolina. 1977-1980—Bryant, Hicks and Sentelle, Partner. 1980-1985—Tucker, Hicks, Sentelle, Moon and Hodge, P.A., Partner.

CONFIRMATION HEARING ON: DAVID SAM, EDMUND V. LUDWIG, STEPHEN V. WILSON, AND J.C. ARGETSINGER II

WEDNESDAY, SEPTEMBER 18, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch, Specter, Simon, and McConnell.

Staff present: Duke Short, chief investigator; Laurie A. Westley, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We have met this afternoon to have a hearing on some judge nominations. The first is Judge David Sam, of Utah, to be U.S. district judge for the district of Utah. I see Senator Garn and Senator Hatch are here. We would be very pleased to hear from them, and then, Senator Hatch, you can come up and join us if you care to on the rostrum, since you are a prominent member of this committee.

We will be very pleased to hear from you all. Senator Garn, I believe you are the senior Senator, are you not?

STATEMENT OF HON. JAKE GARN, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Garn. Yes, Mr. Chairman.

The Chairman. We do not have to take them by seniority, but we generally do that.

Senator Garn. In terms of age, too. [Laughter.]

Thank you, Mr. Chairman.

The Chairman. Speaking of in terms of age, any man that is an astronaut, to me, is pretty young.

Senator Garn. I am willing to go again. [Laughter.]

Mr. Chairman, in the interests of the committee's time, I would ask unanimous consent that my full statement be placed in the record.

The Chairman. Without objection, your full statement will go in the record.

Senator Garn. Mr. Chairman, for the second time in as many weeks, it gives me a great deal of pleasure to appear before this committee and brag a little about another judicial nominee from the State of Utah.

You have before you the nomination of Judge David Sam for the advice and consent of the Senate to his appointment as U.S. district judge for the district of Utah to replace Judge Alden Anderson, who has retired.

We are very proud of the nominees we have presented to you, Mr. Chairman. They are the product of a judicial selection committee that Senator Hatch originated and I supported several years ago to take these judge nominations out of the political world and have them selected on the basis of their qualifications.

Our judicial selection commissions have been broadly based at home, with attorneys and nonattorneys on them, and their work has produced, I think, the best judge nominees that we could possibly have from our State.

Once again, we have that situation. Judge Sam brings 9 years of judicial experience at the State level to the Federal bench, having served as a Utah district judge since 1976. In addition, he has had many years of experience as county and city attorney, where he earned and maintained the confidence and support of the people who elected him to those posts.

He has also been very active in civic and community affairs and has held appointments to important advisory positions at the State level.

Let me just close by saying I am personally very proud of Judge Sam. He is a person of integrity and great character who will add greatly to the prestige of the Federal bench not only in Utah, but across the country.

I am very pleased that the President has chosen to nominate him and very wholeheartedly and sincerely support his nomination for this important post.

The CHAIRMAN. We are very glad to have you with us, Senator. And you feel free to stay, or if you want to leave at any time, you may.

[Statement follows:]

PREPARED STATEMENT OF SENATOR JAKE GARN

Mr. Chairman, for the second time in as many weeks it gives me great pleasure to appear before this committee and brag a little about another judicial nominee from the state of Utah.

You have before you the nomination of Judge David Sam for the advice and consent of the Senate to his appointment as U.S. District Judge for the District of Utah, to replace Judge Aldon Anderson, who has retired.

Judge Anderson was a valued asset to the federal bench, and provided many years of superb service in his capacity as District Judge. His chair and the legacy he leaves it calls for a special kind of man to replace him. We have found that man in Judge David Sam.

Judge Sam brings nine years of judicial experience at the state level to the federal bench, having served as a Utah District Judge since 1976. In addition, he has had years of experience as County and City Attorney, where he earned and maintained the confidence and support of the people who elected him to those posts.

Judge Sam has been active in civic and community affairs, and has held appointments to important advisory positions at the state level.

As is virtually always said of nominees from our state, Judge Sam is a very loving and devoted family man. He comes from a very large family, as the youngest of eleven children. He and his wife Betty Jean have six children of their own and have adopted two girls from Guatemala. The Judge is no stranger to the generous and unselfish process of adoption. He has presided over many adoption cases during his service on the bench, and has earned a reputation, in fact, that this committee might find interesting. I am told that he is often referred to as the "Ice Cream Judge". This stems from his practice of including in his adoption rulings an order that the adoptive parents immediately go out and buy ice cream for their new family members.

This warm sensitivity will serve Judge Sam well on the Federal Bench, where justice must always be tempered with mercy, and the judicial system can contribute to a constructive outcome from even the most difficult cases.

Finally, Judge Sam has a unique appreciation for the American system of government, and democracy. His personal background and the heritage of his immigrant parents, have instilled in him from his very first years an awareness of how fortunate he—and all of us—are to live in this great country. In the materials that I have on file in my office is a quote attributed to Judge Sam that I would like to share with the Committee:

"Do not give up on America. Do not listen to the bad but correct it by the law of the land. America will fulfill her destiny."

Mr. Chairman, I take great pride in joining with my colleague, Senator Hatch, in commending Judge Sam to your Committee and urging your positive action on his nomination.

The CHAIRMAN. We will be very glad to hear from Senator Hatch, a member of this committee, chairman of the Constitution Subcommittee.

You may proceed, Senator.

STATEMENT OF HON. ORRIN HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman, Senator Simon and Senator Specter as well. It is a great privilege for me to introduce to the committee a very fine man named Judge David Sam, who is currently serving on Utah's district court bench.

David Sam is one of the most outstanding Americans I have ever known. He is hard working, he is dedicated, he is scrupulously honest. From personal experience with this fine gentlemen, I know for a fact that he is one of the finest men I have ever known and he is especially deserving of our respect and admiration. I think he is particularly well qualified to be a Federal district court judge.

Judge Sam has distinguished himself in many ways. In his professional career, he spent years in private law practice representing the ranchers and the farmers of the mostly agrarian communities of Utah's Uintah Basin. He knows and he understands the common man, which I think is very important.

In 1976, he accepted a prestigious appointment to the State district bench in Provo, UT, and he has served there with distinction for the past 10 years.

To sum up my feelings about David Sam's suitability for the Federal bench, I would simply say that Dave Sam is one of those rare individuals who I am absolutely convinced will bring a temperament to the trial bench that is perfectly suited to the task at hand.

He will be fair, while being just, and he will treat every man and woman, regardless of rank or stature, with courtesy and patience. More than most people I know, David Sam really cherishes his American citizenship; it is not something that he has taken for granted, for it was not all that long ago that a young Romanian by the name of Andrew Serb traveled by foot across the entire country of Romania to escape the ravages and hopelessness of a freedom-destroying monarchy to start all over again with his new wife in a land across the Atlantic where hope and freedom were alleged to be in abundance.

Fortunately for us, Andrew Serb successfully made that journey, crossing the border into Austria, then Germany, then aboard a steamer to the United States where he finally fulfilled his dream. He selected the most American name he could possibly find, Sam, in honor of his newest favorite uncle, and Andrew Serb became Andrew Sam.

Then he and his wife settled in Gary, IN, and had 11 children and a little boy named David was No. 11. Now, David Sam appears before this committee for confirmation to the Federal bench. He and his family have been through a lot to get him here and I am satisfied that the result will be a tremendous credit to our Federal courts.

So I highly recommend Judge Sam to you, and I would just say in closing that Judge Sam was the No. 1 selection of our judicial selection commission, which was balanced with Democrats, Republicans, with lawyers, judges, and regular citizens, and they chose him No. 1 out of a wide number of people who applied for this position.

We are very proud the President selected Dave Sam for this particular position, and I want to thank you, Mr. Chairman, for allowing me this opportunity to present him to you this day.

The CHAIRMAN. It is a pleasure to have you Senators here, Senator Garn and Senator Hatch. Judge Sam, I want to congratulate you for being appointed by the President. I want to congratulate you for having the unanimous, high endorsement of both of these able, fine Senators.

Now, we will ask you to step back for a few minutes to hear these Senators and then we will come back to you.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. Oh, excuse me.

Senator SIMON. That is quite all right; I have no questions.

The CHAIRMAN. We are bringing him back for questions.

Senator SIMON. I am unfortunately tied up with floor action on the immigration bill. I simply want to say for the minority that we have taken a look at all four of these nominees and we have no problems with any of them.

The CHAIRMAN. Thank you very much, Senator.

Senator HATCH. Thank you, Senator Simon.

The CHAIRMAN. Next on our agenda is Judge Ludwig of Pennsylvania. Now, Senator Wilson did tell me he was on a very tight schedule. Would you mind letting him go next, or do you have something that is very urgent, too?

Senator SPECTER. I do, but I would defer.

The CHAIRMAN. Senator Wilson, you said you were on a very tight schedule and the distinguished Senator from Pennsylvania is willing to yield to you.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Mr. Chairman, I am most grateful. That is the third time in two days that I have become indebted to the Senator from Pennsylvania, and I thought I might as well say it to save him the trouble of reminding me.

But I do thank him and I thank the committee for their courtesy. I have the great privilege today to come before this committee once again in the cause of introducing to it a distinguished candidate for the bench. It is my honor and privilege today to appear before you to introduce Stephen V. Wilson, an outstanding, greatly respected California attorney who is a candidate for appointment to the United States district court.

Mr. Wilson has been nominated by the President of the United States for a judgeship in the central district of California. I recommended Mr. Wilson to the President following a most careful and thorough review of potential candidates by my judicial qualifications screening committee in California.

The committee unanimously agreed that Mr. Wilson would be not just a welcomed addition to the ranks of the Federal judiciary, but that he was an outstanding candidate. I am very pleased that the President and the officials within his administration in the Department of Justice have affirmed my choice through their detailed, independent investigations.

Stephen Wilson is known as an extremely competent and extremely diligent attorney by both his fellow California lawyers and members of the California judiciary, before whom he has appeared.

He is a member of the law firm of Hochman, Salkman, and DeRoy in Beverly Hills, CA, where he specializes in business and tax matters. If I might at this point, Mr. Chairman, I would point out that accompanying him to today's hearings are his parents, Harry and Rae Wilson, who are seated directly behind Stephen Wilson, and one of his distinguished law partners, Martin Gelfand.

Mr. Wilson received his undergraduate degree from Lehigh University in Pennsylvania. He then graduated from Brooklyn Law School and later received a master of laws degree from the National Law Center at George Washington University here in Washington, DC.

From 1971 through 1977, he served as an assistant United States attorney in the central district of California, the largest district in the United States. During most of this time, he was chief of the Fraud and Special Prosecutions Division.

Early on in his legal career, Mr. Wilson served as a trial attorney for the Department of Justice, where he worked on a myriad of civil and criminal tax litigation matters. In 1976, Mr. Wilson received both the Attorney General's Special Commendation Award and the District Director's Award for his contribution to the enforcement of our tax laws.

Mr. Wilson is no stranger to the intricacies of our Federal laws. While he was a United States attorney, he was responsible for prosecuting fraud cases involving the Department of Housing and Urban Development and other governmental agencies.

He supervised some 34 successful multidefendant prosecutions of violations of our Nation's securities laws, and he has to his credit many successful prosecutions regarding the fraudulent use of tax shelters. He was also involved in the first prosecutions of copyright violations relating to record and tape piracy and film piracy.

Mr. Wilson has made important contributions to the academic aspects of the legal profession. He has taught at both the University of San Diego Law School and at Loyola Law School in Los Angeles. He has also contributed to many American Bar Association continuing education programs and, additionally, has had articles published in numerous legal periodicals.

Stephen Wilson has made significant contributions to every facet of the legal profession. I am confident that he will serve Californians and the legal community with great distinction, and that he will reflect credit upon the President as the appointing authority.

In short, Mr. Chairman, he has not only my unqualified endorsement, but my enthusiastic support and recommendation to this distinguished committee that it send to the full Senate a recommendation for his confirmation.

I can only tell you that while I am proud of the appointees that this committee has recommended for confirmation, I think that few that I have brought before you can claim any greater distinction than Mr. Wilson. He has received especially enthusiastic, as well as unanimous, support from the members of my screening committee.

I do thank the Chair again, and my colleague from Pennsylvania, Senator Specter, for your courtesy in allowing me to appear out of order.

The CHAIRMAN. Mr. Wilson, I want to congratulate you upon your appointment by the President, and also congratulate you that your name is Wilson. [Laughter.]

One of the ablest Senators we have had come to the Senate from California in a long time is sitting right beside you now and we are very proud of him, and his high endorsement of you, I am sure, is responsible for this appointment.

Now, Senator Wilson, since you have to go, so we will excuse you, and we will call him back in a few minutes for some questions.

Senator WILSON. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Hatch, do you have some questions?

Senator HATCH. I have no questions.

The CHAIRMAN. Senator McConnell, do you have some questions?

Senator MCCONNELL. Mr. Chairman, I would just like to congratulate Mr. Wilson on his nomination, as well as the others who have been chosen by the President, and I look forward to supporting all of them.

Thank you.

Senator HATCH. Well, if I could also add my congratulations, it is a wonderful privilege to serve in this capacity. I know that this administration takes these nominations very seriously, so it is a real compliment to you and your family. And I just want to personally welcome you to the Federal court system.

Mr. WILSON. Thank you very much.

The CHAIRMAN. All right. You are now excused, Senator Wilson.

We will ask Judge Ludwig to come around. Senator Specter, we will be glad to hear from you.

Is Senator Heinz here? Senator Heinz, come around. I believe Senator Heinz is the senior Senator. We will take them according to seniority. They are both good men.

Senator Heinz, we would be pleased to hear from you now concerning Judge Ludwig.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Well, Mr. Chairman, it is a pleasure and a privilege to appear here before you with my distinguished colleague, Senator Specter, to introduce to you Judge Ed Ludwig. We are both extremely proud to have this opportunity to introduce him to you as the nominee of the President for the U.S. District Court for the Eastern District of Pennsylvania.

I obviously am here to lend my strong support to his nomination and confirmation by your committee and by the Senate. His career is one that is full of outstanding achievements. While he was in private practice, Judge Ludwig argued many cases in Federal court, and he was particularly accounted an authority on antitrust matters.

He has served as a member of the Court of Common Pleas of Bucks County now for some 17 years, and he has handed down many significant decisions on a variety of criminal and civil and juvenile cases.

His successful work both in the private practice of law and as a common pleas judge has certainly earned him the admiration and respect of his peers. I know I could go on and recite his numerous accomplishments, but I will not do so in the interest of time.

I just want to make the observation that Ed Ludwig is not only a good lawyer and a good citizen, but he has a gift of legal scholarship. He has that good and often rare ability to apply abstract legal thought to real-life situations, and so I have absolutely no reservations, Mr. Chairman, about Judge Ludwig's ability to serve with distinction as a member of the Federal judiciary. To the contrary, I think he has an exceptional record.

The quality of his legal opinions are a matter of record. His experience both in private practice and as a judge constitute the very best sort of preparation for the responsibilities for which the President has nominated him. I cannot think of any more exceptional qualifications. I can think of none that he lacks and he has my unqualified support for his endorsement by the Senate.

Therefore, I am delighted and pleased to be here with my distinguished colleague, Senator Arlen Specter, to put in a good word for his nomination. I might add that Senator Specter is a member of this committee, and he, I think, really more properly should address Judge Ludwig's qualifications. I know he knows them well, and so I am delighted to yield to my colleague from Pennsylvania.

The CHAIRMAN. Thank you very much, Senator. We are glad to have you here. Senator Specter is a very able member of this committee; we are glad to have him appear on your behalf.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. After Senator Heinz' eloquent presentation, little else need be said, but that will not deter me from saying somewhat more than a little.

I share with Senator Heinz pride and pleasure in introducing Judge Ludwig to the Judiciary Committee as a recommendee from the nominating panel which Senator Heinz and I have appointed.

Judge Ludwig has a really unique combination of education, intelligence and experience to come to the Federal bench. He is a graduate of the Harvard Law School; was in the service; clerked for a very distinguished Philadelphia common pleas judge, Judge Joseph Sloan. Among the illustrious history of the Philadelphia lawyers and the Philadelphia bar, I would say that Judge Sloan was excelled by none.

Judge Ludwig then worked for a large firm in Philadelphia, Duane, Morris and Ekshire, where I first met him. He and I were young lawyers carrying briefcases for senior lawyers in a famous milk antitrust case—Country Maid Dairy. I represented Sealtest and he represented Abbott's in that particular case, and I saw his work on a day-in and day-out basis.

He then moved to Bucks County, to the suburban area, formed a law practice, practiced for several years, and then became a judge on the Court of Common Pleas of Buck County, where he has done very distinguished work.

So he comes to the Federal bench in the prime of his life at the age of 57, well-educated, well-seasoned, well experienced. He joins a very outstanding court on the U.S. District Court for the Eastern District of Pennsylvania, and he will be a very fine addition to that court.

I am delighted to make these introductory remarks to join my distinguished colleague, Senator Heinz. Thank you, Mr. Chairman.

The CHAIRMAN. Judge Ludwig, I want to congratulate you upon your appointment by the President and having the high endorsement of both of your Senators. They are both held in high esteem here, and I am sure we will act on these right away. With both of these able Senators backing you, there should be no trouble getting you through.

Senator Hatch.

Senator HATCH. Judge Ludwig, I am happy to welcome you before the committee, with your two distinguished Senators, and I just want to tell you that I support you and we look forward to having you serve on the Federal bench and we appreciate your willingness to serve.

Judge LUDWIG. Thank you very much, Senator.

The CHAIRMAN. We thank you both. Senator Heinz, you may remain if you care to or if you are busy and have to leave, we will understand it.

Senator HEINZ. Mr. Chairman, thank you very much for your courtesy in accommodating us both.

The CHAIRMAN. We will now ask Senator Pressler to come around and introduce Mr. Argetsinger. Now, this position is for the Copyright Royalty Tribunal.

STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Mr. Chairman, Senator Hatch, members of the committee, I am happy to introduce to the Senate Judiciary Committee today and recommend the appointment of J.C. Argetsinger II, as Commissioner of the Copyright Royalty Tribunal.

It is a privilege for me to introduce J.C. J.C. served as my legislative director from September 1979 to March 1982; he did excellent work for me. I think very highly of him and I was very honored and pleased to recommend him to the White House for this nomination.

J.C. will bring to the tribunal a good, solid background as a member of the legal profession with a great deal of experience in many areas of the Federal Government. He is extremely knowledgeable about the workings of Congress and is well respected on Capitol Hill.

I am confident that he will carry out the duties and responsibilities of the Office of Commissioner of the Copyright Royalty Tribunal with dispatch and expertise.

J.C. is currently qeneral counsel of ACTION. Prior to joining my staff, he was a professional staff member of this distinguished committee, having served as chief minority counsel from 1975 to 1977. While serving on this Senate Judiciary Committee, he worked on the copyright revision bill which established the Copyright Royalty Tribunal.

He also served on the staff of former Senator Roman Hruska and as minority counsel of the Senate Constitutional Rights Subcommittee. He was a trial attorney in the U. S. Department of Justice and served as special assistant U. S. attorney in 1971.

He served as an attorney on the U.S. Board of Veterans Appeals and was a captain in the U.S. Army. J.C. graduated with a B.A. from Youngstown University and a J.D. from Western Reserve University.

In addition to knowing J.C. on a professional basis, I have personally enjoyed knowing him and his wife, Joan, and their three lovely children.

J.C. is highly professional, fair minded and analytical. He will bring a sense of fairness to the tribunal in making determinations concerning the adjustment of copyright royalty rates.

I urge this committee to recommend the confirmation of J.C. Argetsinger to the full Senate. I might say I think it is wonderful that someone who was chief minority counsel to this committee as a staffer has returned as an executive branch nominee. I believe he served on the staff at the same time as one of the members of the committee who has returned as a Senator from Kentucky.

The **CHAIRMAN**. Mr. Argetsinger, I congratulate you on your appointment by the President, and I also congratulate you upon having the approval of both your Senators from Virginia, I believe, and also having the high endorsement of Senator Pressler. He has taken time to come here in person to speak exceedingly well of you, and I believe you worked with him for 3 years.

Mr. **ARGETSINGER**. Yes, sir.

The **CHAIRMAN**. So when a former employer comes and endorses you as highly as he has, you certainly must be a good man.

Senator **PRESSLER**. He was one of the best.

The **CHAIRMAN**. I remember when you were on the committee here some years ago and I enjoyed working with you.

Senator Pressler, we thank you very much for coming here on behalf of this fine gentleman.

Now, Judge Sam, if you will come around, Senator Hatch is interested in your appointment and we will take you first; he is still here.

I will ask all you appointees—Judge Ludwig, Judge Sam, Mr. Wilson, and Mr. Argetsinger—to all stand and be sworn at one time.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but truth, so help you God?

Judge SAM. Yes.

Judge LUDWIG. I will.

Mr. WILSON. Yes.

Mr. ARGETSINGER. Yes.

The CHAIRMAN. Judge Sam, would you like to introduce your family or any friends you have here?

TESTIMONY OF DAVID SAM, OF UTAH, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF UTAH

Judge SAM. I would be very honored to, Mr. Chairman. I have with me my wife, Betty, my daughter Pam and my son Danny—two of our eight children, Mr. Chairman.

The CHAIRMAN. You have eight children?

Judge SAM. Eight children, yes.

The CHAIRMAN. That is a wonderful family.

Judge Sam, at the present time you are a judge, I believe, for the fourth judicial district of Utah?

Judge SAM. That is correct.

The CHAIRMAN. It is my understanding that this is a trial court of general jurisdiction?

Judge SAM. That is correct.

The CHAIRMAN. You have the power of the death penalty in criminal cases and unlimited jurisdiction in civil cases?

Judge SAM. That is correct.

The CHAIRMAN. Now, would you tell the committee if you foresee any difficulty in meeting the challenges of the Federal district court—transition from the State to the Federal court?

Judge SAM. Mr. Chairman, I am sure that the challenge will be a great one, and there are differences, I am sure, between the Federal and the State law. However, I will endeavor to work hard and to study the Federal law and to attend those seminars and other matters that will educate me, and to devote all my time and effort to make sure that I am well informed.

The CHAIRMAN. Judge Sam, in recent years Congress has given a great deal of consideration to reform of Federal habeas corpus procedures. What are your views on the need for reform in this area?

These appeals are trial cases in the State court, then go into a district judge in a Federal court, then the circuit court of appeals, and then the Supreme Court.

Judge SAM. Well, I——

The CHAIRMAN. Two men killed a little girl in my State 7 years ago and it was not until a few months ago that they were finally executed. People lose respect for the law when it goes on so long like that.

Judge SAM. Well, I share that view, Mr. Chairman. I believe that the habeas corpus proceedings should be used with restraint and I would support that type of bill.

The CHAIRMAN. Judge Sam, what are your views of the primary purposes of the criminal justice system?

Judge SAM. My judgment is that individuals should be brought promptly before the bar of justice to determine guilt or innocence, and I would certainly do all in my power to make sure that there were no delays.

The CHAIRMAN. Now, we hear a lot about judicial activism. It is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does this phrase mean to you?

Judge SAM. Well, Mr. Chairman, I would do my utmost to remain within my role as a judge. I have great respect for the process that has brought you gentlemen to the place of representing our people and to be our lawmaking body. And I certainly respect that process and I would do all in my power to make sure that I did not go out of my role to become a lawmaker, but to be a judge and to judge.

The CHAIRMAN. Some Federal district judges have taken over the operation of schools; others have taken over State institutions of various kinds. It seems they have got enough work to do to interpret the law and try cases rather than try to take over the running of State institutions of various kinds. Do you agree with that?

Judge SAM. I certainly do, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Well, I just want to compliment you, Judge Sam, for this opportunity to serve and for the President thinking enough of you to call you to serve. I think it is a tribute to you, your family and your background that you are going to have this opportunity.

I think it was a great tribute to you that Senator Simon was willing to stand up here and say that he, on behalf of his colleagues on the other side of the bench here, feels that these four nominees today are excellent nominees. Of course, that includes you.

So I am very proud that we will get your nomination through and you will be able to serve as a Federal district court judge. I just want to compliment you for it. I know what a fine man you are and I think you will do a very good job on the bench.

Judge SAM. Thank you very much, Senator Hatch.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Congratulations, Judge Sam.

Judge SAM. Thank you very much.

The CHAIRMAN. You are excused now, Judge. Thank you very much.

Judge SAM. Thank you very much.

The CHAIRMAN. I hope you enjoy your service on the bench.

Judge SAM. Thank you. I am very appreciative and very humbled by the call. Thank you.

The CHAIRMAN. Next is Judge Ludwig of Pennsylvania. Judge Ludwig, if you will come around, I believe you served as a judge for the Court of Common Pleas of Bucks County since 1968?

TESTIMONY OF EDMUND V. LUDWIG, OF PENNSYLVANIA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge LUDWIG. Yes; that is correct, Mr. Chairman.

The CHAIRMAN. I am sure you have noticed an increase in the caseload of your court over the years. I wonder, however, what steps you have taken to prepare yourself for the demanding caseload that awaits you as a Federal district court judge.

Judge LUDWIG. Well, my docket, Mr. Chairman, is virtually clear at the present time. I have had the opportunity to study methods of Federal court calendar control and the Federal Rules of Evidence. I am following the Federal reports and I am raring to go.

The CHAIRMAN. Judge Ludwig, is your court a court of general jurisdiction?

Judge LUDWIG. Yes, sir; it is.

The CHAIRMAN. Do you have the power of death in criminal cases and unlimited jurisdiction in civil cases?

Judge LUDWIG. Yes, that is correct.

The CHAIRMAN. Judge Ludwig, do you feel that a judge should assume direct control over complex issues in cases in order to avoid delays and to effectively manage such cases?

Judge LUDWIG. Yes. The Federal court caseload requires very strong calendar control. It means cutting through cases, disposing of them very promptly, while still according those who are entitled to it their just day in court.

The CHAIRMAN. Judge Ludwig, would you give us your own perspective on the recent trend in the Supreme Court toward stricter standards of standing?

Judge LUDWIG. The rule on standing is designed, of course, to assure that people who come into court have a genuine and significant stake in the outcome of a case. I agree with a narrow definition of standing.

With the tremendous flood of cases in the last number of years, the rule on standing is just about a rule of necessity.

The CHAIRMAN. Judge Ludwig, do you believe that changes in the law should be reserved to the legislature—that is, Congress nationally—whose members can be altered by the voters if the elected officials fail to reflect the values of society?

In other words, how do you feel about judicial activism?

Judge LUDWIG. Well, I entirely agree that judges should not try to make the law. That is not their job. They should exercise their jurisdiction narrowly and decide each case on the specific facts and issues before them on a case-by-case basis.

The CHAIRMAN. In other words, you believe in the separation of powers, I believe, under the Constitution?

Judge LUDWIG. Absolutely.

The CHAIRMAN. And that those who are serving the public should restrict their responsibilities to those powers given to them under the Constitution?

Judge LUDWIG. That is correct, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Ludwig, congratulations on your appointment and on your appearance here today. I would only repeat a statement made by Senator Thurmond, the distinguished chairman of this committee, when judges were being questioned about 3 years ago.

Senator Thurmond said something that I considered to be profound, and I have said this to Senator Thurmond before. He had asked a question in a very direct way about the necessity for judges being courteous on the bench, and the response was, of course, that the nominee would be courteous.

Senator Thurmond then said, the more power a man has, the more courteous he should be. I have reflected on that more than once and I think it is something that those who are judges or those who are Senators or those who are in power should reflect on very, very carefully.

So I share that comment with you because having been a practicing lawyer for many years, thinking back of the old, crusty Common Pleas Court in Philadelphia, the judges were not very courteous when you and I came to the bar in the mid-1950's. I think it is worth just a moment to reflect on Senator Thurmond's comment in that respect.

Thank you, Mr. Chairman.

Judge LUDWIG. Well, thank you very much. It is a great honor to be here and I want to thank you very much, Senator Specter, for your very generous introduction. And I thank you, Mr. Chairman, and your staff for your great courtesy.

The CHAIRMAN. Judge Ludwig, we wish you a happy tenure of service on the bench, and with the able assistance of this able Senator from Pennsylvania, I hope we can get you out right away.

Judge LUDWIG. Thank you, sir.

The CHAIRMAN. You are now excused.

Next is Mr. Wilson of California. Mr. Wilson. I was very glad to see you out in California some months ago. It is a pleasure to have you here.

Mr. Wilson, several years ago you were a founding director of an organization known as Foundation for People. This organization, I believe, was formed in conjunction with the U.S. Probation Office in order to develop more meaningful programs of community service for probationers.

Would you tell the committee the contributions that have been made by this organization and its status at this time?

TESTIMONY OF STEPHEN V. WILSON, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Mr. WILSON. Its current status is that it is very viable and it is serving as a prototype for other similar organizations in other districts. It was founded with the concurrence of the Chief Judge of our district and the probation office to better utilize the talents and skills of essentially white-collar offenders who had substantial talents aside from their crimes.

It was thought that they could put their talents to use, once they served their sentences and went on probation, to the betterment of the community, especially in teaching trades and skills to young people who unfortunately did not abide by the law.

The CHAIRMAN. Mr. Wilson, would you tell the committee what procedures you will follow in determining any potential conflicts of interests and how you intend to resolve them?

Mr. WILSON. Well, if there is a conflict of interest, of course, I would recuse myself. I would abide by the standards of the American Bar Association and the various promulgations by bar associations and by the courts.

The CHAIRMAN. Mr. Wilson, how does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process of equal protection clauses?

Mr. WILSON. Well, Mr. Chairman, those clauses are not a part of our legal heritage as a license for judges to legislate. As a district judge, having, of course, to follow the law closely as decided by the higher courts, it would be my function to examine those clauses in light of precedent by both the Supreme Court and by the Ninth Circuit Court of Appeals, which will, of course, be binding upon me as a district court judge.

In other words, I would not view those somewhat amorphous clauses as a license to do more than what a judge should do; that is, I should judge and not legislate.

The CHAIRMAN. Mr. Wilson, article III, section 1, of the Constitution invests in the Congress plenary power to ordain and establish such inferior Federal courts as it sees fit. To what extent as a direct function of that power is Congress equally empowered to limit the jurisdiction of lower Federal courts over various classes of cases and controversies?

Mr. WILSON. I believe the Congress does have the authority to limit the jurisdiction of the Federal courts if it sees fit, except that it cannot limit the jurisdiction in a manner that interferes with article III and the jurisdiction conferred therein.

The CHAIRMAN. Would you mind expressing yourself on judicial activism? I am very interested in that. I have seen some Federal judges that have just assumed too much power. I have seen some that were discourteous to jurors and lawyers and witnesses, and I have seen others that felt they had the power to go out and run school districts and State institutions. I think the power went to their heads.

Would you mind giving us your view of judicial activism and how you feel about it?

Mr. WILSON. Yes, Mr. Chairman; I believe that a judge should decide the case or controversy before him, and decide that matter as narrowly as possible. I do not believe that a Federal judge should look to expand his powers or decide a case beyond the facts before that judge.

I feel that in terms of the judge exercising authority over school systems and the like that in most instances, if not all, that function is best left to other administrative authorities and that a judge should never seek to administer such institutions unless, of course, Congress, by statute, indicates that a judge should.

The CHAIRMAN. Now, I have a statement here by Senator Cranston, I believe, approving your nomination, too. We will put that in the record.

[Committee insert.]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman, I am pleased that Stephen V. Wilson of California has been nominated to serve as a U.S. District Judge for the Central District of California.

A young attorney who is now a partner in a distinguished Beverly Hills law firm, Steve Wilson has had solid government experience, including service with the Justice Department as a trial lawyer in the tax division and six years as Assistant US Attorney for the Central District of California. In 1976, he was awarded a special commendation from the Department of Justice for his work and was named one of the best lawyers in America in a publication by the same name (Naifeh and Smith) in a chapter on criminal defense attorneys.

A moderate Republican by political affiliation, he has good recommendations from California Democrats I've talked with. Steve has published widely on aspects of criminal law, specializing in complex white collar crime prosecutions. He's a clear thinker and a moral one; I believe he understands the crucial need to ensure equal justice for all citizens—he was chair of the Federal Indigent Defense Panel in the Central District Court in Los Angeles.

In all ways, Steve seems a good choice for the Reagan Administration to make. I believe he has the qualifications for the District Court bench and I support his appointment.

The CHAIRMAN. Mr. Wilson, I think those are the only questions I have to ask you. Would you like to introduce your family who are here?

Mr. WILSON. It would be a great pleasure, Mr. Chairman. I would like to introduce my mother, seated in the first seat to the left, and my father.

The CHAIRMAN. We are very glad to have you all here.

Mr. WILSON. I might add that my father is a practicing lawyer for almost 50 years and still practices law on a fulltime basis, and I might say has been a great credit to the legal community in New York and to the legal community at large because throughout his career he has exercised the highest principles of integrity in approaching the practice of law.

The CHAIRMAN. He is practicing in New York, did you say?

Mr. WILSON. Yes, yes. He is a lawyer who is greatly revered by his clients and I am very proud of him.

The CHAIRMAN. Well, this legal family is going to extend from New York to California.

Mr. WILSON. I moved there about 15 years ago.

The CHAIRMAN. Do you have any friends you want to introduce?

Mr. WILSON. Yes. To the far right is my partner and, fortunately, my closest friend, Martin Gelfand, who is a member of Hochman, Salkman & DeRoy—a most able lawyer and a strong supporter of me and my family and my firm for many years. And I am proud to introduce him to the committee.

The CHAIRMAN. We are glad to have all of you with us. You are now excused. I hope you enjoy your service on the bench.

Mr. WILSON. Thank you, Mr. Chairman.

The CHAIRMAN. Our last nominee here is for the Copyright Royalty Tribunal. Mr. Argetsinger, if you will come around, do you have any family or friends here you want to introduce?

TESTIMONY OF J.C. ARGETSINGER, OF VIRGINIA, TO BE A COMMISSIONER OF THE COPYRIGHT ROYALTY TRIBUNAL

Mr. ARGETSINGER. Senator, my wife and three children are busy over in school in Alexandria, but I am proud that my brother—I am the oldest of nine—my brother, Duke, is here. He is the youngest of nine, and between us we think we are the best and the brightest in the family.

The CHAIRMAN. We are glad to have you with us.

Mr. Argetsinger, presently you serve as general counsel for the U.S. Agency, ACTION, is that right?

Mr. ARGETSINGER. Yes, sir.

The CHAIRMAN. Prior to that, you served as a committee counsel and legislative director for the U.S. Senate for 9 years, I believe.

Mr. ARGETSINGER. Yes, sir.

The CHAIRMAN. From 1970 to 1973, you were a trial attorney for the Department of Justice?

Mr. ARGETSINGER. Yes, sir.

The CHAIRMAN. And now you have been nominated for the position of Commissioner of the Copyright Royalty Tribunal. What do you feel will be the most rewarding aspect of serving in this capacity?

Mr. ARGETSINGER. Well, Senator, one very personal reward, having been on this committee as a staff member—I sat through many long afternoons and spent the best part of my youth, I think, in this room, and a good portion of that time was taken up with the copyright revision.

The process had started long before I came here, but from 1973 to 1976, the committee had many hearings, and out of that came the copyright bill of 1976 which set up the Copyright Royalty Tribunal.

I was very interested in the concept at that time and I have kept—I cannot say paternal, but certainly a brotherly look at that Tribunal ever since. Having had a part in that creation it is particularly thrilling and rewarding to become a member of the Tribunal and to see that it is working as Congress had intended it to.

I know there has been some criticism of the Tribunal. I remember, though, when it was set up that it was done so with limited powers. I think it will be rewarding to serve on the panel and to work with the Congress in strengthening and continuing with the mission of that body.

The CHAIRMAN. Mr. Argetsinger, would you please tell the committee what long-term goals, if any, you have as a Commissioner of the Copyright Royalty Tribunal?

Mr. ARGETSINGER. Well, Senator, as I just mentioned, I look forward to working with this committee and with the House committee. Now that the Tribunal is coming up to the completion of its first decade, Congress is beginning to take a look at how it functions and how well it does so.

There have been enormous changes in the market since Congress first established this Tribunal up in 1976. I think the Congress will be looking at how rates are distributed, how the rates are fixed, and the whole issue of compulsory licenses.

I think that will be very interesting and it will be rewarding for me to work with these committees. The Tribunal of course, is a creature of Congress. It is in the legislative branch and I am pleased that the Congress does have as much interest in that Commission as it does.

This will be my goal, working with the Congress to strengthen and improve the Tribunal.

The CHAIRMAN. Mr. Argetsinger, the Copyright Royalty Tribunal, I believe, is responsible for distributing millions of dollars in fees each year. As a commissioner of the Tribunal, how will you ensure that these fees are equally and fairly distributed?

Mr. ARGETSINGER. Senator, in my reading of the law and my recollection of the legislative history created when Congress set up the Commission, there were really very few guidelines put in place. The general principle, of course, is equity and fairness.

The Tribunal has a body of precedents; they have regulations. I think the Tribunal should work, and as a commissioner I will work, to encourage the various claimants to reach settlements and if there are disputes before the panel, to weigh the evidence fairly and objectively, and to apply the law and the regulations in an objective and fair manner.

The CHAIRMAN. Mr. Argetsinger, I observe you mentioned the compulsory license feature. I am wondering if you feel it is necessary to attain this pertaining to jukeboxes, records, cable television, and public broadcasting, which falls within the mandate of the Copyright Royalty Tribunal.

The reason I ask this question is that some people have suggested that the market forces which control other areas of copyrighted material provide a better means of establishing rates and distributing fees.

Mr. ARGETSINGER. I think that is a very central question, Senator, and normally on most issues, generally I would say that I believe in the market forces. Looking back at the history of the Tribunal and the copyright revision of 1976, Congress itself was forced to reach several compromises in the cable area and the jukebox area.

The owners and the users had totally different views on whether the copyright law should apply or not, and the compulsory license, whether it is liked by some people or not, was the compromise that was borne out of this conflict.

I think in the nearly 10 years that have passed, there have been changes in the marketplace. There are various organizations that represent the owners that have been successful in reaching settlements without going to the Tribunal.

I think there are some mechanisms now that perhaps did not exist, and I think this is something the Congress, in the review and oversight, will look into, and I look forward to approaching this with the Congress.

The CHAIRMAN. Now, one question that we ask of all appointees except judges: Will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. ARGETSINGER. Yes, indeed, Senator.

The CHAIRMAN. That is all the questions I have and I hope you will enjoy serving on the Copyright Royalty Tribunal, and I hope we can get your nomination up and approved very quickly.

Mr. ARGETSINGER. Thank you, sir.

The CHAIRMAN. I believe that is all the nominations we have and so we now stand adjourned.

[Whereupon, at 2:50 p. m., the committee was adjourned.]

BIOGRAPHIES

DAVID SAM

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF UTAH

Birth: August 12, 1933, Hobart, IN.

Legal Residence: Utah.

Marital Status: Married to Betty Jean Brennan Sam, 8 children.

Education: 1951-1952—Western Michigan University. 1952—Valparaiso University. 1952-1954—Brigham Young University. 1956-1957—B.S. degree. 1957-1960—University of Utah, College of Law, J.D. degree.

Bar: 1960—Utah.

Military Service: 1961-1963—United States Air Force. Judge Advocate Corps.

Experience: 1963-1964—R. Earl Dillman, Esq., Associate. 1964-1966—Church of Jesus Christ of Latter-day Saints. 1969-1970—Education System. Seminaries and Institutes. Brigham Young University. Principal, Duchesne High School (1964-1965). Director, Institute of Religion Colorado Univ. (1965-1966). Director, Portland State Univ. Institute of Religion (1969-1970). 1966-1969—Private Practice. 1970-1976—Roosevelt & Duchesne, Utah. 1966-1972—Duchesne County Attorney. 1976-present—District Judge, Fourth Judicial District of Utah.

EDMUND V. LUDWIG

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF PENNSYLVANIA

Birth: May 20, 1928, Philadelphia, PA.

Legal Residence: Pennsylvania.

Marital Status: Married to Sara Marie Webster, 4 children.

Education: 1945-1949—Harvard College, A.B. 1949-1952—Harvard Law School, LL.B. degree.

Bar: 1953—Pennsylvania.

Military Service: 1953-1956—United States Army, Judge Advocate General's Corps.

Experience: 1952-1953—Honorable Joseph Sloane, Common Pleas Court, Law Clerk. 1956-1959—Duane, Morris & Heckscher, Associate. 1959-1968—Biester & Ludwig, Partner. 1968-present—Judge, Court of Common Pleas of Buck County, Seventh Judicial District.

STEPHEN V. WILSON

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: March 26, 1941, New York, NY.

Legal Residence: California.

Marital Status: Single.

Education: 1958-1959—Adelphi University. 1959-1962—Lehigh University, B.A. degree. 1962-1966—Brooklyn Law School, J.D. degree. 1969-1971—George Washington University, School of Law, LL. M. degree (1973).

Bar: 1967—New York. 1972—California.

Experience: 1965-1968—Dewey, Ballatine, Bushby, Palmer & Wood, Law Clerk. 1968-1971—U.S. Department of Justice, Tax Division, Trial Attorney. 1971-1977—Assistant U.S. Attorney, Central District of California.

1977-present—Hochman, Salkin & DeRoy, Partner.

J.C. ARGETSINGER II

NOMINEE, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL

Birth: December 28, 1941, Montour Falls, NY.

Legal Residence: Virginia.

Marital Status: Married to Joan V. Rousseau, 3 children.

Education: 1959-1960—Cornell University. 1961-1963—Youngstown University, B.A. degree. 1963-1964—Cornell Law School. 1964-1966—Western Reserve School of Law, J.D. degree.

Military Service: 1967-1969—United States Army, Captain.

Experience: 1970—U.S. Board of Veterans Appeals, Attorney. 1970-1973—U.S. Department of Justice, Trial Attorney. 1973-1979—Senate Judiciary Committee: (1973-75)—Criminal Law and Constitution Subcommittees; (1975-77) Chief Minority Counsel; (1977-79) Professional Staff Member. 1979-1982—Senator Larry Pressler, Chief Legislative Counsel. 1982—Senator Frank Murkowski, Chief Legislative Counsel. 1982-present—ACTION, General Counsel.

CONFIRMATION HEARING ON: DAVID A. NELSON, JAMES L. RYAN, AND HENRY T. WINGATE

WEDNESDAY, SEPTEMBER 25, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Simon.

Staff present: Duke Short, chief investigator; Laurie A. Westley, chief counsel, Senator Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today to have hearings on three Federal judges, two U.S. circuit judges, David A. Nelson, of Ohio, to be U.S. Circuit Judge for the Sixth Circuit, and James L. Ryan, of Michigan, to be U.S. Circuit Judge for the Sixth Circuit; and a district judge, Henry T. Wingate, of Mississippi, to be U.S. District Judge for the Southern District of Mississippi.

Senator Cochran, you were here first, but I understand Senator Glenn has to leave right away; would you mind letting him go first?

Senator COCHRAN. Not at all, Mr. Chairman.

The CHAIRMAN. Senator Glenn, please come around.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator GLENN. Thank you, Mr. Chairman, and Senator Cochran. I appreciate that. We all get bogged down with too many meetings here, and I appreciate this very, very much.

It is a real pleasure for me, Mr. Chairman, to introduce to you David Nelson, from Ohio. He has been nominated while being in the law firm in Cleveland of Squire, Sanders & Dempsey, one of the most prestigious law firms in Ohio, and one of the largest, also.

His wife, Mary, is here with us today, and his son Fred, back in the second row. We are glad to have them with us today.

David Nelson went to Hamilton College; he went to Cambridge University, in England, as a Fulbright Scholar, he went to Harvard Law School. He served time in the U.S. Air Force here in Washington; was with the U.S. Post Office as general counsel and later as

Senior Assistant Postmaster General. He has worked on energy matters; has been a trial lawyer, and in corporate law. He has a broad background and experience, and it is a particular pleasure for me to introduce you to him here.

I have a number of friends in that law firm in Cleveland, OH, and I can say that in David's work there in that law firm, I have not heard a single bad word about him. All of the people there have been unanimous in recommending him very strongly and think he would be an outstanding Federal judge, and I agree with their assessment of his capabilities.

So, it is a real pleasure, Mr. Chairman, to introduce him, and I am sure you will be as impressed with his credentials and his views on things as we have been.

Thank you very much.

The CHAIRMAN. Mr. Nelson, we are very glad to have you with us. I congratulate you on your appointment by the President; I also congratulate you on having the high endorsement of Senator Glenn, who is held in high esteem here in the Senate.

We will take Senator Cochran next.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Mr. Chairman, I appreciate very much your invitation to introduce Henry Wingate to you and to the members of the Judiciary Committee.

It is an honor for me to be able to recommend to the committee that it confirm and ratify the appointment of Henry Wingate as U.S. District Judge for the Southern District of Mississippi.

I am happy that President Reagan has submitted his name to the Senate for confirmation, because I am convinced he will be one of the finest district judges we have ever had in the State of Mississippi. He is well-educated. He is bright. He is hard working. He is well respected by all who have met him and who have had dealings with him.

He is a graduate of Yale Law School, Mr. Chairman. He also graduated from Grinnell College, where he received his undergraduate education. He graduated from the public schools in Mississippi before going to college.

He is also an outstanding racquetball champion, Mr. Chairman. He is our State champion racquetball player. He and his wife both have won State titles in racquetball championships.

But he is also a person who has given a great deal of himself to his community; he is looked to for leadership and advice in matters affecting the community, and he takes time to get involved in community activities

Professionally, Henry Wingate is a well-rounded lawyer. He has had experience as a special assistant attorney general, a position he held for 4 years. He also served for 4 years as an assistant district attorney in Jackson, MS. In both of these positions, he prosecuted cases in the courts of general jurisdiction in the State of Mississippi—and he did so with a great deal of skill, winning the respect of trial lawyers all over the State.

For the last 2 years, he has been serving as an assistant U.S. Attorney for the southern district of Mississippi, handling both criminal and civil matters, and again, displaying a great deal of skill and ability in the handling of the matters assigned to him.

I have known Henry personally, Mr. Chairman, for several years. I have known his wife, who is a well-respected teacher in the public schools of our State. Henry has a strong family background. He is a person of good moral character.

Senator Stennis has also asked me to convey to the committee his support for Henry Wingate's confirmation, and he has submitted a statement, which he has asked be included in the record of today's hearing.

The CHAIRMAN. I have it here. Without objection, it will follow your statement in the record.

[Statement follows:]

PREPARED STATEMENT OF SENATOR JOHN C. STENNIS

Mr. Chairman, I am pleased to give my full support to the nomination of Henry T. Wingate to be U.S. district judge for the southern district of Mississippi. He has compiled an exemplary record of service to the legal profession in my State. A prosecutor with a reputation for honesty, integrity, and hard work, he has won the respect of his fellow lawyers throughout Mississippi.

Mr. Wingate is well prepared for service on the Federal bench. He is particularly well versed in matters of criminal law, and his extensive background in trial work in both State and Federal courts will serve him well as a Federal Judge. For the past year and a half he has served as an assistant U.S. attorney for the southern district of Mississippi, with his major responsibility being the prosecution of Federal criminal law violations.

Prior to his experience in the U.S. Attorney's Office, Mr. Wingate was for 4 years an assistant prosecutor in our State court system. There he again focused primarily upon criminal law matters, specializing in the prosecution of violent crimes.

Mr. Wingate also is familiar with the legal problems that confront State government. His 3 years as special assistant attorney general for the State of Mississippi exposed him to a variety of cases in which the State or one of its agencies was a party.

Mr. Chairman, Mr. Wingate's contribution to the legal system is not limited to this outstanding record of trial experience. He has devoted substantial time to teaching courses on criminal law and procedure. For the past 7 years he has been an adjunct professor at the Mississippi College School of Law. Since last November he has been a lecturer for the National College of District Attorneys at the University of Houston Law Center.

Mr. Wingate's concern for the proper functioning of our State's legal system can be seen in the time he has given in educating our State's local judges on criminal law and procedure as a lecturer with the Mississippi Judicial College, a part of the Mississippi Court Education Program. He has participated in numerous workshops on criminal law for members of the Mississippi highway patrol and other local law enforcement officials.

As you can see, Mr. Chairman, Mr. Wingate has a commanding combination of extensive trial experience and detailed substantive knowledge of criminal law. I think that it is a very important combination. Because of his commitment to a well functioning criminal justice system in Mississippi, he has given untold hours in sharing his knowledge and experience with others. Mr. Wingate's record suggests an underlying personal commitment of dedication, fairness, and public service.

I have had an opportunity to talk with Mr. Wingate, and I am fully persuaded that he understands the important responsibility that goes with being a Federal trial judge. I am confident that he has the dedication to hard work and the temperment for fairness and evenhandedness that this job requires.

Because of his background of Federal trial experience, his knowledge of Federal criminal law, and his commitment to the proper functioning of the legal system, I believe Mr. Wingate is fully qualified to serve in the position for which he has been nominated. He is the sort of person we need on the Federal bench. I feel confident that he will live up to the high standards we set for our Federal judges and will bring honor to the judicial system and the legal profession. I commend him to the committee highly.

Senator COCHRAN. Thank you, Mr. Chairman.

Mr. Chairman, without any reservation whatsoever, I recommend Henry Wingate to the committee. I am confident that his service will reflect a great deal of credit on the Federal bench.

The CHAIRMAN. Thank you very much.

Mr. Wingate, I want to congratulate you on your appointment by President Reagan, and also congratulate you for the strong endorsement you have received here from both Senators from Mississippi. And I want to congratulate you on the fact that Senator Cochran has come here in person, and he has taken the time out from other work to come and endorse you. He is held in very high esteem here, and that means a lot.

Mr. WINGATE. Thank you, Mr Chairman.

Senator COCHRAN. Mr. Chairman, I wonder if I could introduce other members of Mr. Wingate's family who have come up from Mississippi for the hearing?

The CHAIRMAN. Go ahead.

Senator COCHRAN. His wife, Mrs. Arnita Wingate; his mother, Mrs. Eloise Wingate; his sister, Mrs. Ruby Wingate-Rhodes; and his mother-in-law, Mrs. Ella Ward—all of whom are here.

The CHAIRMAN. Well, I believe he's got some supporters, anyway. [Laughter.]

Senator COCHRAN. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. Stay, if you want, or feel free to leave if you wish.

Now, Congressman Broomfield, will you come around and bring your candidate, Judge Ryan, of Michigan.

You may proceed.

STATEMENT OF HON. WILLIAM S. BROOMFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. BROOMFIELD. Thank you, Mr. Chairman.

I appreciate the opportunity today to appear to introduce my constituent, Michigan's Supreme Court Justice Jim Ryan, who has been nominated by the President for a seat on the Sixth Circuit Court of Appeals.

As the dean of the Michigan Republican congressional delegation, I have been involved in the selection of a number of candidates for Federal judicial posts for several years. I am extremely proud of the generally high caliber of candidates we have recommended. Jim Ryan is clearly at the top of the list.

Although he is just 52 years of age, he has already built an accomplished career in a number of areas of the legal profession. He has served as a teacher and a distinguished lecturer at the University of Detroit Law School, his alma mater, and at the Thomas Cooley Law School, in Lansing, MI. He has served as a military judge-advocate and a military trial judge, and continues as an officer of the U.S. Naval Reserve. Jim has been a private practitioner and served nearly 20 years on the bench, the last 10, as the justice of the Michigan Supreme Court, where he compiled a record of outstanding legal scholarship and reputation for fairness and hard work.

Among his peers, Mr. Chairman, there is no question of Jim Ryan's credentials. What is most impressive to me is his lifelong dedication to public service. Far less qualified men and women are leaving government service for greener pastures at a time when Jim is seeking the opportunity for greater public service.

Our country is fortunate, Mr. Chairman, that there are still talented and patriotic Americans like Jim Ryan, who are willing to step forward and volunteer to serve.

Mr. Chairman, it is a great honor for me to recommend Justice Jim Ryan for the Sixth Circuit Court of Appeals.

The **Chairman**. Thank you very much, Congressman Broomfield. We are very glad to have you come here in person and take your time to recommend the candidate here today, the nominee, Judge Ryan.

I want to congratulate him upon his appointment by President Reagan, and also upon the great interest that Congressman Broomfield has shown. Congressman Broomfield is held in high esteem in the Congress, and his endorsement carries great weight.

Mr. **Broomfield**. Mr. Chairman, I wonder if I could just introduce his wife? He has a number of family here, as well.

The **Chairman**. We would be glad for you to introduce them, if you would like to, Mr. Broomfield.

Mr. **Broomfield**. Thank you very, very much.

The **Chairman**. Mr. Ryan, do you have any friends you would like to introduce now?

Mr. **Ryan**. Yes, Mr. Chairman. If I may introduce my sister, Mrs. Joan Fitzgerald; and my nephew, Tim Fitzgerald, and niece, Kerry Fitzgerald. I would like to introduce, Mr. Chairman, a former chief justice of the Michigan Supreme Court, Justice Thomas Brennan and Mrs. Brennan; and behind them, a lifelong friend, Mr. James Raftery, of the Michigan Bar, and Mrs. Raftery; Prof. Grover Rees, from the Department of Justice; and in the fourth row is a dear friend, late of Notre Dame and now of Washington, Andy Dillon.

The **Chairman**. We are very glad to have all of you here.

Thank you.

Mr. **Ryan**. Thank you, Senator.

The **Chairman**. Now, we will take you in the order listed on the agenda. First is Mr. Nelson.

If all of you would stand, I will give the oath to all of you at one time.

Mr. **Barrett**. Excuse me, Mr. Chairman. Will the witnesses be heard now, or after——

The **Chairman**. We are not swearing the witnesses; we are just swearing the appointees.

Mr. **Barrett**. Mr. Chairman, I have come from Mississippi to oppose the nomination. Could I be heard?

The **Chairman**. Oh, you will have a chance to be heard, yes.

Now, will you three gentlemen hold up your hands.

Will the testimony you will give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **Nelson**. Yes.

Mr. **Ryan**. Yes.

Mr. **Wingate**. Yes.

The **Chairman**. Thank you.

Gentlemen, please sit down, and we will begin with Mr. Nelson.

TESTIMONY OF DAVID A. NELSON, OF OHIO, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

The **Chairman**. Mr. Nelson, do you want to introduce your family, or any friends that you have here today?

Mr. **Nelson**. Thank you, Mr. Chairman.

I am accompanied by my wife of some 29 summers, Mary Nelson, and one of my three children, Fred Nelson, who found it not inconvenient to be present; the other two are in graduate school and college, respectively.

Jack T. DiLorenzo is an old friend of mine from the Post Office Department, and he dropped in. I think that completes the roster.

The **Chairman**. Thank you.

Mr. Nelson, I believe you have been a practicing attorney for over 25 years.

Mr. **Nelson**. That is correct, Mr. Chairman.

The **Chairman**. Now you have been nominated to be a Federal Circuit Judge for the Sixth Circuit.

Have you ever held any judgeship position of any kind?

Mr. **Nelson**. I have not, sir.

The **Chairman**. I wonder if you foresee any difficulty in the transition from private practice to that of a Federal judge at the Federal circuit level?

Mr. **Nelson**. I think it is going to take a tremendous amount of work. It is going to be a real challenge, and I am looking forward to seizing that challenge. It is not going to be easy, but it can be done. Others have done it. And I think the background that I have had in the practice of law is such that I can expect to do what others have done.

The **Chairman**. Mr. Nelson, I consider judicial temperament to be a prerequisite for a good Federal judge. Would you give me your thoughts on that? The reason I ask you that is that I have seen some Federal judges embarrass jurors and witnesses and attorneys and act almost like tyrants, and there is no excuse for that. I think the higher in life a man gets, the more humble he ought to be.

Mr. **Nelson**. Mr. Chairman, having been on the receiving end of the phenomenon to which you refer on occasion, I could not agree with you more. I think it is terribly important, not only to the individuals involved, but to the public, that judges be seen as fair and impartial and concerned. I think a judge should view each case that comes before him as a case of great importance, as it always is to the litigants, and should I be confirmed by the Senate and take office, all I can say is that I will do the best I can to reflect the kind of judicial temperament that you and I agree that people holding those offices should have.

The **Chairman**. Mr. Nelson, would you tell the committee what procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. **Nelson**. I will, of course, Mr. Chairman, resign from the law firm of which I am a member and resign from the various director-ships that I hold. I shall not sit in any case in which lawyers from my law firm appear as counsel for the litigants, and I shall, of course, recuse myself from any matter which involves a company in which I might have a financial interest.

The Chairman. Mr. Nelson, in response to a portion of the committee questionnaire concerning judicial activism, I believe you stated that,

> The judicial power vested in the Federal courts under Article 3 of the Constitution extends to designated categories of cases and to controversies between designated categories of litigants. The records of the Constitutional Convention said that it would generally suppose that the jurisdiction given to the Federal courts was constructively limited to cases of a judicial nature.

I believe you were referring to section 2 of article 3. Section 1 of article 3 invests in the Congress the plenary power to ordain and establish such inferior Federal courts as sees fit.

To what extent, as a direct function of that power, is Congress equally empowered to limit the jurisdiction of lower Federal courts or various classifications in controversies?

Mr. Nelson. Mr Chairman, I think at the outset, I should say that it helps one's sense of perspective considerably to know that the Framers of the Constitution referred to the court to which one aspires as an "inferior" court. The inferior courts exist by sufferance of Congress. Congress was not required to establish the United States Court of Appeals for the Sixth Circuit. Given the discretion that Congress has under article 3, section 1, and given the historical compromise that was reached at the Constitutional Convention, when it was decided that the establishment of inferior courts would not be mandated and that it would be left to the determination of Congress whether State Supreme Courts or lower Federal courts should decide matters to which the Federal judicial power extends, I would think, sir, that Congress has broad power to determine what the jurisdiction of those inferior courts should be.

The Chairman. The distinguished Senator from Illinois.

Senator Simon. Thank you, Mr. Chairman.

Mr. Nelson, your background looks like an excellent one. I have just a couple of questions, however. One is your trial experience. As I gather from glancing through the record, you have tried approximately seven jury cases; is that correct?

Mr. Nelson. I would have thought it might be a little higher than that, but it is in that ballpark, Senator.

Senator Simon. And your background has been entirely in civil litgation?

Mr. Nelson. That is correct.

Senator Simon. Your background is excellent in many ways, but this area frankly, is not strong—are you preparing yourself in any special ways?

Mr. Nelson. I am doing some reading in the area of criminal law, Senator. I have got a lot to learn, there is no question about that, and it is going to take time. But the area of criminal law is one on which I expect to spend a significant amount of time, as I get acclimated and begin to wrestle with the matters that come before the court.

Senator Simon. The American Bar Association says in its Code of Judicial Conduct that it is inappropriate for a judge to hold a membership in any organization that discriminates on the basis of race, sex, or religion. A question has been raised about an organization—called the Court of Nisi Prius. Am I pronouncing that correctly?

Mr. **Nelson**. You are pronouncing it correctly. The members of that organization follow the English practice and mispronounce it. They call it "the Court of Nisi Prius."

Senator **Simon**. Does this organization in fact discriminate, and if it does, do you intend to continue membership in it?

Mr. **Nelson**. If it does, I intend to withdraw from the organization. I need to have a heart-to-heart talk with the people who are now in charge of running it about the question whether, as a matter of policy, the organization excludes women. There are people of diverse religious backgrounds, racial backgrounds. The court has black members, Jewish members. It has no women members. I think in large part, that is a matter of history, because the middle-aged practitioners who historically have been members of the court come from an area of practice where, until recently, there simply haven't been women. My belief is that women are not automatically excluded from membership in the court, but I need to come to an understanding with them on that subiect. I am conscious of the rule in the Code of Judicial conduct, and if I determine that the organization discriminates against women as a matter of policy, I will withdraw.

Senator **Simon**. Thank you

As you have proceeded through this process, meeting with people in the Justice Department and elsewhere, have people asked questions that you felt were improper? For instance, has anyone asked you how you would rule on certain cases?

Mr. **Nelson**. No one, sir, has asked me a question that I thought improper. There have been rather free-wheeling discussions about judicial philosophy, judicial activism. Lawyers sometimes talk more than they should, and I have volunteered some views on various subjects. But it was my choice to do so. I do not feel that I was asked any improper questions.

Senator **Simon**. You do not feel under any obligation then to do anything other than rule as the law is, if you become a judge?

Mr. **Nelson**. As I am given the light to determine what the law is, I shall try to apply it fairly and impartially to the best of my ability; I really will.

Senator **Simon**. Thank you, Mr. Nelson.

Thank you, Mr. Chairman.

The **Chairman**. Mr. Nelson, I hope you enjoy your service on the Bench. We hope to get you on the agenda tomorrow, if possible—and with the aid of my good friend here, Senator Simon, maybe we can get you on the agenda tomorrow.

Mr. **Nelson**. Thank you. I appreciate your courtesy.

The **Chairman**. Thank you very much.

Senator **Simon**. Mr. Nelson, if you could place a phone call to the organization in question, and let me know or let my staff know the status of your membership, I think I would certainly have no objection to moving ahead with your nomination.

Mr. **Nelson**. I will do it.

The CHAIRMAN. If you would get in touch with Mr. Short, too, and give him the answer. You can also give it to his people, or Mr. Short can give it to them, either one.

Thank you.

[Information follows:]

September 25, 1985

The Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

With regard to the question Senator Simon raised at my confirmation hearing this afternoon about my membership in the Court of Nisi Prius, I do not believe that the membership policies of the organization are such as to require that I withdraw if my nomination to judicial office is confirmed.

In order to avoid any possible question on this score, however, I have decided to resign from the group and have so advised its head.

Very truly yours,

David A. Nelson

David A. Nelson

cc: Senator Simon

The CHAIRMAN. Next is Judge Ryan, if you will come around.

TESTIMONY OF JAMES L. RYAN, OF MICHIGAN, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

The CHAIRMAN. Judge Ryan, we are glad to see you here.

Mr. RYAN. Thank you, Mr. Chairman.

The CHAIRMAN. I feel very kindly toward you, even though your university beat the University of South Carolina last Saturday in football.

Mr. RYAN. That is very kind of you, Senator. [Laughter.]

The CHAIRMAN. I believe you served 3 years in the Navy, didn't you?

Mr. RYAN. Yes, sir.

The CHAIRMAN. And you are still in the Naval Reserve?

Mr. RYAN. Yes, I am, Mr. Chairman.

The CHAIRMAN. Well, that is commendable. I like to see a man serve in uniform for his country.

Now, you were a Circuit Court Judge in the Third Judicial Circuit in Michigan, Wayne County, I believe?

Mr. RYAN. Yes, sir.

The CHAIRMAN. Is that a court of limited jurisdiction or unlimited? Do you have the power of death in criminal cases, unlimited in civil?

Mr. RYAN. It is a court of unlimited general trial jurisdiction, but there is no capital punishment penalty in Michigan, Mr. Chairman.

The CHAIRMAN. There is no capital punishment in the State of Michigan?

Mr. RYAN. No, sir.

The CHAIRMAN. You all have not corrected that decision—I mean, you have not realigned your State yet.

Mr. RYAN. There is a sympathy in the State for bringing capital punishment to Michigan, but it was abolished about 1850, Mr. Chairman.

The CHAIRMAN. Yes. We have not corrected it at the Federal level yet, either. We have been trying to do it, and we are still trying to do it. It passed through the Senate twice, and the House got a little soft-hearted and did not pass it. So we hope to get another bill through—except for plane hijacking. We do have capital punishment for plane hijacking at the Federal level.

Now, Judge Ryan, you have served, I believe as a Justice of the Supreme Court of Michigan since 1975?

Mr. RYAN. Yes, sir.

The CHAIRMAN. From 1966 to 1975, you were Circuit Judge for the Third Circuit, Wayne County.

Mr. RYAN. Yes, sir.

The CHAIRMAN. With this extensive judicial background, would you please tell the committee what you consider to be the prerequisites for a just and fair judge?

Mr. RYAN. Mr. Chairman, I would think they are certainly many, but premiere among them, I think, would be personal integrity. If that is combined with scholarship in the law and a cultivated sense of intellectual self-discipline, and, certainly, allegiance to the letter and the spirit of the Constitution, a judge will have no trouble at all in discharging his duties with the fairness that the law requires.

The CHAIRMAN. Judge Ryan, how would you resolve a conflict between your own conscience, or on your own sense of justice, and the clear meaning of a statutory or Constitutional provision?

Mr. RYAN. Mr. Chairman, with respect to the Constitution, it is inconceivable to me that my conscience would be at-odds with any provision of the U.S. Constitution. However, if a statutory enactment were part of the law of the land which conflicted with my conscience, it would be resolved by my remembering that I was not nominated to decide cases according to my conscience, but to decide them according to the Constitution and the statutes as enacted by the Congress and the States of the Circuit.

The CHAIRMAN. In other words, even though you had a different personal view, you would stand by the law of the land, the statute of the Constitution?

Mr. RYAN. Exactly, yes, sir

The CHAIRMAN. Judge Ryan, what are the standards that you will use in deciding that your court has a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. RYAN. Mr. Chairman, I think that the jumping off place for establishing standards ought to be that the judiciary ordinarily should not have any continuing supervision or continuing oversight of the administration of its judgments and orders. It seems to me that the cases and controversy provision of article III of the Constitution suggests pretty directly that the courts are designed to decide specific justiciable issues and conflicts, and oversight should ordinarily be the business of the executive and the legislative branches of Government.

The CHAIRMAN. Judge Ryan, in its famous dissent in *Plessey* v. *Ferguson* in 1893, Justice John Harlan referred to our Constitution as a "colorblind" Constitution. Would you agree with this characterization.

Mr RYAN. Mr. Chairman, the only answer to that is absolutely. Mr. Justice Harlan's statement is as sound and valid now as it was when he wrote it in that case, in my opinion.

The CHAIRMAN. In other words, you will decide your cases regardless of race, color, creed, religion, sex, purely on the merits of the case?

Mr RYAN. Absolutely, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

Mr. Ryan, I am pleased to have you here. You have come with strong recommendations, and you have even overcome in your background, I notice, being a justice of the peace.

Mr. RYAN. Thank you, Senator. Some think that is one of the richest parts of it.

Senator SIMON. Well, I can believe that. It is very different from the kind of activity you will be involved in in the near future.

Mr. RYAN. Yes, sir.

Senator SIMON. Could you describe for me briefly, during your meeting with the Justice Department, what kinds of questions are asked of a nominee?

Mr. RYAN. I was asked to come to Washington for a half-day of interviews shortly after that announcement, and I was interviewed by four or five lawyers in the Justice Department—I do not remember precisely the number. By some, I was asked little or nothing; by one or two lawyers in the Justice Department, I was given the benefit of their judgment and their views about matters philosophical. With respect to others, I was asked—Mr. Trott, for example, of the Criminal Division, was only interested in knowing more about how, in Michigan, we handle the voir dire of jurors. He wanted to know whether our experience in the Michigan Supreme Court was that decisions of our court were being overturned by Federal District Judges pursuant to the issuance of writs of habeas corpus. In another case or two, I was asked questions of the most general sort, about my philosophy, about what is the sweep of judicial decisionmaking. There was a discussion about general areas of judicial self-restraint, some of which were touched in the questionnaire which the Senate submitted.

Senator SIMON. Did anyone ask you how would you rule on any given case?

Mr. RYAN. Absolutely not, Senator. And I must say, I remember that so clearly because I was prepared, I hope, to face that question as a possibility, and I was delighted to see that the question was not put.

Senator SIMON. Good.

One final question. The Canon to the American Bar Association's Code of Professional Responsibility says—and I am quoting—"Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Can you tell me what you have done to live up to this particular canon?

Mr. RYAN. My primary responsibilities for 20 years have been 10 as a trial judge and 10 as a Supreme Court Justice. As a trial judge, I made a special effort to utilize the authority given to trial judges in Michigan to see to it, for example, that minority lawyers were given the opportunity to receive assignments to represent indigent defendants and participate in the growth of the criminal defense bar that way.

Since I have been on the Supreme Court, I have been involved in the authorship of the Rules of Evidence, the rules of practice for the juvenile courts, the probate courts, the circuit courts, and the Supreme Court of Michigan, and in shaping those rules, I have attempted at every turn to be sensitive to their application to the most disadvantaged in our society in Michigan.

Aside from those duties, I have been an adjunct professor of law for 10 years at two Michigan law schools. During those times, I spent extra time with students, not always members of minorities, but students who had special disadvantages in their preparation for law school, in order to help them succeed. And finally, I have done what I think I can do within the ambit of the canons, in the practice of my faith, in my parish, and in my parish community, to share with the disadvantaged the material benefits which have come to Mary and me.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, judge. I hope you will enjoy your service on the Bench, and wish you well.

Mr. RYAN. Thank you, Mr. Chairman.

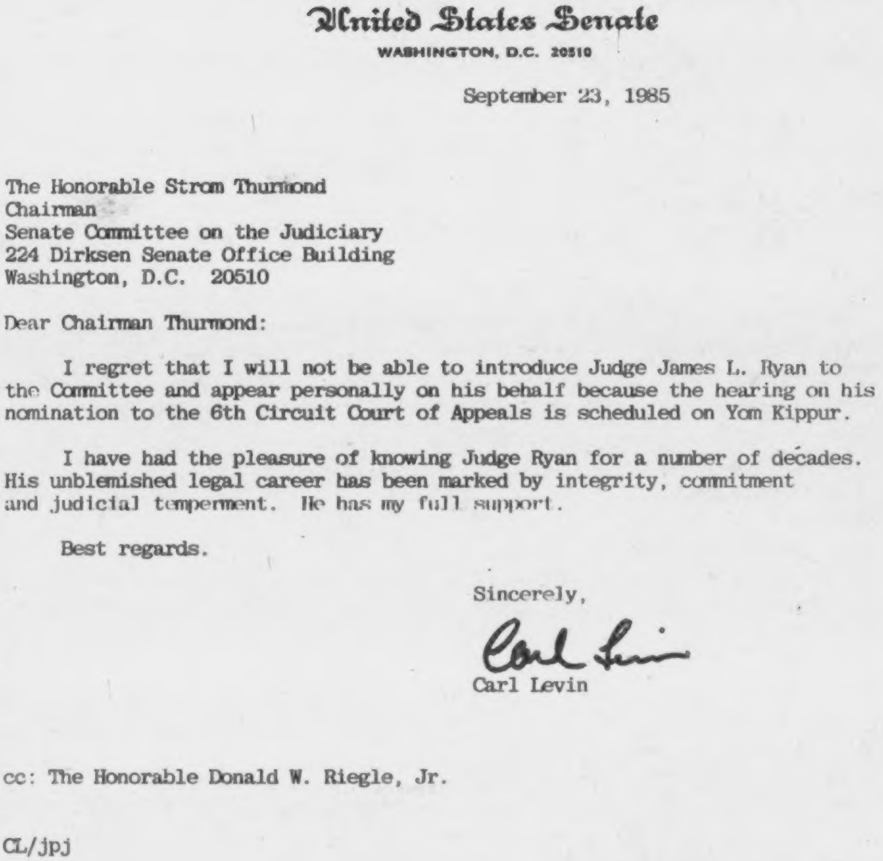
Thank you, Senator.

The CHAIRMAN. We will try to get you on the agenda tomorrow, with the help of my distinguished friend here from Illinois.

Senator SIMON. No problem.

Mr. RYAN. Thank you, Senator.

[Letter to the chairman follows:]



United States Senate
WASHINGTON, D.C. 20510

September 23, 1985

The Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Thurmond:

I regret that I will not be able to introduce Judge James L. Ryan to the Committee and appear personally on his behalf because the hearing on his nomination to the 6th Circuit Court of Appeals is scheduled on Yom Kippur.

I have had the pleasure of knowing Judge Ryan for a number of decades. His unblemished legal career has been marked by integrity, commitment and judicial temperment. He has my full support.

Best regards.

Sincerely,

Carl Levin

cc: The Honorable Donald W. Riegle, Jr.

CL/jpj

The CHAIRMAN. Mr. Wingate, if you will come around, I have already sworn you.

TESTIMONY OF HENRY T. WINGATE, OF MISSISSIPPI, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

The CHAIRMAN. I believe you graduated from Grinnell College and recieved a J.D. degree from Yale Law School, correct?

Mr. WINGATE. That is correct, sir.

The CHAIRMAN. And you finished in 1972 at Yale?

Mr. WINGATE. Yes, sir, I did.

The CHAIRMAN. You served in the Navy, in the Judge Advocate General's Corps, 3 years?

Mr. WINGATE. Yes, sir, I did.

The CHAIRMAN. What rank did you attain?

Mr. WINGATE. When I was discharged from the U.S. Navy, I was a lieutenant. I am still in the Navy Reserve, and I am currently a lieutenant commander

The CHAIRMAN. A lieutenant is equivalent to a captain in the Army; a lieutenant commander is equivalent to a major, isn't it?

Mr. WINGATE. That is correct, sir.

The CHAIRMAN. You served with Community Legal Aide, law clerk for a year; private practice from 1973 to 1976—3 years?

Mr. WINGATE. No, sir; it was 1 year, while I was waiting to go into the service.

The CHAIRMAN. You were special assistant attorney general, Justice Department, State of Mississippi, 4 years, is that correct?

Mr. WINGATE. Yes, sir, with the Attorney General's Office in the State of Mississippi.

The CHAIRMAN. I believe you were the first black to occupy that position?

Mr. WINGATE. Yes, sir, I was.

The CHAIRMAN. Who was your Attorney General there?

Mr. WINGATE. Mr. A.F. Summer.

The CHAIRMAN. Then, you served 4 years as assistant district attorney, seventh circuit court district, State of Mississippi; is that right?

Mr. WINGATE. Yes, sir. I tried felony cases.

The CHAIRMAN. And you were the first full-time black in that position?

Mr. WINGATE Yes, sir, I was.

The CHAIRMAN. And you served as assistant U.S. attorney, southern district of Mississippi, Department of Justice, from 1984 to the present?

Mr. WINGATE. Yes, sir. I am in that position.

The CHAIRMAN. And you are the first black to occupy that position; is that right?

Mr. WINGATE. Yes, sir, I am.

The CHAIRMAN. OK; now, I have a few questions here.

Mr. Wingate, at present, you serve as assistant U.S. Attorney for the southern district of Mississippi. Prior to that, you were an assistant district attorney for the seventh circuit court district, State of Mississippi. Do you believe these jobs have prepared you for the challenging task that lies ahead as a U.S. district court judge, and if so, how?

Mr. WINGATE. Yes, sir. I think those jobs will be a tremendous asset in those duties. As assistant district attorney for the seventh court district in Mississippi, I was tasked with trying felony cases, so I tried everything from capital murder to burglary to arson to rape, and I was in court constantly. So I have first-hand experience with courtroom procedures. I have first-hand experience with the application of the Federal Rules of Evidence, and also with the State rules of evidence, and also with courtroom procedure in general.

As Assistant United States Attorney, I have again tried a number of cases, and again, I have gained experience in the courtroom, application of Federal Rules of Evidence, application of Federal criminal statutes. I think both of those jobs have caused me to learn a great deal about litigation, about courtroom procedures, and I think they will be invaluable as service on the Bench.

The CHAIRMAN. So you are familiar with the rules of the State of Mississippi, Justice Department, and the rules of the Federal Government, Department of Justice rules?

Mr. WINGATE. Yes, sir; I have lectured on both to other attorneys.

The CHAIRMAN. Mr. Wingate, would you tell the committee how you would handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

Mr. WINGATE. I believe that every client who comes before the court is entitled to a fair trial, to due process of law, and that includes competent representation. If counsel comes before the court not equipped to provide competent representation, then that counsel is then denying that client due process of law. As judge, in making the determination that that counsel is inept and unqualified, then it would be my duty to relieve that counsel of his duties, to declare a mistrial, to see to it that competent counsel is appointed, and then to admonish that particular counsel.

The CHAIRMAN. Mr. Wingate, what kind of guidelines should a judge follow in determining the propriety of Federal intervention into State affairs?

Mr. WINGATE. With caution, sir. The Federal courts possess neither the resources nor the expertise to make day-to-day decisions for State-run activities. The Federal courts should not intrude into the affairs of the State government unless there is a clear constitutional violation that the State does not address.

The CHAIRMAN. Mr. Wingate, one of the criticisms of judicial activism is a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals. Do you feel that this criticism is valid, and would you please explain your answer?

Mr. WINGATE. I have heard the criticism before, and I would hope that this procedure is not employed by most Federal judges.

For my part, I think that judicial restraint would be the watchword, that a Federal judge should not necessarily decide issues that are not before the court, and should not involve itself in making policy decisions which are constitutionally assigned to the other branches of Government.

The CHAIRMAN. Do you believe in our system of three branches of Government, each having its own responsibilities, check and balance on each other, with each staying within their own spheres, provided in the Constitution?

Mr. WINGATE. Yes, sir; I do.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Yes; first of all, you come with strong recommendation from our colleague, Senator Cochran, and that is a great credit to you.

Mr. WINGATE. Thank you, Senator.

Senator SIMON. I notice he mentioned you are a racquetball champion, but he did not mention you are a table tennis champion, to. I notice that in the record.

As you went through the process of being interviewed, do you feel as a result of any questions you answered that you are under any kind of compulsion to represent a particular political philosophy or ideology or will you be free to be an unbiased judge simply and uphold the law?

Mr. WINGATE. I feel absolutely no compulsion to follow any particular philosophy, and I will certainly try to uphold the law.

Senator **Simon**. Did anyone ask questions of you that you felt were improper during the interviewing in the process?

Mr. **Wingate**. No, sir; there were just broad-range discussions, but no one asked me specifically how I would rule in any specific matter.

Senator **Simon**. All right. I think my other questions have been answered by examining your record, and I have no further questions, Mr Chairman.

Mr. **Wingate**. Thank you, Senator.

The **Chairman**. Thank you very much.

Mr. Wingate, have you introduced all of your family or friends?

Mr. **Wingate**. Yes, sir; I have.

The **Chairman**. Thank you. You may retire.

Now, I understand we have one witness here in opposition, Mr. Richard Barrett, of Learned, MS.

Mr. Barrett, come around, and if you would hold up your hand and be sworn, that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Barrett**. Yes, Senator

The **Chairman**. Have a seat.

Mr. **Barrett**. Thank you, Senator.

TESTIMONY OF RICHARD BARRETT, LEARNED, MS

The **Chairman**. Mr. Barrett, we generally allow 5 minutes for witnesses and put their entire statement in the record, but I will give you 10 minutes, if you would like to have that.

Mr. **Barrett**. Thank you, Mr. Chairman.

The **Chairman**. You may proceed.

Mr. **Barrett**. Mr. Chairman, I bid rejection of the nomination of minority activist Henry Wingate, and beg the committee not to turn the clock back 100 years in Mississippi, to the dismal days of Reconstruction, when there was no progress for any of our people, when we had black power tyranny, and when we had no democracy and no majority rule.

Some may think that white Southerners interpose this objection simply to dismember the Nation or, perhaps, to cripple the Federal courts. That is not my purpose in being here today.

I am here in behalf of the mechanic at his wheel, the farmer at his plough, with just a simple plea, and that is, Mr. Chairman, guarantee the freedom and the democracy of the people of Mississippi, and you will guarantee freedom and democracy to all the American people throughout the land.

When I was wounded in Vietnam, the injury may have been to my limb, but actually, my body as a whole was pierced. If a tyranny is thrust upon Mississippi, the Nation as a whole is pierced. President Reagan, Republicans, Democrats, Americans—there is no need to punish the people of Mississippi. Mississippi has given her sons to defend you, her substance to clothe you, her steeples to adorn you, and her laws to magnify you.

As recompense, she has been straitjacketed and hamstrung by Civil Rights Acts, Voting Rights Acts, busing, integration, forced housing, racial quotas, and now, laws to prevent the dilution of minority voting strength. And Boston is no less persecuted than Biloxi.

Maybe the authors of these oppressive laws meant well, but like the drafters of Prohibition, they failed. If I speak with the tongue of malice against any man today, may the blood in my veins run cold. But, Mr. Chairman, minority rule is unjust, and the American people cry out for change. It is a silent scream.

In my own district, in the Mississippi Delta, I was a candidate for Congress last year. A Federal judge took the Constitution that I would call a Michelangelo, and he twisted it into a Picasso. Previously, the laws assured majority rule; he changed them until the district was 60 percent colored, and he vowed that they would be changed until a Negro held that congressional office. Some 92 percent of the electorate protested this despotism by shunning the polls in droves. North and South now experience the same plight, agonize over the same dilemma but perceive the same solution: genuine majority rule.

Today, we must increase majority voting strength, white voting strength, if democracy is to survive. I say this not out of love less for any group, but out of love more for American democracy.

Mr. Chairman, it is said by some—and I call them hypocrites—that race is not an issue so long as a Negro is appointed to office. If King George the Third had sent one of his noblemen here today to be confirmed, who was a racquetball champion, who had no judicial experience and who was undistinguished, you would object to him, as I would, for his red coat. You would say that he wore a badge of privilege. He would be given to side with his lords because of his membership in the nobility. He would put birth before worth, and crown over craftsmanship.

The nominee submitted by President Reagan presents himself for appointment, undistinguished, without judicial experience, a racquetball champion. But I object to his black coat, his badge of privilege. He will be given to side with his lords because of his membership in the NAACP. He will put black before white, and minority over majority.

I object to the belief that the citizen is helpless before the Governor, or the Governor before the Congress, or the Congress before the President.

I protest because minority rule will establish a tyranny that can forbid majority young people today, who are breathlessly looking to the stars, from sitting in the cockpits of space ships, or from sitting upon the benches of Federal courts, or from sitting in these very seats here in Congress.

I know you say, "Well, he is the first," or "He is only one." Mr. Chairman, James Meredith was the first to integrate education in Mississippi, and now, the public school classrooms of the city where I toiled up from poverty are 90 percent Negro—in a State that is not 90 percent Negro. Witness darkening Dallas. Witness despairing Detroit.

Thomas Paine said, "It is absurd for an entire continent to be governed by a small British isle." Is it not equally absurd for an entire Nation today to be governed by the whims and wishes of the NAACP, or Harlem, or Watts?

You might ask, "Well, then, how can the majority be prevented from lording over the minority?" Working men in Mississippi and throughout this land, who arise at daybreak, who drive trucks, who forge steel, and who descend down into mines are not given to be lords or dandies. If only they could vote here today. I would urge that someday all citizens indeed could vote for Federal judges, as we do for our other important officials; and perhaps someday, the American people could also vote by initiative and referendum on issues that affect their destiny. If the entire electorate could vote on the Wingate nomination today, upright and honest men would not rank a man by the list of his friends, but rather, by the sweat from his brow; not by the plaudits of public officials, but by the hours of his own toil.

Some might say, "Well, then, what if a white man holds the job? Will that not mean that we will have segregation?"

What is segregation? Is it not simply a natural preference for one's own race or nationality? Some call it apartheid, some call it nationalism, some call it patriotism. But Mr. Chairman, I submit that segregation is a moral and commonsense way for different races to touch without colliding. It is South Africa, defending the Cape against communism. It is the Afgans, standing for their liberation behind the Iron Curtain. It is a pizza parlor, serving only pizza and hiring only Italians. It is a Polish church, singing in the Polish tongue. It is an Irish neighborhood, where the lilt of "When Irish Eyes Are Smiling" brightens the classroom with light and happiness.

Mr. Chairman, what message shall this committee send to the majority youth of America, if it confirms the Wingate nomination? Will it not say, this generation will go out into eternity with these words on its palid lips: "Your skin is too light, son. Your record is too good. Your grades are too high. You cannot be a Federal judge. You cannot be a foreman. You cannot work here."

Instead, if Wingate is rejected, Mr. Chairman, then you say to the American Nation, "Study harder, and you will earn more. Work harder, and you will have more. Do more, and you will be more—the American way."

The cry goes out. The fight goes on. Lexington, MA. Lexington, MS. We are already united in a common bond. We hate oppression. We love liberty. Now, we are united in the most righteous cause of all—to lift our people up, to keep our people free, and to set democracy on higher ground.

[Statement follows:]

SENATE JUDICIARY COMMITTEE ADDRESS
RICHARD BARRETT
September 25, 1985

Mr. Chairman:

From the bust beneath the stately capitol dome to the pleasant gardens of his home in Carrollton, Mississippi, the memory and legacy of J. Z. George spans the skies -- as a rainbow -- rising above the pettiness and confusion of his day and ours.

Senator. General. Statesman. Patriot. J. Z. George. Mississippi's most illustrious native son, revered for leading his people from the foggy frenzy of Black and Carpetbagger rule to the higher plain of democracy and majority rule.

His only torch, the truth. His only vision, freedom.

Today, before you confirm minority activist, Henry Wingate, to preside for life over the lives and fortunes of Mississippians, before you replace the red, white ands blue aspirations of lovers of democracy with the black and somber drapes of apostles of despair, I lift again that torch of truth. I catch a glimpse of that vision of freedom.

And I bid rejection of the Wingate nomination in the name of democracy and majority rule.

Turn not the clock back to the dismal days of the Reconstruction, when there was no progress for any of our people. For should the Wingate nomination be confirmed, a despotism so hated, a tyranny so oppressive, will affix itself upon our land that should our children one day regain their freedom, they will look back to the place where you cast the fatal vote and surely say, "Up from that grave we arose."

It was not just the wound in my side alone, but my body that bled in the Vietnam War. Wound Mississippi and you pierce not a limb alone, but the body of the nation.

Some have suspected that the white Southerner meant to dismember the nation, to cripple its courts and to defy its authority. To them, a liberal federal judge, indeed, a Negro federal judge, would be just the schoolmarm to crack the knuckles of so unruly a child. Indeed, until this very day, even this very moment, although our ancestors signed the Declaration of Independence together, Northerners and Southerners view each other with such misgivings that some might delight more in the company of Fidel Castro than Lester Maddox, or in Henry Wingate than J. Z. George.

But I say to you, "Guarantee the freedom of the people of Mississippi, and you assure your own."

Republicans need not punish Mississippi.

She gave your standard-bearer the nectar of her votes, your candidate the warmth of her heart and your policies the strength of her conviction.

Democrats need not punish Mississippi.

She gave this Committee its venerable Chairman for so many years, this Congress so much of its progressive legislation and the poor so outstretched a helping hand.

Americans need not punish Mississippi.

She has given up her sons to defend the nation, her substance to clothe the naked, her steeples to adorn the skies and her laws to magnify our inheritance.

May the blood in my veins turn to dust if I speak out of malice or meanness toward any man, but, Mr. Chairman, minority rule is unjust.

Civil Rights' Acts, Voting Rights' Acts, busing, integration, forced housing, forced hiring, racial quotas and law to "prevent dilution of minority voting strength" may have meant well. But, like Prohibition, they failed. It is not time to disect the past, but to grasp the future.

And the American people cry for change.

It is a silent scream.

After federal judges beat and hammered election laws which guaranteed majority rule in Jackson, Mississippi into a Picasso of their former symmetry and strength, a mere 20% of the electorate turned out to "ratify" the allocation of seats to Negroes on the City Council. Eighty percent protested by staying away from the polls.

In my own race for Congress, a federal judge changed the district twice to "increase Negro voting strength" up to nearly 60%. Some 92% of the electorate protested that despotism by shunning the polls in droves.

The time has come to increase white voting strength, majority voting strength, if democracy is to survive at all.

It is said that if Negroes make up a majority of a district, they must hold the seat. If Negroes do not make up the majority, the district must be redrawn until they hold the seat. If Negroes do not hold the majority in the redrawn district, the seat must be given to a Negro regardless if Negroes make up a percentage of the whole state. Honest men cannot blind their eyes to the tyranny that results.

Upright men shun public office. Apathy clamps itself upon the body politic like a lid on a kettle. Or should I say a cauldron, a boiling cauldron.

Resistance to integration turns into immigration away from integration.

Small towns are withering. Lights are going out. Atlanta. Birmingham. New Orleans. Detroit. Property values are wiped out. Soul Cities are replacing Emerald Cities.

If the core of Three Mile Island's nuclear plant were expanding at so unstoppable a pace, an immediate alarm would activate every engine of our resources to shut it down. But with the nucleus of minority rule burgeoning at its present rate, the forces of majority rule are no less summoned to defend the nation's very existence.

Some two hundred twenty thousand Negroes brought here from Africa have burgeoned into some twenty-two million. No people on the face of the earth has multiplied and flourished as has the Negro race in America.

Now, it is said, race is not the issue, so long as a Negro is appointed to office.

A noble of King George III might present himself for appointment, undistinguished, without judicial experience, but I would object to his red coat, his badge of privilege.

He would be given to side with his lords, with rank before work, with birth before brain.

A nominee of President Reagan presents himself for appointment, undistinguished, without judicial experience, but I object to his black coat, his badge of privilege.

He will be given to side with his lords, the NAACP, with black before white, with minority over majority.

I object to the belief that the citizen is helpless before the mayor, or the mayor before the governor, the governor before the senate or the senate before the President. Men have created our institutions and if men have acted in error, men can remedy those errors.

But, you protest, he is only one -- the first federal judge in Mississippi.

James Meredith was the first to integrate Mississippi schools, but the classrooms of the Magnolia State's capitol city are some 90% colored as a result. Clark Gable uttered the first four letter word on the silver screen, but profanity in movies has made common decency "Gone With the Wind" as a result.

Thomas Paine said it is absurd for our vast continent to be ruled by the tiny British Isle. It is equally absurd for the entire American nation to be governed by the whim of Harlem or Watts.

How then can the majority be prevented from being haughty or oppressive itself?

Men who arise at daybreak and drive trucks, pour steel or descend into mines are not given to be lords or dandies. If they could vote here today (and it is my prayer that someday they can vote directly on federal judges and in national referenda), they would doubtless rank their choice by the sweat from his brow, not the length of the list of his friends, by the hours he has toiled, not by the plaudits of special interests he has gained.

But what if a white man is selected instead? Is this not segregation?

Segregation (some call it nationalism) is a preference for one's own race or nationality. It bids the Afganistanis to fight for freedom. It eggs on South Africans to defend the Cape against communist takeover. It destined pioneers to tame the West. It holds out hope to Poles for their liberation.

It is a pizza parlor, serving only pizza and hiring only Italians.

It is a Polish church, singing in the Polish tongue with parishioners wearing their native costumes.

It is an Irish neighborhood, with laughter of happy children playing in the streets and the strains of "When Irish Eyes Are Smiling" filling the classroom with gladness.

It is a Christian country, with the man the head of the home and righteousness exalting the nation.

That we are a white, English-speaking democracy, founded on the work ethic, grounded upon belief in God, is not our shame, but our glory. Is it a plague we bring to Africa, or medicine and food? Is it a scourge we bring to Latin America, or earthquake relief and a better way of life?

It is not that we love others less, but that we love America more.

It is not that any man must be oppressed, but that democracy must rule.

What signal shall your vote send to majority American youth?

That, by confirming the Wingate nomination, no matter how hard you study, or work, or prepare, or serve, you can never hold the office of federal judge in Mississippi? In Chicago?

Or, by rejecting the Wingate nomination, that you who work more shall have more...

That you who honor the freedom and democracy of your fathers shall live long on the land the lord has given to you.

The CHAIRMAN. Mr. Barrett, regarding your statement, I would like to make one thing clear. In allowing you and other witnesses to testify today, this committee is merely carrying out its longstanding policy of receiving information from all parties interested in a particular judicial nomination.

However, no one should suggest that because you are allowed to address this committee that the committee in any way condones or agrees with what you have said.

Personally, I believe in equal opportunity for everybody, whether they are white or black or whatever color, or whatever sex, or whatever race, whatever religion. And sometimes, I feel that those who come from the minorities, who are deserving, deserve probably more consideration because they have really had to overcome a lot of obstacles. I do not think we should deny anyone the right to be a Federal judge because he is in the majority or the minority, or because of his color or his race or his sex or religion.

So, speaking for myself, I cannot agree with your statement.

Mr. BARRETT. I hope, Senator, someday the American people could vote on Federal judges, and then we could all trust the ultimate wisdom of the democracy.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Mr. Barrett, were you born in Mississippi?

Mr. BARRETT. No, sir; I was born in the North. I came to Mississippi as a young man, after serving in Vietnam.

Senator SIMON. I just have a very brief statement, Mr. Chairman.

I find occasionally, that people who move to Mississippi or Alabama or other places want to prove themselves and get themselves established in such a way that they are accepted by people with certain political beliefs.

You have a lot of talent, Mr. Barrett. You ought to try to channel it in a constructive direction. I do not mean this disrespectfully to you, but I have served on this committee, as the chairman can tell you, and I have been sitting through hearings on a great number of judges. Mr. Wingate is the second black judge out of all of these judges we have had here. He is a graduate of Yale Law School. What you have said does not harm him. I think it may hurt you. I suggest you take some time and go out in the forest. Think about what you are doing and where you are going—and see if you can take that considerable talent you have with words and use it in a more constructive way to make Mississippi and this nation a better place.

Thank you, Mr. Chairman.

Mr. BARRETT. Senator, some 95 percent of the white Democratic electorate in Mississippi voted for me last summer. I am speaking for my country and for my people, and I will continue to do that without fear or favor, Senator.

The CHAIRMAN. Thank you very much, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman.

The CHAIRMAN. Is there any other witness? I do not think so.

Mr. Wingate, I hope you have a successful tenure on the bench. We will try to get you on the list tomorrow for consideration.

The committee is adjourned.

[Whereupon, at 3 o'clock, the committee was adjourned.]

BIOGRAPHIES

DAVID A. NELSON

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Birth: August 14, 1932, Watertown, NY.

Legal Residence: Ohio.

Marital Status: Married to Mary Ellen Dickson Nelson, 3 children.

Education: 1950-1954—Hamilton College, A.B. degree. 1954-1955—Cambridge University. 1955-1958—Harvard Law School, LL.B. degress.

Bar: 1958—Ohio.

Military Service: 1959-1962—United States Air Force.

Experience: 1958-1959—Squire, Sanders & Dempsey Associate. 1962-1969—Squire, Sanders & Dempsey, Associate, 1962-1967; Partner, 1967-1969. 1969-1971—U.S. Post Office Department, General Counsel, 1969-1971; Senior Assistant Postmaster General, 1971. 1972-present—Squire, Sanders & Dempsey, Partner.

JAMES L. RYAN

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Birth: November 19, 1932, Detroit, MI.

Legal Residence: Michigan.

Marital Status: Married to Mary E. Rogers Ryan, 4 children.

Education: 1950-1954—University of Detroit. 1954-1956—University of Detroit, School of Law, LL.B. degree.

Bar: 1957—Michigan.

Military Service: 1957-1960—United States Navy. 1960-present—United States Naval Reserve.

Experience: 1960-1962—Waldron, Brennan & Maher, Associate. 1962-1963—Private practice. 1963-1966—Ryan & Burress, Partner. 1963-1966—Justice of the Peace, Redford Township. 1966-1975—Circuit Court Judge, Third Judicial Circuit of Michigan (Wayne County). 1975-present—Justice, Supreme Court of Michigan.

HENRY T. WINGATE

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF MISSISSIPPI

Birth: January 6, 1947, Jackson, MI.

Legal Residence: Mississippi.

Marital Status: Married to Turner Arnita Ward.

Education: 1965-1969—Grinnell College, B.A. degree. 1969-1972—Yale Law School, J.D. degree.

Bar: 1973—Mississippi.

Military Service: 1973-1976—United States Navy, Judge Advocate General's Corps.

Experience: 1972-1973—Community Legal Aid, Law Clerk. 1973—Private practice, Jackson, Mississippi. 1976-1980—Special Asst. Attorney General, Justice Department, State of Mississippi. 1980-1984—Asst. District Attorney, Seventh Circuit Court District, State of Mississippi. 1984-present—Assistant U.S. Attorney, Southern District of Mississippi, U.S. Department of Justice.

CONFIRMATION HEARING ON: MICHAEL K. BLOCK, ILENE H. NAGEL, AND PAUL H. ROBINSON

(U.S. Sentencing Commission)

WEDNESDAY, OCTOBER 2, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SR-301, Russell Senate Office Building, Hon. Charles McC. Mathias (acting chairman) presiding.

Also present: Senators McConnell, Kennedy, and Specter.

Staff present: Duke Short, chief investigator; Nicholas W. Allard, counsel (Senator Kennedy).

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS

Senator **Mathias**. The committee will come to order.

The Judiciary Committee meets this morning to hear from three nominees of President Reagan's to the U.S. Sentencing Commission.

They are Michael K. Block, a professor of law at the University of Arizona; Ilene H. Nagel, professor of law and professor of sociology at Indiana University; and Paul H. Robinson, professor of law at Rutgers University.

I am very happy that the chairman of the committee has provided this opportunity for the nominees to meet the committee, and I want to welcome the nominees and to congratulate them on the confidence that has been expressed in them by the President.

The Sentencing Commission was created by the Comprehensive Crime Control Act of 1984 in an effort to achieve greater fairness and equity in Federal sentencing procedures.

The record should reflect that the Judiciary Committee has referred four of the nominees to the full Senate without the benefit of a formal hearing because those four nominees—including three Federal judges and a member of the Parole Commission—had previously been examined and confirmed by the Senate on the recommendation of the Judiciary Committee.

Thus, the Senate is already in possession of a considerable body of information about them.

We have invited the three nominees who are before the committee this morning to come to Washington today only because the committee has not had an opportunity to meet with them and to hear their views and to answer questions which they may have.

The Sentencing Commission, of course, will have a very important role to play in the future of the Federal criminal justice system.

These nominees will assume the demanding role of founders. They will set the patterns. They will establish the precedents and, thus, this is an extremely important appointment.

The statute confers on the Commission very broad powers and very heavy responsibilities. The impact of the Commission's deliberations and decisions will be felt directly by judges, by prosecutors, by defense counsel, by witnesses, and of course, ultimately, and finally, by the defendants who are convicted in Federal criminal courts.

But your decisions will also affect the work of those who work in the Federal probation service, the parole and correctional systems. Importantly, the judgments of the Commission will also affect the public safety, and the domestic tranquility that the Federal courts, in fact, the Federal Government itself, is constituted to promote.

In that sense, the decisions that are made by the Sentencing Commission will affect all Americans for many years to come.

I believe that the Senate owes it to the American people to examine the nominees on the public record. In that way we demonstrate to the public, and to the nominees themselves, that we take our constitutional obligation very seriously. It is our responsibility to consider nominations which are laid before us by the President and to advise him with respect to them.

I would like to thank each of the nominees for coming to Washington. They have done so on relatively short notice, which we regret, but by their willingness to do so, I think that they have made it easier for us to consider their nominations and to move them along just as quickly as possible.

Before I ask the nominees to be sworn, let me ask Senator McConnell if he has a statement?

STATEMENT OF SENATOR MITCH MCCONNELL

Senator **McConnell**. Thank you, Mr. Chairman.

As is often the case, we have three meetings going on at the same time, and I am on the way to chair a hearing on the exclusionary rule.

But I wanted to stop by and congratulate the nominees and indicate that I think that bringing the professorial point of view, if there is one, to the Sentencing Commission is an excellent idea.

And I thank you, Mr. Chairman, for the opportunity to make a brief opening statement.

Senator **Mathias**. We have a letter from the Senator from New Jersey, Mr. Bradley, which I will insert in the record, with respect to the qualifications of Professor Robinson. We have a statement by Senator Goldwater with respect to the nomination of Professor Block, and a statement from Senator Lugar with respect to the nomination of Professor Nagel, and a statement from Senator DeConcini with respect to the nomination of Professor Block, and a statement from Senator Kennedy.

And all of those will be included in the record.

[Aforementioned follows:]

BILL BRADLEY
NEW JERSEY

United States Senate
WASHINGTON, DC 20510

October 1, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman: Mr Chairman

I am sorry I cannot be present to introduce Professor Paul Robinson to the Judiciary Committee. He has been nominated by the President to fill a seat on the Federal Sentencing Commission.

Professor Robinson has achieved a level of recognition for his outstanding criminal law scholarship which is unusual for a person his age. Rutgers University School of Law has promoted him to the rank of Distinguished Professor, it's highest academic rank. I am told that he is the youngest person holding that position in the University. He also has an extremely broad background in the criminal justice system, having served as an attorney with the Department of Justice, with the U. S. Attorney's office and with the Senate Judiciary Committee. He has also written extensively on a wide range of criminal law and criminal procedure issues.

I am sure that Professor Robinson can contribute greatly to the work of the new Commission.

Sincerely,

Bill

Bill Bradley
United States Senator

BB/mae

PREPARED STATEMENT OF SENATOR BARRY GOLDWATER

Unfortunately, I regret a conflict has prevented my attendance, but as Chairman of the Senate Armed Services Committee, I am committed elsewhere. I do thank the Chairman for placing my statement in the record.

It gives me great pleasure to strongly endorse Michael K. Block, Ph.D. for membership on the United States Sentencing Commission. I can think of no one more qualified than Professor Block for this appointment. Professor Block has devoted his professional life to the study of the deterrence of crime. He has an enviable record of academic and professional experience which will serve him well on the Commission.

At the University of Arizona, Professor Block held the position of Associate Professor in the College of Business and Public Administration for four years. Currently, he is a Professor of Law at the University of Arizona. At the Hoover Institution, he was Director of the Center for Econometric Studies of the Justice System and a Senior Research Fellow. In addition, he found time to devote to the subjects of antitrust, public utilities and democratic principles.

Professor Block has been repeatedly recognized by his peers as is evident from his extensive professional publications, memberships, and awards. These kinds of accolades tell me that this man is well respected for his breadth of knowledge and his ability to impart that knowledge in a straightforward manner. The Federal Government needs men of this caliber. To my way of thinking, the Commission will be well served by Doctor Block's membership. He is one of those rare individuals who is able to move easily from the world of academia and abstract ideas to the world of government and real problems. It is my belief Professor Block will be able to utilize his professional background to the fullest in the challenging work of the Commission.

In closing, I encourage my colleagues on the Senate Judiciary Committee to vote in favor of Michael K. Block, Ph.D. as a member of the United States Sentencing Commission.

PREPARED STATEMENT OF SENATOR RICHARD G. LUGAR

Mr. Chairman, it is an honor and a privilege today to introduce to this distinguished committee, Ilene H. Nagel, nominee to be a Member of the United States Sentencing Commission for a term of six years.

Ms. Nagel's credentials as a scholar, author, and teacher are impressive. She received her baccalaureate from Hunter College. She later graduated from New York University with a Masters Degree in Sociology and a Ph.D. in Sociology. Ms. Nagel has also received a Masters of Law Degree from Stanford University.

While Ms. Nagel's academic career is truly outstanding, her professional accomplishments have likewise been remarkable. She has taught with much distinction at Indiana University as a Professor of Law and a Professor of Sociology. Ms. Nagel earlier served as a Guggenheim Fellow at Yale Law School. Her area of particular expertise is sentencing, with emphasis on federal sentencing practices and she has taught courses on sentencing as well as related courses on bail, plea negotiations, white collar crime, and serious youth crime. She has also authored numerous books and articles.

Mr. Chairman, Ms. Nagel's professional accomplishments speak for themselves. It is also important to note, though, that she is highly spoken of by persons with whom she has associated, both inside and outside of her professional status.

Mr. Chairman, it is my privilege to introduce her to the committee, and to urge your support for her appointment.

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

I am pleased that the President has chosen a distinguished professor from my school, the University of Arizona to serve on the initial U.S. Sentencing Commission.

Dr. Block has a distinguished education receiving his Ph.D. from Stanford University in economics in 1972. He has taught at the University of Santa Clara, the Naval Postgraduate School, and for the last four years at the University of Arizona. He was a Senior Research Fellow at the Hoover Institute for 6 years.

Dr. Block has been a prolific writer on many legal and economic issues. Among his writings that are relevant to his new duties on the Sentencing Commission are articles on the costs of correctional institutions, the deterrent effect of antitrust enforcement, and an econometric approach to victims and crime.

I am sure that Dr. Block will provide a much needed economic and cost-benefit analysis to the problems to be considered by the Sentencing Commission. I look forward to reviewing the work of the Commission and the analysis of Dr. Block.

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

The President has nominated what by all accounts appears to be a professional, non-partisan slate of nominees for the new Sentencing Commission.

The seven nominees selected from hundreds of candidates include judges, law professors, and a parole commissioner. Three are former Judiciary Committee staff. All seven have been reported and are ready for Senate action, except action on three nominees, Ilene Nagel, Paul Robinson, and Michael Block, is subject to today's hearing being satisfactory to my colleague from Maryland, Senator Mathias.

These are among the most important nominations President Reagan will make in 1985. Many of us in Congress had been increasingly concerned about the year-long delay in submitting these names.

But the log jam is now broken, and I hope that the same bipartisan support which led to the creation of the Commission will guide the members in the difficult job ahead of them.

Our sentencing system has long been a national disgrace. We have come too far and taken too long to further tolerate delay of desperately needed sentencing reform. It has been an effort lasting over a decade, and it is time to finally implement the landmark Sentencing Reform Act of 1984,

It is time for the new Sentencing Commission to get to work on developing guidelines that will provide uniform and fair sentencing and guarantee that criminals actually serve the full sentence that a judge imposes.

The Senate report on the act explains: "The extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole, demanded the highest quality of membership. For such a critical position, Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority . . . without superior and professional members the Commission, and indeed sentencing reform, can never achieve the progress so sorely needed."

Time is short for the fledgling Commission to accomplish its task. It must write new guidelines for controlling all sentences for all Federal crimes and report its initial recommendations to Congress by April, 1986. Whether the new system succeeds or fails hinges on the work of the Commission. Its members must have broad knowledge of criminal law and penology and the compassion and good sense to balance the community's interests and those of the offender.

I look forward to these hearings as another step toward desperately needed sentencing reforms, and I expect that we will find the nominees to be well worth the wait.

Senator MATHIAS. It is with great pleasure for the committee to also have with us, in person, our colleague from the other body, Representative Kolbe, from Arizona. I know that he is under pressures of time, and if he would like to say something at this point, we would be glad to hear from him.

STATEMENT OF HON. JAMES KOLBE, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. KOLBE. Thank you, Mr. Chairman.

If I might, Mr. Chairman, I have a very brief statement which I would like to have just inserted into the record.

Senator MATHIAS. It will be included in the record.

Mr. KOLBE. Mr. Chairman, I will make my remarks very brief. I am sure that it is no surprise that I come here to speak in strong support of Professor Block for his nomination to the Sentencing Commission. But I do so based on more than just a passive interest in this Commission.

I had the privilege of serving for 4 years in the Arizona State Senate, as chairman of the judiciary committee there.

During that time, we had a complete overhaul of the sentencing provisions, in fact, of our entire Criminal Code.

As you might imagine, the sentencing provisions in a State Criminal Code are as difficult as they are when you talk about the Federal Criminal Code. And we found that it was necessary to have good data on which to base our information.

We turned to people, such as Professor Block, and I must say, he was the leading person in the kind of information that we received, on which to base our decisions.

We found that he was a thorough researcher and the data we received from the university and from Professor Block gave us the ability to make a decision in a manner that was devoid of emotion. It was an objective kind of a decision, and I think, allowed us to adopt tough deterrents.

I think that I can say that Professor Block was respected by all members of the Judiciary Committee, Republicans and Democrats alike. And I think that what sets him apart is his ability to combine a philosophy of deterrence, common sense and solid data.

So I am very pleased to be able to speak here on behalf of Professor Block and to urge his confirmation for this position.

Senator MATHIAS. We appreciate very much your coming and giving us a personal assessment of Professor Block and of what he has been able to accomplish in Arizona.

Thank you very much.

Mr. KOLBE. Thank you very much.

Senator MATHIAS. And your statement will be included in the record.

[Statement follows:]

PREPARED STATEMENT OF CONGRESSMAN JIM KOLBE

Mr. Chairman: I appreciate this opportunity to join with my colleagues and fellow Arizonans in supporting the nomination of Michael Block to the United States Sentencing Commission.

Mr. Chairman, when the Comprehensive Crime Control Act was passed in the last session of Congress, it included a provision establishing a Sentencing Commission to create uniform and consistent penalties based upon rational and consistent evaluations of the deterrent effects of these penalties. The most important element in devising such a system depends on the Commission's ability to remove itself from a strictly philosophical consideration of the merits of punishment, and concentrate on the quantatative effects of penalties on criminal behavior in society.

It is on this basis that I can offer my highest recommendation of Professor Block's abilities. My judgements are not based on passive observance—they are based on personal experience working with Professor Block in just this context.

When I was chairman of the Judiciary Committee in the Arizona Senate, my colleagues and I were faced with the task of implementing a new criminal code. At the time, we were engaged in numerous philosophical disputes about the deterrent effect of various criminal penalties. While we could discuss it from an emotional—and very human—point of view, it was Michael's role to give us hard data.

As you well know, that is not an easy assignment in the criminal justice field. But he would remove the emotion, the subjective element, and give us solid evidence on which to base a tough, deterrent penalty. He was and is highly respected by all members of the Judiciary Committee—Republicans and Democrats, liberals and conservatives. What sets Professor Block apart is his ability to combine a philosophy of deterrence with common sense and solid data to martial almost irrefutable arguments in support of his position.

While Michael's professional credentials are, in my opinion, beyond question, it is just as evident that you have before you, Mr. Chairman, a nominee of unparalleled personal integrity. He will be a central asset to the successful work of the Sentencing Commission.

I feel I know something of the task which confronts the Sentencing Commission. I can think of no individual who is better suited to serve than Professor Block. I respectfully urge this committee to forward Professor Block's nomination for speedy confirmation.

Thank you, Mr. Chairman, for this opportunity to share with the committee my thoughts in support of Professor Block's confirmation.

Senator Mathias. Professor Block if you will stay at the table, we will ask your colleagues to join you.

And if you will all stand and raise your right hand, you will be sworn in.

Do each of you swear that the testimony that you will give at this hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. Block. I do.

Ms. Nagel. I do.

Mr. Robinson. I do.

Senator Mathias. You may be seated.

As I have just said, the other nominees for the Commission are three Federal judges and a member of the Parole Commission. Each of them have unique qualifications that they will bring to the Commission. However, I think that we are fortunate in having each of you, who will bring academic credentials. I know that you have been very active in this field of study.

One of the great services that we have on Capitol Hill is that provided by the Library of Congress. And I am advised by the Library of Congress that each of you has been very prolific in print, which is, of course, a dangerous thing. [Laughter.]

I think that it was Cardinal Richelieu who said, "Oh, that mine enemy should write a book."

But we do have a bibliography which I am going to place in the record at this point so that the committee will be advised of your professional writing.

I wish that I might claim that I might have read all that you have written, but I think that might strain my credibility.

But I might ask each of you to make a brief review, in general, of your work.

[Aforementioned follows:]

BIBLIOGRAPHIES

Michael Block

PUBLISHED WRITINGS

Books:

Sherman Act Indictments: 1955–1980 (with J.M. Clabault), Federal Legal Publications, Inc., 1982.

Student Workbook Bach Economics 8/E, 9/E, 10/E (with H.G. Demmert), Prentice-Hall, 1974–1980.

Articles:

"The Spillover Effect of Antitrust Enforcement" (with J.S. Feinstein), Review of Economics and Statistics, (forthcoming).

"Asymmetric Information and Collusive Behavior in Auction Markets," (with J.S. Feinstein and F.C. Nold), American Economic Review, June, 1985.

"The Effectiveness of Recent U.S. Government Criminal Antitrust Enforcement Efforts in the Construction Industry," (with J.S. Feinstein and F.C. Nold) in Internationale Forschungsergebnisseisse Auf Dem Gebiet Der Wirtschaftskriminalitat, ed. K. Liebl, 1984.

"The Level of Theft, The Size of the Public Sector, and the Distribution of Income: Some Interesting Empirical Findings," White Collar and Economic Crime, Peter M. Wickman and Timothy Dailey, ed., Lexington Books, 1982.

"The Deterrent Effect of Antitrust Enforcement," (with F.C. Nold and J.G. Sidak), Journal of Political Economy, June, 1981.

"Some Simple Analytics of International Deterrence," (with R.C. Lind), The American Political Science Review, March 1981.

"The Cost of Automobile Efficiency: A Comparison of Conventional and Alternative Engine Technologies," (with F.C. Nold), Logistics and Transportation Review, March, 1981.

"The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?" (with J.G. Sidak), Georgetown Law Journal, June, 1980.

"Cost Functions for Correctional Institutions," (with T.S. Ulen), Chapter 10, The Costs of Crime, C.M. Gray, ed., Sage Publications, 1979.

"Estimating the Cost of Judicial Services," (with D. Weller), Chapter 8, The Costs of Crime, C.M. Gray, ed., Sage Publications, 1979.

"Controlling Hospital Costs: An Index Approach," (with D. Whipple), Inquiry March, 1976.

"A Choice Theoretic Approach to Crimes Punishable by Imprisonment," (with R.C. Lind) Journal of Legal Studies, June, 1975.

"A Labor Theoretic Approach to Criminal Choice," (with J.M. Heineke) American Economic Review, June, 1975.

"The Cost of Entrepreneurship and Output Decisions," (with J.M. Heineke) Journal of Economic Studies, May, 1975.

"Factor Allocations Under Uncertainty: An Extension," (with J.M. Heineke) Southern Economic Journal, January, 1975.

"Crime and Punishment Reconsidered," (with R.C. Lind) Journal of Legal Studies, January, 1975.

"An Economic Approach to Theft," Atlantic Economic Journal, November, 1974.

"Income Uncertainty: The Geometry of a Special Case," Journal of Economic Studies, May, 1974.

"Subjective Probability of Victimization and Crime Levels: An Econometric Approach," (with G. Long) Criminology, May, 1973.

"The Allocation of Effort Uncertainty: "The Case of Risk Adverse Behavior," (with J.M. Heineke) Journal of Political Economy, April/May 1973.

"A Comment of Uncertainty and Household Decisions," (with J.M. Heineke) Review of Economic Studies, October, 1972.

"Inference from Menu: A Note on Restaurant Pricing," (with H.G. Demmert) Applied Economics, June, 1971.

ILENE NAGEL

ARTICLES, CHAPTERS, AND NOTES

Garth, Bryant, Ilene Nagel, and Sheldon Plager, "Empirical Research and the Shareholders Derivative Suit: Toward A Better Informed Debate", Law and Contemporary Problems (forthcoming).

Nagel, Ilene H., "The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release", Law and Society Review 17:4 (1983).

Nagel, Ilene H. and Sheldon J. Plager, "RICO, Past and Future: Some Observations and Conclusions," Cincinnati Law Review (Summer 1983).

Stryker, Robin, Ilene H. Nagel and John Hagan, "Methodological Issues in Court Outcome Research: Pretrial Release Decisions for Federal Defendants." Sociological Methods and Research Vol. 11, #4 (1983).

Nagel, Ilene H. and John Hagan, "Gender and Crime: Offense Patterns and Criminal Court Sanctions", in Norval Morris and Michael Tonry (eds.) Crime and Justice: An Annual Review of Research, University of Chicago Press, (1983).

Hagan, John, Ilene H. Nagel, "White Collar Crime/White Collar Time: The Sentencing of White Collar Offenders", American Criminal Law Review 20:2 Fall 1982.

Nagel, Ilene H. and John Hagan, "The Sentencing of White-Collar Criminals in Federal District Court: A Socio-Legal Exploration of Disparity," Michigan Law Review, June (1982).

Nagel, Ilene H. and Eleanor Bernert Sheldon, "Methods of Evaluative Research", in Robert Smith (ed.), An Introduction to Social Research: Volume I, Ballinger: Harper and Row, (1982).

Hagan, John, Ilene H. Nagel and Celesta Albononti, "The Social Organization of White Collar Sanctions: An Analysis of Sentencing Decisions in Ten Federal Disrtict Courts," American Sociological Review, October (1980).

Reprinted with revisions as: "The Social Organization of White Collar Crime Sanctions: A Study of Prosecution and Punishment in the Federal Courts" in Wickman, Peter and T. Dailey (eds.) White Collar and Economic Crime, D.C. Heath (1981).

Nagel, Ilene, John Cardascia and Cathy Ross, "Sex Differences in the Processing of Criminal Defendants" in Kelly Weisburg (ed.) Women and the Law: The Social Historical Perspective, Schenkman (1981).

Reprinted with revisions as: "Institutional Sexism: The Case in Criminal Court" in Rudy Alvarez (ed.) Discrimination in Organizations, Jossey Bass: (1979).

Reprinted with revisions as: "Sex Differences in Court Outcomes for Criminal Defendants" in Allison Morris (ed.) Women and Crime: Cropwood Conference Series, Cambridge University (1981).

Berk, Richard, Paul Burstin and Ilene H. Nagel, "Evaluating Criminal Justice Legislation" in Malcolm Klein and Kathy Teilman (eds.), Evaluation in Criminal Justice, Sage Publications (1981).

Hagan, John and Ilene Nagel Bernstein, "Conflict in Context: The Sanctioning of Draft Resisters, 1963-76." Social Problems: July (1979).

Hagan, John and Ilene N. Bernstein, "The Sentencing of Upper and Underworld Offenders in Federal District Courts: Variation in Plea Negotiation Practices." Law and Society Review: July (1979).

Reprinted with revisions. Hagan, John and Ilene Nagel Bernstein, "Sentence-Bargaining in Federal District Courts," in William F. McDonald and James A. Cramer (eds.) Plea-Bargaining, D.C. Heath (1980).

Macke, Ann, George Bohrnstedt and Ilene N. Bernstein, "Housewives' Self-Esteem and Their Husband's Success: The Myth of Vicarious Involvement." Journal of Marriage and the Family, February (1979).

Bernstein, Ilene Nagel, "Social Control in Applied Social Science: A Study of Evaluative Researchers Conformity to Technical Norms," Social Science Research: March (1978).

Bernstein, Ilene Nagel, Edward Kick, Jan Leung and Barbara Schulz, "Charge Reduction: An Intermediary Stage in the Process of Labelling Criminal Defendants", Social Forces, December (1977).

Bernstein, Ilene Nagel, William Kelly and Patricia Doyle, "Societal Reaction to Deviants: The Case of Criminal Defendants," American Sociological Review, October (1977).

Freeman, Howard E. and Ilene Nagel Bernstein, "Evaluation Research and Public Policies," in Stuart Nagel (ed.) Policy Studies and the Social Sciences, D.C. Heath: 9-25 (1976).

Bernstein, Ilene Nagel, "Validity Issues—Evaluative Research." Sociological Methods and Research, 3-12, Vol. 4, #1, August (1975).

Bernstein, Ilene and Nagel, George Bohrnstedt and Edgar F. Borgatta, "External Validity and Evaluative Research: A Codification of Problems" Sociological Methods and Research, 101-128, Vol. 4, #1, August (1975).

Bernstein, Ilene Nagel, "Evaluative Research in Corrections: Status and Prospects Revisited," Federal Probation: 56-7, March (1975) (short reply note).

PAUL H. ROBINSON

PUBLISHED WRITINGS

Books:

Criminal Law Defenses (West 1984) (2 volumes) (Reviewed at: 321 Wayne Law Review 247 (1984))

Articles:

Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 Virginia law Review 1 (1985)

Imputed Criminal Liability. 93 Yale Law Journal 609-676 (1984)

Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stanford Law Review 681-762 (1983) (with Jane Grall)

Criminal Law Defenses: A Systematic Analysis, 82 Columbia Law Review 199-291 (1982)

A Brief History of Distinctions in Criminal Culpability, 31 Hastings Law Journal 815-953 (1983)

Crimes of Carelessness in the United States, 50 Revue Internationale de Droit Penal 115 (1979)

A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 U.C.L.A. Law Review 266-292 (1975) (but see Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson, 23 U.C.L.A. Law Review 293)

Proposal and Analysis of a Unitary System for Review of Criminal Judgments, 54 Boston University Law Review 485-514 (1974)

A Proposal for Limiting the Duty of the Trial Judge to Instruct the Jury Sua Sponte, 11 San Diego Law Review 325-352 (1974)

Parole Holds: Their Effect on the Rights of the Parolee and the Operation of the Parole System, 19 U.C.L.A. Law Review 759-803 (1972)

Monographs:

Final Report of the Rhode Island Criminal Code Revision Project (1985) (2 volumes)

An Empirical Study of Federal Habeas Corpus Review of State Court Judgments (United States Department of Justice 1979)

TESTIMONY OF MICHAEL K. BLOCK, OF ARIZONA, TO BE A MEMBER OF THE U.S. SENTENCING COMMISSION

Mr. BLOCK. Thank you, Mr. Chairman.

If it pleases the Senator, I would like to begin by thanking the Senator for the opportunity to appear here and express my views.

I would also like to thank the President and the Attorney General for giving me the opportunity to serve on this important Commission.

In terms of an overview of my own academic career, I have spent most of my time since receiving my Ph.D. applying economics and quantitative methods to the study of the legal system.

A good deal of my work in recent years has dealt with the assessment of deterrent effects, especially for white collar crime. I am currently involved with a research project which deals with the appropriate sentence specification for white collar crimes, specifically antitrust violations.

Thank you.

TESTIMONY OF ILENE H. NAGEL, OF INDIANA, TO BE A MEMBER OF THE U.S. SENTENCING COMMISSION

Ms. NAGEL. I would like to express my appreciation to the Senator and to the committee for permitting me to appear before you. Also to the President and Attorney General Meese for their support and confidence in nominating me to this Commission.

In terms of my career——

Senator MATHIAS. I can see some people in the room are having a little trouble hearing you so that if you could speak right into the microphone it would be helpful.

Ms. NAGEL. In terms of my academic career, I have devoted my research career to primarily two objectives. One has been to examine the bases for the application of laws, specifically with respect to pretrial release and sentencing decisions. And, to examine the bases for judicial discretion, and within that context, to look at questions of disparity in sentencing, in particular.

The other aspect that my research has focused on is the evaluation of programs and policy with particular emphasis on designing program evaluation for criminal justice legislation.

Thank you.

[Material follows:]

DAN QUAYLE
INDIANA

SH 524 HART SENATE OFFICE BUILDING
(202) 224-5623

INDIANAPOLIS OFFICE
ROOM 447, 46 EAST OHIO STREET
INDIANAPOLIS, INDIANA 46204
(317) 269-5555

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES
ARMED SERVICES
BUDGET
LABOR AND HUMAN RESOURCES

September 19, 1985

The Honorable Strom Thurmond
Chairman
U.S. Senate Committee on the Judiciary
SD-224
Washington, D.C. 20510

Dear Mr. Chairman:

I have previously expressed to your Committee my support for the confirmation of Professor Ilene H. Nagel to serve as a member of the United States Sentencing Commission.

Attached is a more detailed statement on her behalf and a curriculum vitae that demonstrates her outstanding qualifications for this appointment.

Sincerely,

Dan Quayle
U.S. Senator

DQ:rgo

NORTHEAST OFFICE
340 FEDERAL BUILDING
FORT WAYNE, IN 46802
(219) 422-1505

SOUTHWEST OFFICE
127 NW 7TH ST
(812) 423-6871 EXT. 440

SOUTHEAST OFFICE
1201 EAST 10TH ST
ROOM 103, FEDERAL CENTER
JEFFERSONVILLE, IN 47132
(812) 228-3387

NORTHWEST OFFICE
5530 SOHL AVE., # 103
HAMMOND, IN 46320
(219) 932-5500 EXT. 380

STATEMENT IN SUPPORT OF THE CONFIRMATION OF PROFESSOR ILENE H. NAGEL TO SERVE AS A MEMBER OF THE UNITED STATES SENTENCING COMMISSION

Professor Nagel's career has uniquely prepared her for this important responsibility. The Sentencing Commission will be addressing some of the most difficult and complex issues in the administration of our criminal laws, involving matters of fairness, justice, and protection of innocent citizens from preventable criminal conduct. Professor Nagel has devoted much of her career to the study of criminal law enforcement, and the understanding of sentencing decisions and their implications. Recently she was principal investigator of a multi-year, national empirical study of the bases upon which pre-trial release, plea bargaining and sentencing decisions are made for federal defendants. The results of her research have been published in major law reviews and social science journals. These works have won her national acclaim from the community of law and social science scholars and practioners, both for her demonstrated methodological expertise in the analysis of court recorded data, and for the contribution her research has made to furthering collective understanding of the exercise of judicial and prosecutorial discretion.

Professor Nagel has been recognized widely for her scholarly contributions to the published research in law and in the social science of law. In 1976, she was the Daniel and Florence Guggenheim Fellow at Yale Law School, in 1980 she was a Visiting Fellow at the Cambridge University Institute of Criminology and on the Faculty of Law, in 1980 she was a Rockefeller Foundation Scholar-in-Residence at their International Center for Scholars in Italy, in 1982 she was the Taft Lecturer at the University of Cincinnati, and in 1985 she was a Visiting Scholar at Stanford University. During her 12 years at Indiana University, she has received numerous grants and awards in recognition of her outstanding scholarship. And, Professor Nagel serves on a host of committees and is an active leader in several national law and social science organizations including the Association of American Law Schools, the American Sociological Association, the Law and Society Association, the American Society of Criminology, and the American Bar Association.

Professor Nagel is married to Professor S.J. Plager. Professor Plager served as the Dean of the Indiana University School of Law from 1977-1984. During these years, the Plagers were especially active and effective representatives of Indiana University in the State of Indiana and at national and international law meetings.

Mr. Chairman, I believe the Nation will be well-served if your committee votes favorably on the nomination of Professor Nagel. I thank you.

CURRICULUM VITAE

Ilene H. Nagel

Professor of Law
Indiana University
School of Law
Bloomington, Indiana

Telephone: (812) 335-6403 or 335-8424 (office)
(812) 334-2728 (home)

Birth: June 4, 1946

Education: B.A. Sociology, 1968, Hunter College
M.A. Sociology, 1973, New York University
Ph.D. Sociology, 1974, New York University

HONORS, AWARDS AND FELLOWSHIPS

Taft Lecturer	University of Cincinnati, 1982
Rockefeller Foundation Scholar	Bellagio Study and Conference Center, 1980
Guggenheim Research Fellow	Yale Law School, 1976-77
N.I.M.H. Postdoctorate in Evaluative Research Methodology	University of Minnesota, 1972-73
N.I.M.H. Fellow in Criminal Law	New York University, 1971
N.S.F. Doctoral Fellow	New York University, 1971 (Summer)
University Research Fellowship	New York University, 1968-70
N.Y.S. Regents Doctoral Fellow	New York University, 1968-70
Department Honors	Hunter College, 1968
Woodrow Wilson, semi-finalist	Hunter College, 1968
Magna Cum Laude	Hunter College, 1968
Phi Beta Kappa	Hunter College, 1968

RELEVANT WORK EXPERIENCE

Indiana University	Professor of Law	1983-
	Professor of Sociology	1984-
	Associate Professor of Law and Sociology	1978-1983
	Tenure Granted	1979
Cambridge University	Visiting Fellow, Institute of Criminology, Faculty of Law, and Trinity College	1980 (Fall)
Indiana University	Assistant Professor of Law and Sociology	1977-1978
Yale Law School (on leave from Indiana)	Daniel and Florence Guggenheim Research Fellow	1976-1977
Indiana University	Assistant Professor of Sociology	1974-1976
	Lecturer in Sociology	1973-1974
University of Minnesota (on leave from Indiana)	Visiting Assistant Professor of Sociology	1972-1973
Russell Sage Foundation	Research Assistant	1971-1972

PUBLICATIONS

BOOKS

Bernstein, Ilene Nagel, and Howard E. Freeman, Academic and Entrepreneurial Research: The Consequences of Diversity in Federal Evaluation Studies, Russell Sage Foundation, 1975.

Bernstein, Ilene Nagel, (ed.), Validity Issues in Evaluation Research, Sage Contemporary Social Science Issues, 1975.

ARTICLES, CHAPTERS, AND NOTES

Garth, Bryant, Ilene Nagel, and Sheldon Plager, "Empirical Research and the Shareholders Derivative Suit: Toward A Better Informed Debate", Law and Contemporary Problems (forthcoming).

Nagel, Ilene H., "The Legal/Extra-Legal Controversy : Judicial Decisions in Pretrial Release", Law and Society Review 17:4 (1983).

Nagel, Ilene H. and Sheldon J. Plager, "RICO, Past and Future: Some Observations and Conclusions," Cincinnati Law Review (Summer 1983).

Stryker, Robin, Ilene H. Nagel and John Hagan, "Methodological Issues in Court Outcome Research: Pretrial Release Decisions for Federal Defendants." Sociological Methods and Research Vol. 11, #4 (1983).

Nagel, Ilene H. and John Hagan, "Gender and Crime: Offense Patterns and Criminal Court Sanctions", in Norval Morris and Michael Tonry (eds.) Crime and Justice: An Annual Review of Research, University of Chicago Press, (1983).

Hagan, John, Ilene H. Nagel, "White Collar Crime/White Collar Time: The Sentencing of White Collar Offenders", American Criminal Law Review 20:2 Fall 1982.

Nagel, Ilene H. and John Hagan, "The Sentencing of White-Collar Criminals in Federal District Court: A Socio-Legal Exploration of Disparity," Michigan Law Review, June (1982).

Nagel, Ilene H. and Eleanor Bernert Sheldon, "Methods of Evaluative Research," in Robert Smith (ed.), An Introduction to Social Research: Volume I, Ballinger: Harper and Row, (1982).

Hagan, John, Ilene H. Nagel and Celesta Albonetti, "The Social Organization of White Collar Sanctions: An Analysis of Sentencing Decisions in Ten Federal District Courts," American Sociological Review, October (1980).

> Reprinted with revisions as: "The Social Organization of White Collar Crime Sanctions: A Study of Prosecution and Punishment in the Federal Courts" in Wickman, Peter and T. Dailey (eds.) White Collar and Economic Crime, D.C. Heath (1981).

Nagel, Ilene, John Cardascia and Cathy Ross, "Sex Differences in the Processing of Criminal Defendants" in Kelly Weisburg (ed.) Women and the Law: The Social Historical Perspective, Schenkman (1981).

> Reprinted with revisions as: "Institutional Sexism: The Case in Criminal Court" in Rudy Alvarez (ed.) Discrimination in Organizations, Jossey Bass: (1979).
>
> Reprinted with revisions as: "Sex Differences in Court Outcomes for Criminal Defendants" in Allison Morris (ed.) Women and Crime: Cropwood Conference Series, Cambridge University (1981).

Berk, Richard, Paul Burstin and Ilene H. Nagel, "Evaluating Criminal Justice Legislation" in Malcolm Klein and Kathy Teilman (eds.), Evaluation in Criminal Justice, Sage Publications (1981).

Hagan, John and Ilene Nagel Bernstein, "Conflict in Context: The Sanctioning of Draft Resisters, 1963-76." Social Problems: July (1979).

Hagan, John and Ilene N. Bernstein, "The Sentencing of Upper and Underworld Offenders in Federal District Courts: Variation in Plea Negotiation Practices," *Law and Society Review*: July (1979).

> Reprinted with revisions. Hagan, John and Ilene Nagel Bernstein, "Sentence-Bargaining in Federal District Courts," in William F. McDonald and James A. Cramer (eds.) *Plea-Bargaining*, D.C. Heath (1980).

Macke, Ann, George Bohrnstedt and Ilene N. Bernstein, "Housewives' Self-Esteem and Their Husband's Success: The Myth of Vicarious Involvement." *Journal of Marriage and the Family*, February (1979).

Bernstein, Ilene Nagel, "Social Control in Applied Social Science: A Study of Evaluative Researchers Conformity to Technical Norms," *Social Science Research*: March (1978).

Bernstein, Ilene Nagel, Edward Kick, Jan Leung and Barbara Schulz, "Charge Reduction: An Intermediary Stage in the Process of Labelling Criminal Defendants," *Social Forces*, December (1977).

Bernstein, Ilene Nagel, William Kelly and Patricia Doyle, "Societal Reaction to Deviants: The Case of Criminal Defendants," *American Sociological Review*, October (1977).

Freeman, Howard E. and Ilene Nagel Bernstein, "Evaluation Research and Public Policies," in Stuart Nagel (ed.), *Policy Studies and the Social Sciences*, D.C. Heath: 9-25 (1976).

Bernstein, Ilene Nagel, "Validity Issues in Evaluative Research," *Sociological Methods and Research*, 3-12, Vol. 4, #1, August (1975).

Bernstein, Ilene Nagel, George Bohrnstedt and Edgar F. Borgatta, "External Validity and Evaluative Research: A Codification of Problems" *Sociological Methods and Research*, 101-128, Vol. 4, #1, August (1975).

Bernstein, Ilene Nagel, "Evaluative Research in Corrections: Status and Prospects Revisited," *Federal Probation*: 56-7, March (1975) (short reply note).

WORK IN PROGRESS

Hagan, John, Ilene H. Nagel and Alberto Palloni, "Beyond Equality: The Sentencing of White Collar Offenders Before and After Watergate."

Nagel, Ilene H., Bryant G. Garth and Sheldon J. Plager, "Dispute Transformations and the Dynamics of Legal Representation in Class Action Litigation." This exploratory research project investigates the lawyer-client relationship in class action litigation suits filed in federal courts. The class action device permits lawsuits on behalf of large groups of persons represented by one or several representative individuals and their lawyers. The research inquires about the relative roles of the represented groups, the class representatives, and the lawyers in the critical decisions that arise in the initiation and processing of class action litigation, and how the allocation of decision-making power affects the results of these lawsuits. In general terms, the study aims to contribute to theoretical concerns about the transformation of disputes, how rights are or are not enforced in the courts, and lawyer-client relations. It aims to contribute to more practical questions about the accountability, effectiveness, and legitimacy of class action litigation. The investigation takes place in the Northern District of California (San Francisco), with comparative data being drawn from the Central District of California. Data are being collected from court files and from extensive questionnaires and inverviews. The project is funded by the National Science Foundation.

Nagel, Ilene and John Hagan, "Judicial Compliance with the Federal Bail Reform Act." A first draft of this paper was presented by me at Iowa Law School. Revisions are being made in preparation for submission for journal review.

Nagel, Ilene H. and John Hagan, "Pleading Guilty and Sentence Severity: The Propriety of the Relationship." This paper reviews the extant case law on the use of the guilty plea as a mitigating factor in sentencing. Empirical findings on the nature of that relationship as it varies by federal jurisdiction, type offense, and characteristics of offenses are presented, followed by a discussion of the policy implications of rewarding guilty pleas with sentence leniency and the effect of this on the appearance of justice.

Nagel, Ilene and John Hagan, "The Impact of Gender on Pretrial Release, Full Prosecution and Sentencing Decisions for Federal Defendants." The analyses of decisions for 34,000 defendants are completed; the literature review is completed as well. A first draft is scheduled for completion shortly.

Nagel, Ilene H. and John Hagan, *Decision Making in Federal District Courts.* The major publication summarizing the results of our grant supported by NIMH focuses on (1) the determinants of the variety of court decisions occurring from the point of entry to the point of departure, e.g., bail, plea negotiations, sentence severity; (2) jurisdictional differences among the ten District Courts in processes and outcomes relating to these various decision points; (3) differences in the processes and outcomes for defendants prosecuted for white collar, economic and occupational crime versus more traditional crimes. We have contracted to publish a monograph with *Academic Press* in the series "*Quantitative Studies in Sociology*," edited by Peter Rossi.

GRANTS RECEIVED

N.S.F.	3/15/83-3/14/85
N.I.M.H.	9/77-6/81
Faculty Grant-in-Aid	Indiana University, 1976
University Faculty Research Grant	Indiana University, 1975
University Faculty Research Grant	Indiana University, 1974
University Course Development Grant	Indiana University, 1974
Easter Seal Foundation Grant	Easter Seal Foundation, 1974 (Summer)
M.U.C.I.A. Summer Grant	Midwest University Consortium (Summer)

NATIONAL ORGANIZATIONS: PROFESSIONAL ACTIVITIES

American Bar Association	Committee on Lawyer Training After Law School: 1983-
Association of American Law Schools:	Chair Elect: Section on Law and Social Sciences
	Committee on Continuing Legal Education: 1982-
American Sociological Association:	Committee on Professional Ethics: 1982-

Law and Society Association	Program Chairman: 1984 national meetings
American Society of Criminology	Committee on Research: 1980-
Editorial Review Board:	Law and Human Behavior 1982- Law and Society Review, 1977-1983 Sociological Methods & Research, 1974-1980 Evaluation Research Quarterly, 1976-1978 Annual Review of Evaluation Research, 1976-
National Institute of Mental Health	Grant Review Committee: Crime and Violent Behavior, 1979-1982
National Institute of Justice	Grant Review Panels: 1981-1983
Law and Society Association	Board of Trustees: 1979-1982
American Judicature Society	Research Advisory Board
Violence in Crime Study (Peter Rossi and James Wright, Study Directors).	Research Advisory Board
American Sociological Association	National Program Committee: 1978-1979; 1979-1980.
American Sociological Association, Criminology Section	Secretary: 1979-1982
American Sociological Association, Criminology Section	Council Member: 1974-75; 1975-1976; 1976-1977.
Evaluation Research Society of America	Steering Committee: 1976-1977.
American Sociological Association	Seminar Program Committee: 1973
Invited Panelist:	1980, Conference of White Collar Crime, U.S. Department of Justice sponsored, Postsdam, N.Y.;
	1978, Judicial Conference on Pre-Trial Detention, U.S. Department of Justice sponsored, San Diego, California;
	1978, National Academy of Science Conference: Committee on the Impact of Legislation on the Courts, N.A.S. sponsored, Woods Hole, Massachusetts;
	1978, Pre-Trial Conference, sponsored by Federal Judicial Center, Washington, D.C.;
	1978, Plea Bargaining Conference, sponsored by L.E.A.A., French Lick, Indiana;
	1976, International Conference on Evaluation Research Methodology, UNESCO sponsored, Washington, D.C.;
	1976, Conference on Policy Makers, Policy Researchers and Evaluation Practitioners, L.E.A.A. and Mitre Corporation, Washington, D.C.;
	1975, Society for Experimental Social Psychologists Meetings, "The Social Psychology of Evaluation."

1973 GAO and L.E.A.A. Conference on Evaluation Research in Criminal Justice.

INDIANA UNIVERSITY:
MAJOR SERVICE ACTIVITIES

Director	Office of Research and Development: School of Law 1977-
Chair	Committee to Select Indiana University Distinguished Research Lecturer: 1983-1984
	Research Advisory Committee: Dean of Research & Graduate Development: 1982-
	Budgetary Affairs Committee: Faculty Committee Responsible for Review and Advice on Campus Budget: 1982-
	Advisory Committee: Dean of Women's Affairs: 1982-
	Search & Screen Committee: Dean of Research & Graduate Development: 1982-1983
Chair	Search & Screen Committee: Dean of Women's Affairs
	Fulbright Hays Selection Committee
	Human Subjects Review Committee

TEACHING

Courses Taught: Law

- White Collar Crime
- Pre-Trial, Plea and Sentencing Decisions in Federal Court
- The Application of Social Science to Problems in Law
- Seminar on Bail
- Seminar on Serious Youth Crime
- Discretion in the Processing of Criminal Defendants

Courses Taught: Sociology

- Introduction to Sociology
- Social Problems
- Evaluation Research Methodology
- Social Policy
- Deviant Behavior
- Criminology
- Advanced Criminology
- Research in Criminal Justice

Leisure Activities: blue water sailing, downhill skiing; slow jogging.

TESTIMONY OF PAUL H. ROBINSON, OF NEW JERSEY, TO BE A MEMBER OF THE U.S. SENTENCING COMMISSION

Mr. Robinson. Senator, I would also like to thank you for the opportunity to testify here today. And the President and the Attorney General, as well, for what I consider to be a very important opportunity.

Most of my academic career has involved work in substantive criminal law. I have published a series of articles that for the most part, try to take our notions of blameworthiness and translate them into an intellectual structure, to bring some sort of systematic organization to the variety of rules and doctrines that we have in substantive criminal law.

My two volume treatise, "Criminal Law Defenses," is to some extent the same sort of effort: that is, to bring some sort of organization, some conceptual organization to the area of criminal law, but it is a document directed toward practicing lawyers, and is really designed for them to be used on a day-to-day basis.

A third sort of academic activity has been my recent work as director of the Rhode Island Criminal Code Revision project.

The Rhode Island Legislature was interested in adopting a modern code and asked me to draft a new code for the State. Again, my job there, and the reason that that task was interesting to me, was that it was an attempt to try to articulate in a rather systematic way, just how we feel about various harms and principles of culpability.

And I suppose that is what makes this assignment with the Commission of particular interest to me, as well. It is, in a sense, a continuation of my career interests.

Thank you, Senator.

Senator Mathias. This is a difficult question to ask you. It is asking you for a subjective judgment, in which your views and that of the general public might be different.

But this committee has had the unhappy experience, from time to time, of having advised the Senate to confirm a nomination when suddenly some publication surfaces, which is extremely embarrassing to the President, to the Senate, and results in great tragedy for the author.

Among your writings, is there anything that you feel might ultimately be embarrassing to the President or to the Senate?

Mr. Block. I will assume that I am the first to answer that question, Senator.

I can answer that one, no. I do not think that there is anything in my writings that would ultimately embarrass either the committee or the President.

Ms. Nagel. I believe that I can happily give the same answer. There is nothing in my writings that would be controversial or, I think, embarrass the committee or the President.

Mr. Robinson. There is nothing that would be an embarrassment to me.

Senator Mathias. How about controversial?

There is nothing wrong with controversy. Every Member of the Congress is embroiled in controversy as a part of the job.

What would you say is the most controversial position that you have taken, Professor Block?

Mr. BLOCK. I guess recently the most controversial position I have taken involves the finding, that is about to be published, that it is slightly more effective to punish white collar criminals more severely once you have apprehended them, than to spend resources apprehending more offenders.

Senator MATHIAS. You mean to put up the fear?

Mr. BLOCK. Yes.

The deterrent seems to be larger if you increase severity than if you increase certainty.

Senator MATHIAS. The deterrent quality of a well publicized prosecution.

Mr. BLOCK. Yes, increasing severity seems to be better than spending more catching additional white collar criminals.

That is about as controversial as my work gets.

Senator MATHIAS. Well, that is not altogether a novel theory. The IRS has worked on that, and I notice that there is a seasonal quality to the work of the prosecutions by the IRS. In late winter and very early spring, you usually have some major tax case surfacing which is just timed for April 15.

Mr. BLOCK. Thank you.

Senator MATHIAS. Professor Nagel.

Ms. NAGEL. I do not think that I have published anything controversial, as I have mentioned.

I think that probably the publication that generates the most debate is a publication on sex differences in criminal justice outcomes, looking in particular at pretrial release decisions, the favorability of negotiated pleas agreements, and sentencing.

The overwhelming conclusion was that there are sex differences, and that women are preferentially treated throughout the system.

Senator MATHIAS. Preferentially treated?

Ms. NAGEL. Yes.

I do not think that the data are controversial, but certainly that finding generates controversy.

Senator MATHIAS. In your judgment, is the preference justified?

Ms. NAGEL. I do not think that the preference is justified if we believe that suspect classifications like race and sex should have no impact on sentencing. And, this finding is controlling four factors like the severity of the crime, the number of charges, criminal history, et cetera.

Mr. ROBINSON. It makes me sound rather boring, but I really cannot think of anything terribly controversial.

Senator MATHIAS. Never been controversial?

Mr. ROBINSON. Well, you have to understand, part of what my goal is, is to try to take our shared community sense of what makes us assign blame and to articulate it.

My goal, in a sense, is to try to articulate rules and structures that approximate this shared community sense as much as possible.

So a victory for me is to be able to state a principle that everyone essentially agrees: "Yes, that does describe the way that we feel about these kinds of cases, or those kinds of cases."

I guess by saying that I have not been controversial, I am saying that I have been generally successful at articulating principles that reflect the shared community sense.

Senator MATHIAS. Have each of you been in jail?

Mr. BLOCK. I can answer no.

Senator MATHIAS. I do not mean as a prisoner.

Have you visited jails?

Mr. BLOCK. No, I have not.

Senator MATHIAS. Have you, Professor Nagel?

Ms. NAGEL. Yes, I have.

Senator MATHIAS. What jails have you been in?

Ms. NAGEL. I visited the New York Federal Detention Center for male defendants.

Senator MATHIAS. You have never visited a Federal penitentiary?

Ms. NAGEL. No, not to the best of my recollection.

Mr. ROBINSON. I have visited several correctional facilities in California.

Chino, the California womens facility and San Quentin. During a summer in law school, I worked with the California Department of Corrections in their parole supervision division.

I am sorry to say that actually, I have also spent some time in jail as a prisoner. I hope that the FBI came up with this so that it is nothing new.

My recollection is that—I cannot even remember the year. I was—I think that it might have been before I went to college, I got a speeding ticket, I think in Great Barrington, somewhere in Massachusetts and I did not have the money for bail. My father had to drive up from Connecticut to bail me out and I spent most of the night in jail.

Not a pleasant experience.

Senator MATHIAS. So you understand what it is to be in a cage?

Mr. ROBINSON. That is just exactly what it was. It was the basement of the police station and they had basically a cage.

Senator MATHIAS. And there is something very, very traumatic about bars when they separate you from the outer world.

Well, I would recommend to the Justice Department and to you, that arrangements be made so that you have an early opportunity to visit several classes of Federal penal institutions.

There are those that are less austere, and there are the high security prisons. But I think that if you are going to deal in this subject, you should be thoroughly familiar with the prisons.

Judge Halleck was a judge in the District of Columbia. At the time he assumed the judicial robe and was elevated to the bench, he actually went and spent some period of time incarcerated so that he could have a sense of just what the psychological impact would be of hearing that slammer slam.

And I think that he found it a very emotional and powerful experience.

Now, I will not impose that on you as a condition of your confirmation, but I think it would be important for you to have a full understanding of just what incarceration is all about.

Have any of you had an opportunity to personally study any foreign penal systems?

Mr. **Block**. I have not had an opportunity to study foreign penal systems.

Ms. **Nagel**. No, sir.

Mr. **Robinson**. I spent a year at Cambridge getting a diploma in legal studies and did not make a formal tour but spent time taking advantage of the location and learning a good deal about the English court and correctional system. I am certainly not an expert by any means.

Senator **Mathias**. No, but you have some awareness?

Mr. **Robinson**. Yes.

Senator **Mathias**. And you would recognize differences between the British penal system and ours?

Mr. **Robinson**. At least as it stood in 1975, yes.

Senator **Mathias**. It would be interesting for you, and not very demanding, particularly on you, Professor Block, with your base in Arizona, to look at the Mexican penal system.

I have visited both some of the good places and some of the bad ones, some of the difficult ones.

There is really a model jail near Mexico City which is a tough place, but in terms of the penal system is a very modern and interesting facility.

But to get some idea of the approach that other countries use in the penal system, because you are going to need a lot of philosophy and a lot of knowledge as you approach this job. This is not something that can be done on a statistical basis.

Mr. **Block**. I would like to concur. I think that it is necessary for me to get some additional experience concerning prisons. Actually getting this experience firsthand by visiting prisons is a good idea. I take your suggestion about visiting prisons very seriously.

Senator **Mathias**. Well, I am glad that you feel that that is a useful suggestion.

But I think that you ought to begin to undertake a study of other penal systems. We hope that we have developed a good one, but looking at what other people are doing is sometimes helpful in confirming your sense that you are right. And occasionally it exposes you to an idea that would be useful to adopt.

It is interesting that one of the most important books on America was written as a result of just that kind of a study.

Alexis de Tocqueville, the young Frenchman who had a position in the French justice system, came to the United States about 1830 specifically to study the penal system. And as a result of that trip he wrote his great analysis of American society which is still valid and still important. I would hope that you could undertake that kind of study. I do not know whether the State Department will be willing to send you to France to look at their system but you might try with them at any rate.

What about the philosophy of punishment?

The Americans have had a different philosophies of punishment. The Puritans took a pretty austere view of what ought to happen to you if you had sinned.

Is that, do you think, the prevailing philosophy today?

Mr. **Robinson**. I am sorry, Senator, I did not hear the last part of your question.

Senator MATHIAS. Do you think the Puritan philosophy of punishment is the prevailing philosophy today or have we got a broader and more philosophical approach?

Mr. ROBINSON. By "we" I take it that you mean the American people in general?

Senator MATHIAS. The United States, specifically the Federal penal system.

Mr. ROBINSON. Well, I think as the statute reflects there are certainly a number of different views of the reasons that it may be appropriate to impose some sort of punishment.

I think that the bill talks about deterrence and just deserts and incapacitation. And certainly to the extent that there is an opportunity to rehabilitate in prison, we certainly should not miss an opportunity to help someone improve while they are in prison, and improve their chances of not becoming a repeat offender.

Those are all philosophies, it seems to me, that we have seen on the current American scene.

Senator MATHIAS. You know, Jonathan Edwards talked about sinners in the hands of an angry God. That was the colonial approach in America to punishment, that God's wrath would have to be visited on the sinner.

Mr. ROBINSON. I am not sure that I have heard any modern commentator suggesting that particular philosophy. It has certainly been associated with, fairly or unfairly, the philosophy of just deserts: That is, that an offender ought to receive a just punishment, no more and no less.

I think that many people distinguish just deserts from a retributive philosophy, where there is this notion of the wrath, the anger of God, and sin. I think the modern just deserts philosophy is somewhat more akin to notions of doing justice. Nothing more, nothing less.

Just deserts, has some adherence in modern American thought, yes.

Ms. NAGEL. I think that the prevailing philosophy of sentencing is probably well reflected in the statute, in that we want a system of sentencing that provides for fairness, and just sentences; sentencing that promotes respect for the law, fits the severity of the punishment to the severity of the offense, and that reflects our concern for deterrence, both in the sense of general deterrence, and specific deterrence. And, I would argue that to the extent that my own philosophy on sentencing is consistent with that philosophy as expressed in the statute, that the task of the Commission is to formulate guidelines that come as close to meeting those purposes as possible, with all of the information possible to be used in meeting the task.

Senator MATHIAS. Professor Block.

Mr. BLOCK. There appears, from informal accounts anyway, to be an increase in the concern with the severity of punishment. There seem to be quite a few stories about the lack of severity. I do not know the Federal data very well but I know that in the State of Arizona the average time served has gone up a little for various offenses in recent years.

So judging by the revealed behavior out there, what people are willing to do, at least in this one State that I know fairly well, there has been an increase in the severity of punishment.

Again, I do not know the Federal statistics on time served. However, my supposition is that it has probably gone up slightly over the past 4 or 5 years. There seems to be a general concern with the fact that length of sentences and the severity of punishment had decreased somewhat in the previous 20 years.

In terms of the prevailing philosophy, I am trying to judge that through revealed behavior, that is in terms of what we have been willing to impose through the sanctioning system.

Senator MATHIAS. In Professor Robinson's case, he has had some practical experience. I believe that Professor Block and Professor Nagel have not had any broad practical experience in criminal justice activities, am I correct on that?

Mr. BLOCK. In what sense, practical?

Senator MATHIAS. Well, have you tried criminal cases, or sat on parole boards?

Mr. BLOCK. I have not tried criminal cases.

Senator MATHIAS. Visited jails?

Mr. BLOCK. I have not visited jails.

Senator MATHIAS. Prisoners' aid activities, or whatever it might be?

Mr. BLOCK. That is true. I have, however, been involved as Representative Kolbe mentioned, in the sentencing debate in a legislative forum.

But I have not had any hands-on experience with the criminal justice system.

Ms. NAGEL. I have not practiced in the court. That would be illegal given the fact that I do not have a J.D. However, I have had experience that I would characterize as somewhat analogous in the sense that when I was a Guggenheim Fellow at Yale Law School, I spent close to 6 months sitting alongside a judge studying pretrial release decisions, and sentencing decisions. And, several years ago, I conducted a study of 10 Federal jurisdictions which was a study looking at the bases for judicial decisions with respect to pretrial release and sentencing. As part of that multiyear, multijurisdiction study, I interviewed, for each of the 10 jurisdictions, all of the judges, with respect to the factors that they consider in making sentencing decisions. Additionally, I sat in on sentencing hearings, interviewed all of the U.S. attorneys and all of the assistant U.S. attorneys with responsibility for criminal cases, the head of the Federal defender office in each judisdiction, and the head of the pretrial services agency in each of the 10 jurisdictions. We conducted probably close to 100 interviews, over a lengthy period, all concerned with the bases for such decisions. As well, we collected observational data while sitting in the Federal courts during sentencing and pretrial hearings, and then analyzed archival record data for some 35,000 Federal defendants.

Senator MATHIAS. Professor Robinson, you have had some experience in litigating criminal cases, I believe?

Mr. ROBINSON. Yes.

It would not be accurate to say that I am an expert litigator, but I have prosecuted both misdemeanor and felony trials as an assistant U.S. attorney in the Eastern District of Virginia.

Senator MATHIAS. And what have you done in the correctional field?

Mr. ROBINSON. My exposure, again, is relatively limited. With a number of other law students at UCLA Law School, I obtained a grant from the California Council on Criminal Justice which enabled us to spend the summer and time during the school year working with the California corrections people in a number of different capacities.

I worked primarily with the parole division. The grant involved a number of other things as well, but that is really the extent of my practical involvement with the correctional process. I was essentially a special assistant to the regional III administrator for California Parole Supervision.

Senator MATHIAS. Do you think that this background is going to be helpful to you as a member of the Commission?

Mr. ROBINSON. Yes.

It certainly will not hurt.

Senator MATHIAS. Senator Kennedy is one of the authors of the legislation which will create the Commission and he has taken a great deal of leadership in the whole question of reforming our sentencing procedures.

And I would like to recognize him at this point.

STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Thank you very much, Mr. Chairman.

Mr. Chairman, I first of all want to congratulate the nominees for their appointments. I have been very much impressed by the quality of the members of the Commission. I am sure that they feel that they would have liked to have been appointed about 1 year ago, and it is time to get on with the job.

And there are many of us who have been pressing and pushing to expedite the process to permit the Commission to have the time necessary for careful consideration of sentencing reform: A very complex and enormously important aspect of our criminal justice system.

But at this time I want to congratulate the three nominees that we have here today, as well as the distinguished Federal judges who will be serving on the Commission.

We look forward to what I thought was a very useful suggestion by Senator Biden at our last meeting of the Judiciary Committee and that is that we are going to try to maintain close communication with the Commissioners as the Sentencing Commission works its way through its responsibilities under the Sentencing Reform Act of 1984. Ultimately we are aware that down the road, the Congress will review and shape the Commission's recommendations and I think that it would be very, very helpful for all of us, at least on the Judiciary Committee, to keep in as close communication as we can during these deliberations. We should try to regularize the whole process of openness and communication.

And I think that the members of the Commission understand full well the strong really bipartisan support that the shaping and the fashioning of this whole process has taken, in the past and indeed, will require in the future.

I am optimistic about accomplishing long overdue reform of Federal criminal sentencing because there is a seriousness of purpose, I know by the Commission members, and certainly by those of us on the Judiciary Committee and in the Congress. Together we will try and ensure that the recommendations of the Commission, and needed changes will be implemented.

If this Commission is successful, as I believe that it will be, then it will also prove to have an important leadership role in helping to provide the States with some initiatives.

I know that some States are moving on this issue, but there is across the board, whether at the State or Federal level, room for improvement of criminal sentencing. And this goal is very basic to preserve the integrity of our whole criminal justice system.

For all these reasons, and because of the enormous talent each of you bring to the Commission, we look forward to working with you.

Let me, if I could, perhaps ask Mr. Block, I understand you have done a good bit of work in the areas of antitrust, is that correct?

Mr. BLOCK. Yes.

Senator KENNEDY. And I do intend to make your life more difficult by asking some of your own conclusions but I would be at least interested in hearing briefly what they are in regard to treble damage suits and the whole concept of contributions?

In the past this subject has been controversial, or at least a matter of widely different views, on this committee, as you well understand. But I think that the differences, to a great extent, were because we did not really have much knowledge about the subject and its history.

And I would just be interested to hear from someone with your background about your findings.

Mr. BLOCK. Let me expand on that a little bit. I have not done much on the contribution issue.

Senator KENNEDY. I see.

Mr. BLOCK. But on the treble damage issue, several years ago, I looked at trying to access, actually for the first time, whether there was a deterrent effect of treble damage suits.

The change in the class action provisions in the late 1960's and their implementation in the 1970's really made the treble damage actions a viable enforcement tool. In the early 1970's before the revision of criminal antitrust penalties, treble damages were the only apparent deterrent.

What I found is that by looking at the bread industry which I had really good data for, is that the conclusion, if you judge it by the amount of the markup, the Federal enforcement in the antitrust area was only really effective in bringing down markups after the colluders were assured that a treble damage action would follow.

And that only occurred really in the early 1970's. I estimated the cost of bread in various locations used published data and actually estimated the markup and using it as an indicator of collusion.

Now, I did not have data for the later period, but I got pretty strong results that it was treble damage action before we had really severe sanctions in the criminal area, that gave the effectiveness in Federal enforcement in the collusion area.

I have since done some work on highway construction which has been much in the news in the last 5 or 6 years. It does turn out there that it appears as if there was an increase in criminal sanctions there. Now, this time, it was not treble damges, but rather the application, I think, of the 1974 amendment of the Sherman Act, that was really quite important in deterring collusion.

It seems that if you try to parcel out the effects, the most important effect was not the fact that we brought a lot of road cases in the 1970's, but that they were more severely punished in that period.

So that is the type of work that I ahve been doing in the antitrust field.

Senator KENNEDY. Have you reached any conclusions or performed any studies about eliminating joint and several liability for price fixers?

Mr. BLOCK. No; I really have not looked at that area.

Senator KENNEDY. Thank you, Mr. Block.

Ms. Nagel, I understand that you have had a conference on white collar crime, and have written extensively on that subject.

Ms. NAGEL. I have published several articles on white collar crime, yes, that is correct.

Senator KENNEDY. Could you perhaps summarize your views about white collar crime, as they relate to sentencing.

Ms. NAGEL. Sure.

There is one article which appears in the Michigan Law Review, an article to which I earlier made reference, which looks at sentencing decisions for 10 Federal jurisdictions. The question to which we primarily addressed ourselves in that article was whether the white collar offense or the white collar of the offender led to preferential treatment, for persons so categorized or for offenses so categorized?

I think that the committee would find of interest the fact that one finding was that there was substantial disparity across jurisdictions in the decisionmaking process, a finding which has been noted several times in testimony before the Congress. Another finding that would probably interest the committee was that there was substantial disparity on the basis of race, sex, socioeconomic status, and so forth. In that particular article, what we reported was that the data indicated that while there were substantial disparities in sentencing and preferential treatment of white collar offenders in 1 of the 10 jurisdictions, that preferential treatment to white collar offenders was not the case in the other 9 jurisdictions, although we were very careful to indicate that this finding may have reflected the particular way in which the work was done, or the fact that it may be that white collar offenders are removed earlier from the system. One needs to take great care when one looks at sentencing.

In a subsequent study which was published in the American Criminal Law Review, we noted for the Southern District of New York, for the years, I believe, 1963 to 1976, that there was considerable advantage for the white collar offender in sentencing decisions. As well, we noted that there were substantial differences in the sentences imposed on the varieties of white collar offenders so that it probably would be improper in the future to aggregate all white collar offenders or white collar offenses, because there is great difference across types of offenses and types of offenders.

Senator KENNEDY. Well, I think that is both interesting and important. For the most part, our first priority in the criminal justice system has been to deal with crimes of violence, or street crime, but unless we are going to address other issues such as the fairness of white collar sentencing, then I think the whole system breeds enormous cynicism, what we have, what we tolerate by ignoring the white collar issue and dealing just with violent crime is a double standard that threathens the integrity of criminal justice. And when you look at who is hurt by the white collar criminal it is hard to say that it is a problem that harms people, that disrupts society, just as much, if not more than crimes of violence.

And so I think that your efforts in this will be very important. Thank you Professor Nagel.

Mr. Robinson, we welcome you.

I note that you are a member of the Massachusetts Bar?

Mr. ROBINSON. Yes, sir, I am.

Senator KENNEDY. I have just had a chance to look through some of your publications and I just welcome you here and congratulate you as well in being selected.

We are familiar with some of your work and appreciate what a fine addition you should be to the Commission. So at this time I will simply wish you good luck in the important and difficult task ahead of you.

Mr. Chairman, I have no further questions.

I look forward to working with all of the members of the Commission. I think that the nominees demonstrate a high level of professional excellence. I am very hopeful that the new Commission will make an important and timely contribution to criminal justice reform.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you very much, Senator Kennedy.

Senator Specter has had a very distinguished career which includes a tour of duty as a prosecutor. He has been intimately involved with the criminal justice system with great success and with great distinction.

I am glad that he can participate today.

STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman.

I am pleased to be here.

I am glad to have the opportunity to review the résumés of the three nominees for this Commission.

I think that you will be undertaking a very important job, an enormous one, and I commend the work that Senator Mathias and Senator Kennedy have done on this subject, for a long while.

One preliminary concern is whether there is enough time for the Commission to do its job?

Judge Becker, a good friend of mine on the third circuit, has raised the question concerning whether you have enough time, within the statutory time constraints, and has urged that the Judiciary Committee to take a look at that question so that if you do not, you tell us and we will do whatever is necessary to make sure that you have enough time to do the job.

I do not know how complicated the job will be, there are lots of guidelines, lots of jurisdictions, and there are difficult judgment calls that you will have to make on it, but if you find that you do not have the time, you ought to come back and tell us, so that we can do whatever is necessary.

On the résumés, as I read the résumé of Mr. Block, he is not a law school graduate?

Mr. BLOCK. No, that is correct.

Senator SPECTER. You are not a law school graduate?

Mr. BLOCK. That is correct.

Senator SPECTER. Well, that certainly gives some diversity to the Commission.

How many other nominees are not law school graduates?

Mr. BLOCK. I think that there are two of us who are not law school graduates.

Senator KENNEDY. You are not either?

Ms. NAGEL. I have a Masters of Legal Studies from Stanford Law School, which is probably not reported on my résumé.

Senator SPECTER. Ms. Nagel, you are a law professor but not a law school graduate, or you are a law school graduate?

You went to Stanford Law School and——

Ms. NAGEL. And I took a Masters of Legal Studies, which is a program specifically for persons like myself, who have a longstanding interest in the law, but are not intending to practice per se.

Senator SPECTER. But you do not have a law degree?

Ms. NAGEL. Not a JD degree.

Senator SPECTER. You have a Master of Laws degree?

Ms. NAGEL. It is called a Masters of Legal Studies. It is an MLS degree.

Senator SPECTER. From what school?

Ms. NAGEL. Stanford University Law School, in California.

Senator SPECTER. Masters, does that qualify you to take the bar examination?

Ms. NAGEL. No, sir.

Senator SPECTER. Does that disqualify you to take the bar examination? [Laughter.]

Well, that diversity is interesting. As I recollect, you do not have to be a member of the bar to be a justice of the Supreme Court of the United States, is that correct, Senator Mathias?

Senator MATHIAS. I believe that is correct, Senator Specter.

Senator SPECTER. We had a group of magistrates in Philadelphia in the mid-1960's and they were notoriously corrupt, and we changed the system that would require that they be lawyers, and they missed their principal defense which was that the Supreme Court Justices do not have to be members of the bar and we finally changed that.

Well, I am glad to be here for a moment to participate, and glad to see such excellent credentials. I did want to say personally to you what I did about letting us know if you need more time.

Thank you very much, Mr. Chairman.

Senator MATHIAS. Thank you, Senator Specter.

I would like to return to the subject of the philosophy of punishment because I think that is going to occupy a lot of your thoughts in the months ahead.

As we were commenting before, there are different goals for punishment. Some people would say that the principal goal is retribution which Mr. Robinson mentioned.

Some would say that deterrence ought to be the overriding social goal of punishment. Some would say rehabiliation. I suspect that there are still a few old fashioned people around who think that vengeance is a legitimate goal of punishment.

What would you say is the primary goal of punishment, Professor Block?

Mr. BLOCK. I guess that I have a rather simple notion of the function of punishment. I think that it is to minimize the social costs of crime and punishment. As the Senator has pointed on previous occasions, punishment imposes costs, both on the individual and on the society. However, the absence of punishment, through the deterrent effect and the lack of incapacitation, also imposes costs on society.

So you are really sort of trading two bads. You are spending resources on punishment and you are trading that against reducing another bad, which is the crime rate.

I think the basic function of sentencing is to minimize the total harm both from the commission of crimes and from the imposition of punishment itself.

Senator MATHIAS. So the cost of deterrence really is your crime rate.

Mr. BLOCK. Deterrence tempered by the fact that imposing punishments impose costs, that deterrence is not free.

Senator MATHIAS. That is right. You can hear the cry, lock them up for 20 years, or lock them up for 50 years, but with very little realization of what that imposes as a cost on society.

Mr. BLOCK. My philosophy is that you need to trade those two bads, you need to trade the costs of punishment against the costs of crime.

Senator MATHIAS. Ms. Nagel.

Ms. NAGEL. I do not know that I have anything in particular to add to the comment that I made earlier, which is that I believe essentially that the purposes of sentencing are reflected and well stated in the legislation.

I do not think that the legislation speaks at all about vengeance, and I think, unfortunately, we are all painfully aware of the fact that rehabilitation as a purpose for sentencing did not serve us well, in the sense that it often stood for long sentences and no rehabilitation.

So I do not think that it continues to have a primary place in the philosophy of sentencing.

Other than that, I think, as I said, my philosophy of sentencing is well reflected in the legislation, both in its combination of deterrence considerations and considerations for just and fair sentences, and with consideration for the reduction in unwarranted disparities and hopefully, an increase in certainty.

Senator MATHIAS. Mr. Robinson.

Mr. ROBINSON. I would make a distinction between the reasons for having punishment at all, for having a system of criminal justice, and the particular principles that one would use in distributing punishment within that system. I think that the reasons for having a system of punishment are all the things that we have talked about.

Because it deters crime, because it incapacitates dangerous offenders, because some times we have the opportunity to change someone's situation whether it is their lack of skills or education or whatever, in prison. Those are all good reasons for having a system of punishment.

And the legislation speaks to these purposes and I agree with all of them.

On the other hand, when it actually comes to deciding for a particular case, what punishment is appropriate, what you might call the distributive principle of punishment, I guess my preference there is that the punishment in an individual case be fair and just for that individual.

I am not saying that that is a principle that I would stick with no matter what. I guess I am too practical for that, but that is certainly my preference in deciding what sort of punishment is appropriate. If we impose a punishment that is a fair and a just punishment for that person, that will have all of these effects of deterring crime and incapacitating and everything else.

Senator MATHIAS. The guidelines that are embodied in this legislation and which are provided for the Sentencing Commission are, in a very large measure, the product of Senator Kennedy's work. I am just wondering if you are each familiar with those guidelines?

Senator KENNEDY. May I just take a moment?

Senator MATHIAS. Surely.

Senator KENNEDY. Mr. Robinson, do you find that view at all inconsistent with the idea of getting some guidelines in terms of the sentencing for particular crimes? While we are attempting to get some consistency and predictability and some certainty in the sentencing procedures?

It seems to me that you were just commenting that the sentence ought to adapt to the individual?

Do I understand you correctly?

Mr. ROBINSON. No, just the opposite. I think that the Sentencing Reform Act is absolutely necessary to have a system that really is fair and just. Obviously we have to look at every individual case, and the particular characteristics of that offense and that offender to determine what a just sentence is.

And as I understand it, that is exactly what the guidelines do. The value of the guidelines is that the same judgment, what is a fair and just sentence in the case, is made and applied the same no matter which judge an offender comes before.

I certainly do not see the guidelines as a way of discarding the need to look at the individual case. That is why we need guidelines: to be able to look at the individual case without inviting gross disparities in sentencing. If we did not have to look at individual cases, we could simply say: "armed robbery, 15 years" or whatever, and that would be it.

The need for a somewhat more sophisticated treatment in the guidelines exists because we believe that to reach a just result, we have to look at more than just what the label on the offense is. We have to look at the facts of the particular case. What are the characteristics of the particular offender?

Justice, in part, is treating similarly situated offenders in a similar way. That is part of justice.

Senator MATHIAS. To pursue Senator Kennedy's point, do any of you have any problem in working within the guidelines that are provided in the legislation?

Mr. BLOCK. Let me be the first to answer that.

I think not. The guidelines do two things from my own perspective. First they provide a mechanism by which we can get less dispersion in sentences and have more equity. Second, we can get, at the same time, what I hope is a more effective system; that is, we can get more crime control out of the same prison capacity.

Ms. NAGEL. No, I do not have any difficulty with the guidelines. I think the major difficulty for the commission will be the enormity of the task, and to make the difficult decisions required.

Mr. ROBINSON. No, I have no difficulty. In my view the guidelines are a much needed and brilliant piece of legislation. If we do our jobs right they will certainly further justice in the United States.

Senator MATHIAS. Now, one of the problems that the committee had in working on this bill was considering how the Commission would affect the size of the prison population. As you know, the Federal prison population is today something like 25 percent above the planned capacity of the penal institutions.

What impact will that fact have on your deliberations? You referred to the public demand for more severe punishments, Mr. Block. How are you going to accommodate a public demand for more severe punishments if we already have overcrowded Federal penitentiaries?

Mr. BLOCK. I think the overcrowding is an important problem, and the legislation, as I understand it, and I am certainly not an expert on the legislation, speaks to this issue. I have read one legislation a number of times but hopefully a year from now I can claim to be an expert on that legislation.

The legislation as I understand it speaks to that issue and recommends that we commissioners take cognizance of the fact that there is limited capacity and that we report the best estimates of what the effects the sentencing guidelines will be on capacity. Moreover, it requires that we take the capacity question in consideration in arriving at the guidelines.

I think that, again, going back to my general philosophy, we do have to weigh the costs of additional prison capacity against what good we can do with that capacity. If it turns out that a system of guidelines leads to an increase in a need for capacity, we need to judge whether it is worth building that capacity.

It may be that the guidelines need to be modified so as to stay within the constraint. It may not be sensible to increase capacity, but we need to consider that. I think at this point I am a long way from knowing what the implications of a good set of guidelines will be for capacity.

Senator MATHIAS. During the debate, Senator Kennedy cited the Minnesota experience. It might be useful to ask if you know about the Minnesota experience.

Senator Kennedy, that is the first example, I believe, is it not?

Senator KENNEDY. You might take a look at the Minnesota experience. During our course of our hearings on sentencing reform, we had the views of the people that developed that system. It is my understanding that it has been very, very successful. They have effectively used the legislation that we initially introduced in the Congress before it was accepted at the Federal level, and they adapted it to fit the State situation. As I understand it, they have less people in prison in Minnesota than before, and it has worked in a very satisfactory way, and there has been some measurable impact on the level of violence and crime in the State. So you might take a look at it.

As I understand it, they are the only State that has effectively taken this kind of package and put it into law. Others such as New York are well on the way. I think there are three or four other States that have some kind of guidelines system that it is working its way through toward implementation of sentencing reform. But you probably can bring us up to date.

I will be glad to give you the information on the particular personnel that were involved in the shaping and the fashioning of the Minnesota system. It is extremely worthwhile, I think, to talk to them.

Mr. BLOCK. Over the course of the next several months, we will be wanting to look at all these systems that are in place, and it is my understanding that the Minnesota system comes closest to the Federal Government.

Senator MATHIAS. The Minnesota commission operates under the premise that it could not permit the prison population to expand beyond 95 percent of system capacity. As a result of that principle, the commission in Minnesota has focused on the types of offenders and the offenses that merited imprisonment because they just had to face the fact that you could not incarcerate all offenders.

Now, is that a practical approach viewing Federal crime?

Mr. ROBINSON. Is it a practical approach to put a cap on the number of prisoners that can be incarcerated?

Senator MATHIAS. You have *x* cells. You can handle *x* prisoners. Is it practical to say that is all the prisoners we will have and we will have to handle other offenders in other ways?

Senator KENNEDY. Just a quick point. We were sensitive to overcrowding in the prisons, too. I think Minnesota did have the 95 percent cap, we provided some degree of flexibility, to deal with overcrowding, but did not specify a cap.

We wanted to try to meet and not exceed the number of slots that were available. We wanted to be sensitive to overcrowding. Overall guidance to the commission of that sort is woven into the Sentencing Reform Act in several places.

Mr. ROBINSON. Let me just say, Senator, it is not clear to me at all that under a guideline system the prison population would go up. I just do not know at this point.

Senator MATHIAS. We would hope not.

Mr. ROBINSON. It is possible that the prison population could go down, if that is part of your question. If part of your question is the overcrowding, I do not think any——

Senator MATHIAS. My question is this. Do you think it is practical for the Minnesota experience to guide the U.S. Sentencing Commission? There, they established a maximum of 95 percent of capacity as the number of offenders who could be incarcerated. They had to find other ways to deal with offenders who would not fit within that numerical limit.

Mr. ROBINSON. I guess unless I knew whether, in fact, that situation would ever arise it is——

Senator MATHIAS. Well, we are already at 125 percent of capacity.

Mr. ROBINSON. What if the guidelines reduced it.

Senator MATHIAS. The situation will face you the first day you walk into the office.

Mr. ROBINSON. The guidelines may reduce it to 95 percent.

Senator MATHIAS. How about it, Ms. Nagel?

Ms. NAGEL. Well, I think that the legislation indicates or envisions that the Commission, in its deliberation, will consider the impact of the guidelines on prison population. But I would agree with Professor Robinson that there is no reason, a priori, to believe that there is necessarily going to be an increase.

Obviously, given my concern for a reduction of disparity, I would expect that you would have perhaps a change in the category of offenses and offender combinations for whom incarceration will be the sentence; but that does not in any way dictate that there would be a change in the number of persons incarcerated.

Senator MATHIAS. The language of the statute is that "the sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons, as determined by the Commission."

So it would appear that you first have to make a determination as to capacity, and then to keep that as a cap as you consider the further determinations of the Commission. But as Senator Kennedy has just said, of course, part of that is concern over overcrowding. Part of it is concern over the fact that the effectiveness of incarceration, at least as it relates to rehabilitation certainly deteriorates with overcrowding. There are costs involved with overcrowding that are important not only to the prisoners themselves but to society in its efforts at rehabilitation and avoiding recidivism and generally having the penal experience to be weighed on the positive side rather than totally on the negative side.

I have a concern, which Senator Kennedy probably has heard me express too often, as to whether or not the sentencing guidelines would provide the trial judges with enough flexibility. I was concerned that a trial judge would be required to impose a sentence within a rather narrow predetermined range even though he had heard the specific evidence about the crime and the criminal and he had seen the defendant in person, sometimes over a period of many days, so that he got some really practical opportunity to make a judgment about the defendant. He had also seen the victims in some cases, the witnesses in some cases, had available the specially prepared presentence, psychiatric, and social workers' reports.

Now, the legislation provides that the judge can deviate from the guidelines only if it is found that an aggravating or mitigating circumstance exists that that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.

I remain somewhat uncomfortable that important information that concerns the crime or that concerns the defendant, the convicted criminal, may not be adequately considered when a particular sentence is set.

Do you have any thoughts? Mr. Block, let us start with you.

Mr. BLOCK. The concern certainly is a serious one, but it seems to me that the legislation has a couple of safety valves—the one that you mentioned, and there is the possibility of challenging the application of the guidelines themselves.

I am not an expert on the legislation but at this point, it seems to me there are some safety valves in the legislation as it is written. Nevertheless, I think, it is an important concern.

Senator MATHIAS. Ms. Nagel, how would you envision the guidelines operating with a trial judge?

Ms. NAGEL. Well, I think first of all, I would note that certainly it is advantageous that there are three judges who are nominees to the Commission, and as you know, the Chairman of the Commission is himself a trial judge. I would expect that their expertise will be given great weight and consideration in the formulation of any guidelines.

I would concur more specifically with Professor Block in that I think that the legislation provides for the judge to go outside the guidelines so long as he or she gives reasons. And, you do have a potential for appellate review of sentences, so that the flexibility is built into the legislation. Moreover, there is a provision for monitoring after the guidelines have been put into effect. I would imagine that any problems that are brought to the attention of the commission would be given consideration at that point in time.

I think that there are a variety of ways in which we could attend to, obviously, a very serious concern that you have raised.

Mr. ROBINSON. Let me say I agree with Professors Block and Nagel. I have the same concern that you have about the need for the sentence to be determined by someone who has seen the witnesses, probably seen the victim, and the defendant and has all the background information.

Really it is for that reason that I think the legislation is an improvement. In large measure, the actual sentence under current law is determined by the Parole Commission, a body that is making a decision without the benefits that the trial judge has.

One of the advantages that I see in the legislation is that in a sense, the judge, is recooping his real sentencing authority. He has some flexibility as has been pointed out. There is a range of possible sentences and there is the ability to go outside the guidelines. But what seems keenly important to me is that the sentence that that trial judge decides on there in the courtroom is the sentence that will, in fact, be served. It's not some unknown, perhaps less than public body, that later on will really do the sentencing. I think that this is valuable for many of the same reasons that you pointed out.

Senator MATHIAS. Well, I am aware that you have some of this concern. You were the subject of an interview in the Courier Post on September 29, right?

Mr. ROBINSON. A few weeks ago?

Senator MATHIAS. Yes.

Mr. ROBINSON. You have a very good news service. It is a very small paper.

Senator MATHIAS. I have a very good staff. In that article you are quoted as saying that, "the judge has seen all of the witnesses. The judge has seen all the harm and misery this guy has caused. The Parole Commission has not. All the Parole Commission sees is the defendant, the prisoner."

Now, you are walking into a situation where you are going to be one step further removed than the Parole Commission. The Sentencing Commission will see none of the witnesses, know nothing about the harm that has been caused by the crime. You will not have the defendant before you, but you will be responsible for drawing a very narrow line within which a defendent's fate and future must fall.

The article goes on to say, and I do not know whether it is a fair reflection of your views, that the Parole Commission's function has made the sentencing judge's role a virtual sham.

Now, is that a fair statement of your position?

Mr. ROBINSON. It is probably out of context.

Senator MATHIAS. Well, Senator Kennedy and I have had the experience of having things taken out of context. [Laughter.]

Mr. ROBINSON. As I said a few minutes ago, I feel uncomfortable with the sentencing judge, who I think has all these advantages, making a determination which is not the real sentence in the case.

We lose two things by that. One is that we lose the benefit of his special position, and two, I do not think we are being terribly honest with the public and other participants in the process.

The judge sits up there and says, "Well, I sentence you to 9 years," but, in fact, this person is eligible for parole in three and may get out in two. I think that hurts the credibility of the system, and that, to me, is one of the real virtues of the Sentencing Reform Act. We get back not only a certain honesty in sentencing but a certain credibility.

Obviously, the public will have to get used to what real sentences are, and that is why the actual sentences, that are imposed in court, will obviously go down. But with that honesty will eventually come credibility. When the judge imposes a sentence, it is a real sentence. He really does have the sentencing authority.

Senator MATHIAS. So you do not see that as a pitfall for the Commission? You see it as a way of avoiding the pitfall.

Mr. ROBINSON. That the sentencing judge imposes the real sentence.

Senator MATHIAS. Yes.

Mr. ROBINSON. I see that as a significant improvement both in giving the individual justice in that particular case and in bringing credibility back to the criminal justice system generally.

Senator MATHIAS. Professor Block, you very wisely stated that you were not an expert on this legislation because it is a mammoth piece of legislation. Have you read the statute?

Mr. BLOCK. I have.

Mr. ROBINSON. Yes, but I would have to say I am not an expert either.

Senator MATHIAS. Well, you are familiar with the powers and duties of the Commission as they are set forth in the statute. Do you find anything contradictory in the mandate that is given to the Commission?

Mr. BLOCK. There are several sections which I noticed on the second reading which will cause us, I think, some concern. How we reconcile the list of possible offender characteristics to be considered and the prohibition about considering any socioeconomic characteristics in setting the guidelines is not obvious.

I don't necessarily think there is a contradiction there, but I think there may be a problem in trying to sort out what is socioeconomic and what is the list I referred to above. I cannot enumerate the list, but there are a list of offender characteristics that the lecislation suggests that we take into consideration, and some of those items would seem to me to be related to the offenders socioeconomic charactertistics which cannot be taken into consideration.

I have only read the legislation a few times. It is going to require some real expertise.

Senator MATHIAS. Let me say that I would hope that as you become familiar with it, if you find difficulties in applying the law, that you communicate to this committee the problems you are having. The committee is in continuous existence, and we are here to deal with just that kind of problem; so I would not let if fester.

You are dealing with a new law, and as I said earlier, you are the founders. You are establishing the precedents, and they ought to be sound. But you do have a duty to promulgate sentencing guidelines.

Under the statute, you are also required to promulgate general policy statements regarding any other aspect of sentencing or sentencing implementation that would further the purposes of sentencing including several specific topics, and you can look for these at your leisure.

But you will find, for example that the Commission is required to adopt guidelines on when courts should modify the conditions of probation. Now, that is a pretty significant area.

You must adopt guidelines on how the Bureau of Prisons should exercise its authority to furlough prisoners to visit dying relatives. I would advise you to talk to some of the veterans in that field, and there are some very fine prison system officials, active and retired, who have served in the Federal system. They would be a source of considerable information and wisdom for you.

You are also required to promulgate guidelines on when to allow a prisoner to contact a perspective employer, and a whole raft of rather detailed areas that deal with the prison system.

How are you going to handle those rather specific subjects?

Mr. BLOCK. It seems to me that at least from my perspective I am not going to know what those policy issues are in any detail until we really get down to the business of setting guidelines and discussing the major issues involved. The policy concerns here are formidable.

But it seems to me that I am a long way now from knowing how we are going to handle these concerns.

Senator MATHIAS. Well, it is not the purpose of this hearing today to set up challenges to you on those subjects, but I think it is important that we understand that you, at least, understand that these are problems that are confronting you and will be waiting for you when you enter upon the duties of your office.

You will be required to give due considerations to petitions from defendants for changes in the guidelines. Defendants have a lot of time to write petitions. I think you have to be prepared for that, and you ought to decide what weight you are going to give those petitions because you are specifically directed by the Congress to give due consideration to them.

Mr. BLOCK. Written replies, I understand, Senator.

Senator MATHIAS. Yes; I would encourage you to give some real thought to that subject because that subsection could provide a basis for a new avenue of appeal in almost every criminal case.

You may find yourself as a new court of last resort rather than a sentencing guidelines commission unless you address that particular issue very early and establish some sound policy for dealing with it.

Of course, as was mentioned a minute ago, there are provisions for appeals which could open another floodgate of litigation in the whole criminal system. So I think you have to be careful to be aware of the fact that what you do should not stimulate a whole new round of automatic appeals that further weigh down the criminal system.

I have a question that has been submitted by the Senator from Delaware, Mr. Biden. Senator Biden's questions will be made available to you in writing and he would like to have your answers.

Also, the Senator from Iowa, Mr. Grassley, has asked me if I would propound this question to you. Could you give us your opinion on whether the Congress retained the authority to enact mandatory sentences in certain circumstances under the 1984 Crime Control Act notwithstanding the authority of the Sentencing Commission to make sentence determinations?

Mr. BLOCK. At this point I do not have an opinion on that. I do not know.

Ms. NAGEL. I believe this is a legal question that would better be addressed by one of the qualified lawyers on the Commission, so I would pass.

Mr. ROBINSON. I am a qualified lawyer, but this is obviously something that the Commission would have to look at. I honestly do not know.

Senator MATHIAS. We will advise Senator Grassley that he asked the $64 question. I have no further questions.

I would say to you, along with the congratulations that you are due, that you have a good deal of sympathy because you face a very imposing task. The statute that has been enacted by the Congress and approved by the President is a sweeping, complex piece of legislation. You should feel excited by the fact that you are going to be the people who interpret it, who apply it for the first time and who, in effect, make the mold.

I doubt that the instructions that we have given you from this committee are as clear and as precise and as specific as they ought to be, and you will find that to be the case as you try to carry out the law.

Again, I invite you to keep the Congress very closely informed about the progress. We are obviously interested in it. We would all like to see it work. And we are aware that almost every piece of legislation of this magnitude has got to have some refinement and fine tuning, as it is applied.

So do not hesitate to seek the help of the Congress in clarifying questions that arise as you begin to actually put it into practice.

I would, again, offer you as a bit of personal advice, that you do visit prisons, specifically Federal penal institutions. I think that is important. If you do not know really what you are doing, in a personal way, you cannot do it, as practically as you should.

And, again, I would urge you, either as a matter of academic study or better yet, as a matter of physical observation, to look at some foreign penal systems and see where they have strengths and where they have weaknesses and how that lesson can be applied to our system.

So we wish you a great deal of luck and we know that this is going to be a time-consuming and demanding effort.

And we know that that will affect not only you but also your families. I believe that some of you have family members with you. Would you like to introduce them at this time?

Mr. **Robinson**. My wife is here, J. Grall Robinson,

Senator **Mathias**. It is a great pleasure to welcome you to the committee today.

Ms. **Nagel**. I would like to introduce my husband, Sheldon Plager.

Senator **Mathias**. Very nice to have you with us.

Mr. **Block**. I would like to introduce my wife, Carole Block.

And my son, Robert Block.

Senator **Mathias**. Robert, it is good to have you. I have a Robert in my family.

Mr. **Block**. And my daughter, Tamara Block.

Senator **Mathias**. Nice to have you here.

Mr. **Block**. Thank you, sir.

Senator **Mathias**. Well, we thank the families in advance for all the time that they are going to give you to work on these duties of the Commission.

Let me say to the families, that if these Commissioners have to do their homework, do not interrupt them, and if they have to be away from home from time to time, just remember that they are doing an important job for the whole country and that we all need their help. That is why we have asked them to come here.

Thank you very much for coming.

Mr. **Block**. Thank you, Senator.

Ms. **Nagel**. Thank you, Senator.

Mr. **Robinson**. Thank you, Senator.

Senator **Mathias**. The committee will stand in recess subject to the call of the Chair.

[Whereupon, the committee was recessed at 11:30 a.m., subject to the call of the Chair.]

BIOGRAPHIES

MICHAEL K. BLOCK

NOMINEE, MEMBER, U.S. SENTENCING COMMISSION

Birth: April 2, 1942, New York, New York.

Legal Residence: Arizona.

Marital Status: Married to Carole Arline Polansky, 2 children.

Education: 1960-1962—Orange County, A.A. degree. 1962-1964—Stanford University, A.B. degree. 1964—Harvard University. 1965—1972—Stanford University, Ph.D. degree.

Experience: 1965-1966—Bank of America, Research Analyst. 1967-1968—Planning Associates, Research Associate. 1969-1972—University of Santa Clara, Assistant Professor of Economics. 1972-1975—Naval Postgraduate School, Assistant Professor of Economics. 1975-1981—Hoover Institution, Senior Research Fellow. 1977-1982—Block and Nold, Principal. 1981-present—University of Arizona. (1981)—College of Business and Public Administration, Associate Professor of Management and Economics. (1985)—College of Law, Professor of Law.

ILENE H. NAGEL

NOMINEE, MEMBER, U.S. SENTENCING COMMISSION

Birth: June 4, 1946, New York, New York.

Legal Residence: Indiana.

Marital Status: Married to Sheldon Jay Plager.

Education: 1964-1965—Alfred University. 1965-1968—Hunter College, B.A. degree. 1968-1974—New York University, M.A. degree, Ph.D. degree. 1984-1985—Stanford Law School.

Experience: 1971-1972—Russell Sage Foundation, Research Assistant. 1972-1973—University of Minnesota, Visiting Assistant Professor of Sociology. 1973-1976—Indiana University, (1973-74)—Lecturer in Sociology. (1974-76)—Assistant Professor of Sociology. 1976-1977—Yale Law School, Research Fellow. 1977-present—Indiana University, (1977-78)—Assistant Professor of Law and Sociology, (1978-83)—Associate Professor of Law and Sociology, (1983)—Professor of Law, (1984)—Professor of Sociology.

PAUL H. ROBINSON

NOMINEE, MEMBER, U.S. SENTENCING COMMISSION

Birth: November 12, 1948, Waterbury, Connecticut.

Legal Residence: New Jersey.

Marital Status: Married to Jane Alberta Grall.

Education: 1966-1970—Rensselaer Polytechnic Institute, B.S. degree. 1970-1973—U.C.L.A. School of Law, J.D. degree. 12973-1974—Harvard Law School, LL.M. degree. 1974-1975—Cambridge University Law Faculty, Diploma in Legal Studies.

Bar: 1974—Massachusetts.

Experience: 1972—U.S. District Court, Central District of California, Law Clerk. 1973—National Center for State Courts, Faculty Fellow. 1973-1974—Boston University Law School, Instructor of Law. 1975—U.S. Department of Justice, Criminal Division, Attorney. 1976—Special Assistant to the United States Attorney, Eastern District of Virginia. 1977—Senate Judiciary Committee, Subcommittee on Criminal Laws and Procedures, Legislative Counsel. 1982-1985—Rhode Island Commission on Criminal Justice, Director of Criminal Code Revision Project. 1977-present—Rutgers University School of Law, (1977-80)—Assistant Professor, (1980-85)—Professor, (1985)—Distinguished Professor.

CONFIRMATION HEARING ON: LAURENCE H. SILBERMAN, PAUL N. BROWN, ALAN A. McDONALD, AND ALAN H. NEVAS

WEDNESDAY, OCTOBER 2, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:06 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mitch McConnell (acting chairman) presiding.

Also present: Senators Simon and Metzenbaum.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McConnell. The hearing will come to order.

Chairman Thurmond has asked me to sit in for him this afternoon and conduct the hearing. I think it is particularly appropriate that our first nominee today is a long-time friend of mine, Laurence Silberman, under whom I served during his tenure as Deputy Attorney General.

I suppose, being a resident of the District of Columbia, he is considered to be without a State, and so here to speak on his behalf are Senator Packwood and Senator Wilson. I would like to ask Mr. Silberman and both Senators to come forward at this time.

Senator Packwood.

STATEMENT OF HON. ROBERT PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator Packwood. Mr. Chairman, thank you. There are few people—perhaps no one—that I feel better qualified to come before you and speak on behalf of than Larry Silberman. I have known him all of my 17-year tenure in the U.S. Senate, known his wife, Rickey, during that entire time, known all of his family well, all of whom are with us today.

I have dealt with Larry in a great variety of circumstances. I am not going to here lay out his academic career and where he went; you have got that record. Others can testify to it. Instead, I will share personal experiences with him.

In my younger days in this body, I was on the Labor and Public Welfare Committee, when he came into the Labor Department after having served in the NLRB general counsel's office. I dealt with him in his capacity as Solicitor in the Labor Department, and then Under Secretary; dealt with him with some very difficult and sticky legislation involving labor during the early days of the Nixon administration.

In every case, I was dealt with honestly, openly, fairly, and never misled. On a number of occasions, Larry had to deal with me in some circumstances where things over which he had no control had changed and he had to break to me some very discomforting news. He did it in a fashion that I was neither aggravated nor felt that I had been dealt with badly.

I kept my contact with Larry very closely even after he left the Department of Labor and continued my personal dealings with Larry and Rickey all during their entire career, but caught up again with Larry professionally when he came back to the Department of Justice during what has to be the most difficult time for the Justice Department, I think, in this century. Maybe the most difficult time in the history of this country because he was there during the zenith and the tail-end of the Watergate affair, the difficulty with the resignation of the President, and all of the problems that the Department of Justice was put through, and the FBI.

You can go through every book that has ever been written about Watergate or every article in the newspaper and you will find not a sentence that ever taints Larry Silberman. In every sense, in everything he has ever done or touched, he dealt with it fairly, honestly, and in the best interests of this country.

There is one classic public example of where he did that, and that is when he was Ambassador to Yugoslavia and an American citizen named Toth was arrested, as I recall, Larry, for taking pictures legally where he was permitted to take pictures as a tourist or a businessman.

He was there for no other reason and he was arrested by the Yugoslav Government and imprisoned. Our State Department—and bear in mind that Larry is now the Ambassador to Yugoslavia—did not want to negotiate for the release of Mr. Toth because it would be upsetting some difficult and sensitive relationships with the Yugoslav Government at that time.

Then Ambassador Silberman went to bat for Mr. Toth against the wishes of the State Department, the very group that was employing him at the moment as our Ambassador, and fought for the release of that American citizen, who was fully entitled to be released, and finally won it.

In my mind, it was one of the finest gestures that any public servant has ever made for a citizen, when you realize that your very Government was willing to trade off the liberty of that citizen for what they regarded as the greater good.

When Larry returned from his ambassadorial duties, I was lucky enough that his wife, Rickey, came to work with me in my office for several years as press secretary, and would have remained in that position had they not for a brief period of time moved out to San Francisco.

It was difficult for her to handle the day-to-day relations of the press office from San Francisco. She offered to try, but it was difficult to do.

I have been a guest, along with Georgie, in their house for dinner many times and they in ours. I have stopped at their house early in the morning when they are up for breakfast to quiz Larry about economics or ethics or law, and found him not only ready and willing and able, but I think without peer or, at worst, with only six or seven equals, to be the best mind I have run across in my experience in government either here or in my earlier days in the State government.

I think we are lucky to be getting a man who is willing to give the remainder of his career—and he is still, for those of us in politics, a relatively young man—be willing to give the rest of his career to the judiciary.

We will not get a better nominee, and I can assure you from personal experience we will not get a smarter, more loyal or more decent man, whose motivation above all else is justice.

Senator McCONNELL. Thank you, Senator Packwood.

Senator Wilson.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Mr. Chairman, Senator Packwood's loss turned out to be my gain because when he lost Ms. Silberman as press secretary, it was, as he has indicated, because of the family's move to San Francisco.

During their stay there, I had the great good fortune to know both personally. Like Senator Packwood, I must utter a disclaimer. I am delighted to participate in the presentation of Mr. Silberman to this committee for three reasons.

First, he is, as you have heard from Senator Packwood, truly outstandingly qualified by intellect, by character, and by temperament to give a superb performance on this very important bench.

Second, and I make no apology for this—it is a fact of which I am proud—he is a personal friend, a very close and dear friend. Finally, I think that looking at Laurence Silberman not simply as an individual member of the bench, but as the kind of person whom I expect to be a role model—he will attract the very best in the legal profession to follow him and to seek a judicial career. I think that is of immense importance in this country.

Let me just say that the personal experiences that Senator Packwood has related, I think, give a very clear indication of why both of us, and those who are privileged to have known him, set such great store by all of his qualities.

He is a man of unblinking integrity, a man of courage, as illustrated in the story which Senator Packwood related having to do with his intervention on behalf of a beleaguered United States citizen in Yugoslavia. It is one of many such instances in which he has put principle ahead of expediency and has chosen to do the right thing rather than the easy thing.

He has counseled those of us fortunate enough to know him and wise enough to ask for his advice. He is, I think, a truly outstanding candidate. There are some defects in his background: He is a graduate of Dartmouth and the Harvard Law School, but he has managed to overcome both of those things

In all seriousness, it is more than a pleasure for me to come forward. He is perhaps disenfranchised at the local level, being here in the District of Columbia, but he has claimed the allegiance and the profound respect and gratitude of citizens of very many States.

I think that as he gave distinguished service, in a particularly troubled time, when the stress would have been more than lesser men could have handled—certainly could have handled as well as he did. He offers us the prospect of distinguished service on this all-important appeals court, a court that is the receptacle of some of the most difficult cases, and the prospect of these cases being handled not only fairly, but with a particular astuteness, with a quality of mind and character that is rare even among the very best in the annals of the American judiciary.

I submit for the record a long and distinguished curriculum vitae. Just to give an indication of the breadth and depth of his experience, he has served as counsel to the National Labor Relations Board, was Solicitor and then Under Secretary of the Department of Labor; has served, as Senator Packwood has told you, as Deputy Attorney General.

In all those instances, obviously, he was no stranger to proceedings of this kind. He has been under the scrutiny of the U.S. Senate for appointment to high office before. I expect that, as he is once again, we should receive not only the favorable, but very enthusiastic consideration of this body and its recommendation to the full Senate that we vote promptly to confirm the judgment of the President of the United States in reposing this special trust and confidence in him.

Senator McConnell. Thank you, Senator Wilson.

Typically, one is not thrilled to be called upon to chair hearings, since we all have plenty to attend. I was, however, very pleased that Senator Thurmond asked me to chair the hearing today.

Larry's sister lives in Kentucky and has been a long-time friend of mine. And as I mentioned earlier, I was in a midlevel position at the Justice Department when Larry was Deputy Attorney General.

I might say that in a department that was full of brilliant lawyers, Larry Silberman was considered by virtually everyone to be the brightest, most competent lawyer in the Department at that time. So I want to simply echo what Senator Packwood and Senator Wilson have said. We are thrilled that you are willing to accept this position.

The Chairman, Mr. Silberman, has asked me to propound several questions to you.

Duke informs me we are going to call on the other Senators first. Senator Bentsen is not here. Is Senator Gramm here on behalf of the nominee from Texas?

[No response.]

Senator Wilson. Mr. Chairman, before we leave the witness table, I would simply ask that we take advantage of the opportunity to allow the candidate to introduce his wife and family. I say not at all in passing that Ms. Silberman is herself a very distinguished public servant, currently serving as a Commissioner of the Equal Employment Opportunity Commission. But I think Mr. Silberman would be pleased to introduce the rest of his family.

Senator McConnell. Why do we not do that, then?

Mr. Silberman. With your indulgence, Mr. Chairman, I would introduce my wife first, Commissioner Silberman, and thereafter my daughter, Ann; my daughter, Kate Balaban, and her husband, Mike Balaban; my daughter-in-law, Christina Silberman, and her husband, my son, Bob Silberman.

Senator McConnell. Thank you very much.

We will get back to Mr. Silberman in a minute and I would like to at this point—are either Senator Bentsen or Senator Gramm here?

[No response.]

Senator McConnell. Apparently not.

In behalf of the nominee for the district court in Washington, Senator Gorton and Senator Evans, if you would like to come up and make your statements in behalf of Alan McDonald.

Senator Gorton.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Gorton. Mr. Chairman, I apologize in advance for the absence of Senator Evans, who will have a statement which he would like to have included in the record.

[Committee insert:]

Prepared Statement of Senator Daniel J. Evans

Mr. President, I am delighted to have the opportunity of introducing to the Committee, Mr. Alan DcDonald, whom you are now considering for the position of Federal District Court Judge for the Eastern District of Washington.

Mr. McDonald received his law degree from the University of Washington. He was also a member of the Washington Law Review and has been inducted into the prestigious Phi Delta Phi legal honor society.

Mr. McDonald served with distinction as the Deputy Prosecuting Attorney for Yakima County before he become a partner in the firm of Halverson, Applegate and McDonald.

Currently, he is a member of American College of Trial Lawyers and the Washington State and American Bar Associations. I am pleased to present Mr. McDonald to the Committee. He truly has been an outstanding and distinguished member of the Washington State Bar.

Senator Gorton. As you know, the Senate is beginning to debate the so-called textile bill this afternoon. It is a matter of great importance to both of us, and Senator Evans was unavoidably called to the floor and will be there for the balance of this hearing.

Alan McDonald, who is sitting next to me and who has been nominated for a position as U.S. district court judge for the Eastern District of Washington, is from an old and distinguished Yakima family. His father was a county commissioner of that county, overlapping the beginning of my career in politics in the State. So Alan is a native of the city for which he is nominated to this court position.

He is a graduate of Whitman College, in which both Senator Evans and I have a considerable interest by reason of children who have attended that school.

I first met Alan McDonald in the late winter or early spring of 1968, Mr. Chairman. I was then an aspiring candidate for the attorney generalship of my State. I had a number of good friends in Yakima who were helping to find me a chairman and suggested that Mr. McDonald might possibly be persuaded to take that position.

In order to have lunch with him, I was privileged to sit in the U.S District Court there in Yakima during about a 1- or 1½-hours trial on a subject which I have since forgotten. I will never, however, forget that experience.

Mr. McDonald used most of that 1 or 1½ hours in cross-examination of the chief witness on the other side of that case, and it was better than any moving picture or television show featuring the law which I have ever seen. In fact, it was so totally devastating that the case was very promptly and very favorably for his client, settled after that cross-examination took place.

That was typical of the legal career of Mr. McDonald. He is, by all odds, the preeminent trial lawyer in the district for which he has been selected by the President to serve as U.S. district court judge.

He was picked on the basis of merit by both Senator Evans and myself to have his name recommended to the President of the United States for this position. In fact, we had an experience which had its analogies to one of the great stories of early American history.

I met with Mr. McDonald almost a year ago at his request. He had requested that meeting to suggest the name of a candidate for this vacancy, and to paraphrase that early American story, I said, why do you not speak for yourself, Alan? Would you not like to have this position, as Senator Evans and I have already discussed it?

He was surprised, I think I could say, and a little bit disconcerted by that request, but recovered rapidly enough to say that yes, indeed, he was willing to speak to that end. And as a consequence, we made that recommendation to the President, which was in due course accepted by him.

So from both personal experience and reflecting, I may say, Mr. Chairman, the views of the bar not only of the Eastern District of Washington but the State of Washington, it is a matter of great pride to me, speaking for myself and for Senator Evans, to present to you Alan McDonald for this position on the U.S. district court.

Senator McCONNELL. Thank you, Senator Gorton. Senator Evans' statement will be made a part of the record.

Mr. McDonald, we will get back to you in a minute, but do you have any family members here you would like to introduce?

Mr. McDONALD. Mr. Chairman, thank you. I would like to introduce my wife, Ruby, who is and always will be the only magistrate in my family. [Laughter.]

Senator McCONNELL. Thank you very much. We will get back to you, Mr. McDonald. Thank you, Senator Gorton.

I would like to call Senator Weicker and Senator Dodd forward, along with Mr. Alan Nevas, who has been nominated by the President to be a U.S. district judge for the District of Connecticut.

Senator Weicker.

STATEMENT OF HON. LOWELL WEICKER, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator WEICKER. Thank you very much, Mr. Chairman. It gives me great pleasure to present to you and the committee, Alan

Nevas, who has been nominated to the U.S. district court in Connecticut.

I have a formal statement which I will ask to be included in the record at this point.

Senator McCONNELL. Without objection.

[The statement follows:]

PREPARED STATEMENT OF SENATOR LOWELL WEICKER, JR.

Mr. Chairman, it is with a great deal of pleasure that I appear before the Committee this afternoon to introduce Mr. Alan H. Nevas, who has been nominated to the United States District Court in Connecticut.

Mr. Chairman, I have known Alan Nevas for a number of years and have the highest regard for his personal integrity and legal ability. The Federal Judiciary Committee of the Connecticut Bar Association concurs with my assessment. In fact, the Committee unanimously found Alan qualified for appointment to the United States District Court. Specifically, the Committee Chairman reported that "Alan is a fair, reasonable and open-minded person who has the character and judicial temperament necessary for judicial office."

Most recently, Mr. Nevas has served the United States Government and the State of Connecticut for nearly four years as U.S. Attorney for the District of Connecticut. In this position, Alan has distinguished himself as a fair, yet aggressive and able prosecutor. During his tenure for example, the number of major prosecutions against drug traffickers has risen dramatically; a statistic that has significantly contributed to the decline of drug traffic in our state.

Prior to his appointment as United States Attorney, Alan served in the Connecticut house of representatives. Elected to four successive terms, Alan served the last four years as the Deputy Republican Leader.

A graduate of Syracuse University and the New York University Law School, Alan practiced law as a partner in the firm of Nevas, Nevas & Rubin for nearly three decades prior to his federal appointment.

Mr. Nevas is accompanied today by his wife Janet and his children Andrew and Debby.

In sum, Mr. Chairman, I highly endorse Mr. Nevas' nomination and urge the Committee to report it favorably to the full Senate for its expeditious consideration.

Senator WEICKER. I do not need a prepared statement when it comes to Alan. We have grown up together in the politics of the State of Connecticut. He served several years in the State house of representatives; the last 4 as deputy Republican leader. It was at that point or close thereto that I nominated Alan to be the U.S. attorney for the State of Connecticut, where he has served for the last 4 years.

When I think about whose name I am going to proffer for a judgship, I put myself in almost the same position as a scout for the professional football league draft. I am not interested in who specifically would make a good U.S. attorney or a good district judge or a judge for the court of appeals, but rather, as the professionals do in athletics, I look for the best athlete; in this case, the best intellectual capacities, and the best capacities of heart and mind that a candidate might bring to the bench.

Nobody believes more fervently in the independence of the judiciary than do I. Nobody gives it a more important place in American life than do I. It is the judiciary of this Nation that has preserved our rights and our freedoms as American citizens over the years.

Never before have we needed men and women of vision and of integrity and of compassion on the bench than we do now. I think from time to time, the whole body politic has forgotten about the Constitution of the United States.

Well, be that as it may, we have a special trust put on us as U.S. Senators, and it is to find the best in order to see that the Constitution is not forgotten by those who are going to rule upon it, and that brings me to the man on my right.

The record speaks for itself as far as how Alan Nevas has fulfilled the duties of U.S. attorney. I think everybody in the State of Connecticut would agree there have been none better; some may be his equal, but none better.

At the same time, I know of his reverance for the individual, for the Constitution, and for the greatness of this Nation in terms of its aspirations and seeing that those aspirations are fulfilled by guaranteeing the rights of its citizens.

He is a dear personal friend. He was a great U.S. attorney, he was a great legislator. Believe me, he will make one of the finest Federal judges ever to serve from the State of Connecticut.

I am especially pleased to be joined here today by my good friend, Chris Dodd.

STATEMENT OF HON. CHRISTOPHER DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator **Dodd**. Thank you, Lowell.

One of the luxuries of living in a small State is we all know each other very well, and I am truly honored and delighted to join with Senator Weicker in presenting to you and to this committee the name of Alan Nevas for consideration as a U.S. district judge.

As Lowell has pointed out, he has had a distinguished private practice for a number of years in Westport, CT. He served in the State legislature, was deputy majority leader and deputy minority leader, having served in both the majority and the minority. So he can appreciate a sense of balance there. He was also U.S. attorney.

He only made one mistake; he joined the wrong party in the State of Connecticut. His kind of talent normally ends up on the other side of the aisle, but we will forgive him that one shortcoming.

I am quite confident that he is going to do an excellent, excellent job in serving on the bench. I could not agree more with the comments of my colleague from Connecticut about the role of the judiciary and the importance of having people serve in that capacity who will defend and protect our rights as citizens of this country.

I have no hesitation whatsoever in suggesting to you, Mr. Chairman, or to this committee that Alan Nevas will be in the forefront of protecting those rights both for the citizens of Connecticut and throughout this Nation as well.

I am delighted to be a part of this confirmation process.

Senator **McConnell**. Thank you, Senator Dodd.

Mr. Nevas, do you have any family members who are with you that you might want to introduce?

Senator **Weicker**. He has an army here. [Laughter.]

Mr. **Nevas**. Thank you, Mr. Chairman. My wife, Janet, and my son, Andrew, and my daughter, Deborah; and then I have two cousins who live in the Washington area, Susan Nevas and Stephen Nevas; and then some friends from the Department of Justice, Judy Freeman and Bill Shockley, and behind them, some friends from Charlottesville, VA, Kay Kessler and her son, Jay, and a friend of my daughter's, Sue.

Senator **McConnell**. It is obvious that Mr. Nevas was taking no chances. [Laughter.]

Senator **Simon**. Anyone from Illinois, by the way? [Laughter.]

Senator **McConnell**. Well, thank you very much. We will get back to you, Mr. Nevas. Thank you, Senator Weicker, Senator Dodd.

Senator **Weicker**. Thank you very much, Senator.

Senator **McConnell**. I see that Senator Gramm is here now on behalf of Paul Brown, who has been nominated by the President for the Eastern District of Texas. Senator Gramm.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **Gramm**. Thank you, Mr. Chairman. I can be brief. I recommended Paul Brown to the President for appointment. I am delighted that he decided to appoint Paul.

He served in the waning days of the Eisenhower administration as a U.S. attorney in the Eastern District of Texas. Leaving government service in his early 20's, he went into the private practice of law, where he was very successful in a law firm that he helped establish. It is one of the most respected firms in east Texas.

Paul Brown has been successful in working in the free enterprise system. He shares with you, Mr. Chairman, and with me, a belief in strict construction of the Constitution.

He believes that it is the duty of the courts to interpret the laws, not to make them, and he shares with me a deep commitment that we should take into account the rights of the victims at least on par with the rights of the criminals.

I strongly support his nomination and I wanted to come here today and recommend him to you.

Senator **McConnell**. Thank you, Senator Gramm.

Mr. Brown, is there anyone here from your family or others that you would like to introduce at this point?

Mr. **Brown**. I did not bring anyone with me.

Senator **McConnell**. Well, there would not have been room for them anyway; Mr. Nevas' crowd has pretty well taken over the room. [Laughter.]

Senator **McConnell**. We will get back to you.

I would like to recall at this point Mr. Silberman, if I may.

If you would raise your right hand, Mr. Silberman, do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Silberman**. I do, Mr. Chairman.

Senator **McConnell**. Mr. Silberman, during the period from October 1, 1979, to June 1, 1983, you were executive vice president and general counsel of Crocker National Bank. Would you briefly tell the committee what your duties were during that time?

TESTIMONY OF LAURENCE H. SILBERMAN, OF THE DISTRICT OF COLUMBIA, TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA

Mr. SILBERMAN. Actually, if I may modify that slightly, I was executive vice president for legal and government affairs from October 1, 1979, until, as I recall, late in 1982. At that point, my title changed to executive vice president for strategic planning, legal and government affairs, and, as I recall, at the end of 1982, was changed to executive vice president for corporate affairs.

I started out with the responsibility for legal and government affairs and then, as the titled suggested, strategic planning was added, and then in the latter part of 1982, the economics department and the public affairs department and the insurance office were added.

So I remained executive vice president for the whole period, but my responsibilities were added to.

Senator MCCONNELL. Crocker National Bank recently paid a large civil penalty for violation of reporting requirements imposed by Treasury regulations under the Bank Secrecy Act. Crocker's noncompliance included the period when you were executive vice president.

Were you aware of this matter while at Crocker?

Mr. SILBERMAN. No; I was not, Mr. Chairman.

Senator MCCONNELL. Mr. Silberman, it would appear from the published accounts that the problem for Crocker and a number of other banks involved amendments to Treasury regulations in June 1980.

Why were you not familiar with the changes that occurred in 1980?

Mr. SILBERMAN. I wish I had been, Mr. Chairman, but I was not. There were people within my division who had the duty to read regulations as they came out. And as a practical matter, they would not be brought to my attention unless either there was a dispute as to an interpretation or question of interpretation or there was a question of compliance; that is, was the new regulation in any particular area going to present a problem for compliance.

In this case, as I now understand it from the public statements that Crocker has made and Treasury has made, it would appear as if this particular regulatory change had two facets. The first was a domestic component; it narrowed the kind of establishments which theretofore had not been required—that is to say, the bank had not been required to report cash transactions coming from that organization to the bank; cash transactions would be deposits or withdrawals.

That category was narrowed and most of the attention throughout the banking industry, as best I can determine, was focused on that isse. There was another part of the regulatory change that came in June of 1980 which eliminated a theretofore exemption for cash transactions, currency transactions, between domestic and foreign banks.

That latter change was missed at Crocker. I do not mean to suggest this as by any means an excuse, but it appears to have been missed by scores of other banks, maybe as many as 60, and I do not know why so many missed it.

It was not brought to my attention and if it had, I would have hoped that I would have gotten it right.

Senator McCONNELL. Mr. Silberman, in your position as executive vice president, do you think you should have been knowledgeable about these regulatory changes or Crocker's subsequent noncompliance?

Mr. SILBERMAN. Well, I have to say, Mr. Chairman, I feel a sense of responsibility about it; it happened on my watch. I was the executive vice president. Somebody subordinate to me seems to have misunderstood the repulation. It was a person in whom I imposed confidence, and indeed although he is no longer at Crocker—he is at an entirely different bank—I still regard him highly.

But on the other hand, it was, as I said, on my watch, and so I cannot help but sense, at least in a managerial sense, some feeling of responsibility.

Senator McCONNELL. Is there anything else with regard to your position with Crocker or your subsequent representation of them that you would like to add?

Mr. SILBERMAN. No; I did represent Crocker this year. All I have learned about this matter, I learned in a peculiar way as a private lawyer at Morrison & Foster. Otherwise, I would, I am afraid, know nothing about it. But I have represented them this year in dealings with Treasury up until a point where I thought, since I was in process of becoming a nominee, I really ought to not be involved.

Senator McCONNELL. One of the characteristics of judicial activism is said to include a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Would you give the committee your views on this criticism?

Mr. SILBERMAN. That is a difficult general question, Mr. Chairman. I have been troubled about notions of judicial activism, and perhaps nowhere is it more troubling than when a Federal judge, usually a district judge, is compelled to continue to admininster a decree, and thereby slips into administering an institution, whether private or public, because judges are really not equipped to be managers.

There has been a tradition in this country—indeed, in Anglo-American jurisprudence—that judges should not issue decrees that force them to get into the act of management of an organization, whether it be public or private.

I think it is a question of trying to fashion decrees, so that is not necessary. But, certainly, as a practice it creates a cost.

Senator McCONNELL. Thank you, Mr. Silberman. I have no further questions.

Senator Simon.

Senator SIMON. Yes. If I may just follow through on the questions of my colleague from Kentucky, the amount of money involved at that bank that should have been reported, the cash transactions—the so-called laundering transactions—is $3.98 billion.

Now, for a boy from southern Illinois out in the country, $3.98 billion is a lot of money. When did you find out that this was taking place?

Mr. SILBERMAN. As I think I said earlier, Senator, I did not know about this matter until I was consulted as a private lawyer this year, but let me—I do not wish to quibble with you, Senator, at all, but I do not think it is true that those cash transactions, most of which came from foreign banks, were an indication of laundering at all.

I do not think there is any evidence of that, and I do not think Treasury said there was any evidence of that. The regulation was issued back in June 1980 to eliminate the exemption which previously existed. Bank-to-bank cash transactions in the United States are not reportable.

Prior to June 1980, bank-to-bank transactions of cash from the United States to foreign banks or from foreign banks to the United States were not reportable, but that was changed in June 1980.

But I do not think it is possible—I am not an expert on it from the Treasury Department law enforcement point of view— I do not think it is possible to conclude that cash transactions from banks, indeed reputable banks, abroad into the United States—this sending of currency—is laundering.

If there is any laundering involved, it has to take place prior to that at a local bank, but you would not know that it is laundering because of a cash transaction from foreign bank to domestic bank. There are just billions of dollars that move all the time.

And although you are quite right to suggest that that is a lot of money for anybody, as a matter of fact, that was over a 4-year period and it is a very small percentage of the actual money that transfers from bank to bank, abroad and domestic. It is a small amount, a relatively small amount, an infinitesimal proportion of the amount.

Most of it moves by wire transfer and very little moves in actual cash deposits. It is almost a nuisance for foreign banks and American banks. When currency is spent in a nation abroad, it has to eventually come back, and that is part of the correspondent relationship that banks, and particularly west and east coast banks, have with foreign banks.

Senator SIMON. You served as Under Secretary of Labor?

Mr. SILBERMAN. I most certainly did.

Senator SIMON. Were you approached by the Yablonskis in connection with an election the United Mine Workers was having?

Mr. SILBERMAN. At what point, prior to the election or after the election?

Senator SIMON. Prior to the election, I believe.

Mr. SILBERMAN. I think that was not when I was Under Secretary of Labor, Senator. I think that is when I was Solicitor of Labor in 1969, and I do not recall now whether I was—I may have been—whether I was present at a meeting with Chip Yablonski concerning that election before the election.

As you may know, a very tragic thing occurred, one of the most tragic things I have ever seen in my time in Washington, in that his father was murdered in that election. As Solicitor, I did have some involvement before the election, but I think it was quite marginal.

I did, however, have a good deal of involvement after the election in explicating the Department of Labor's position.

Senator SIMON. The family approached the Department of Labor, asking for an investigation of some of the things that were taking place.

Mr. SILBERMAN. That is correct.

Senator SIMON. And as I understand it, the Department declined to make an investigation, is that correct?

Mr. SILBERMAN. That is correct. In fact, Senator, if I may explain, this was a matter that I was questioned about almost 11 years ago in this room when I was nominated to be Deputy Attorney General, and 3 years before that when I was nominated to be Under Secretary of Labor in the Labor Committee.

My view of this matter, although I do not think I was involved in the initial decision not to investigate, when it did come to my attention was that the Department of Labor had no legal right to conduct an investigation of a union election before the election is completed.

The Landrum-Griffin Act precludes the Labor Department from conducting an investigation of an ongoing election campaign; I set forth my views on that in a law review article which I have provided to the committee in the Georgia Law Journal back, I think, in 1970.

The reason, incidentally, Senator, why I believe Congress did not permit the Labor Department to conduct an investigation of an election until it was completed is that Congress did not want the Government intervening in the election before it was over for fear the Government's very intervention would be an effort to influence the election.

Senator SIMON. But in any event, as far as you can recall, you were not involved in that decision?

Mr. SILBERMAN. Not in the initial decision.

Senator SIMON. Right.

Mr. SILBERMAN. I cannot recall; it has been a long time but I do not think I was.

Senator SIMON. Your background indicates that you have limited jury trial experience.

Mr. SILBERMAN. That is correct. I have only tried two jury cases, one criminal, one civil.

Senator SIMON. Are you doing anything or do you plan to do anything to beef up that background before or immediately after you become a Federal judge?

Mr. SILBERMAN. Well, as a matter of fact, I notice that my friend Ralph Winter, who sits on the second circuit, and Dick Posner, who sits on the seventh circuit, take the opportunity as circuit judges to ask for chances to sit as district judges so that they can get—in both cases, I think, because they were law professors—more jury experience.

I would love to do that. Unfortunately, at the moment the Court of Appeals here in the District of Columbia is terribly short handed. So I have a feeling if I asked to do it, it would not be possible until the vacancies are filled.

I would say with respect to that point that I am glad that I have some jury experience and some trial experience—more than some, I think, although most of it was in my early years, first 10 years of practice.

But something like 75 percent of the cases on the U.S. Court of Appeals here are appeals from administrative agencies and Government departments, and perhaps I have a comparative advantage there.

Senator SIMON. The American Bar Association's Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion.

To your knowledge, are you a member of any such organization?

Mr. SILBERMAN. I did not know—is that what the judicial canons say?

Senator SIMON. That is correct.

Mr. SILBERMAN. I am a member of the Metropolitan Club, Senator, and although there is no statement of discrimination in their bylaws or articles, I do note, and I would be foolish to say otherwise, that there are no women members. They do not, I know, discriminate on the basis of race, national origin, or any other criteria.

But there are no women members, and as far as I know, and I did inquire into that, no woman has been put up for membership. I do believe that it would be wise for the club to permit women to join, and would be inclined to support that. I would rather not resign from it.

I would check the canons of ethics and if the canons of ethics obliged me to resign, I would. But I did not understand they do, and if they do not, I should rather not resign from the club.

Senator SIMON. Let me read them to you here so we can make the investigation very quickly.

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others that the judge's impartiality is impaired.

I would just simply suggest that you may want to reflect on your membership in the Metropolitan Club and get in touch with the chairman and with me before the committee acts on this.

Mr. SILBERMAN. Yes; Mr. Senator, I will.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator MCCONNELL. Thank you, Senator Simon. I might, since you raised the matter of the preballoting investigation, insert Mr. Silberman's Georgia Law Review article into the record.

[The following was received for the record:]

GEORGIA LAW REVIEW

VOLUME 7 FALL 1972 NUMBER 1

THE SECRETARY AND THE LAW: PREBALLOTING INVESTIGATIONS UNDER THE LANDRUM-GRIFFIN ACT

*Laurence H. Silberman**
*George B. Driesen***

Messrs. Silberman and Driesen address their Article to a position taken by Mr. Joseph Rauh in his article which appeared in an earlier issue of this Review.† *Mr. Rauh contended that the Secretary of Labor has the statutory authority to enforce the LMRDA with pre-election investigations where massive evidence of pre-election LMRDA violations exists—authority which Mr. Rauh said the Secretary should have exercised in the 1969 United Mine Workers' election in which the late Joseph Yablonski was defeated. The authors of this Article argue that the statute, read in light of its legislative history, does not authorize the Secretary to intervene by investigating union election contests before the ballots are cast.*

I. INTRODUCTION

ON January 1, 1970, Joseph A. Yablonski, the defeated candidate for president in the December 9, 1969, election of the United Mine Workers of America, and his wife and daughter were brutally murdered in their home in Clarksville, Pennsylvania. Subsequently, five persons, including a UMWA local president, were convicted of murder and civil rights violations; an officer and an employee of a UMWA district have since been indicted on similar counts.[1]

---

* Undersecretary of Labor. A.B., Dartmouth College, 1957; LL.B., Harvard Law School, 1961.

** Ratner & Driesen, Washington, D.C. Adjunct Professor of Law, Georgetown University Law Center. B.A., Harvard College, 1954; LL.B., Yale Law School, 1961.

† Rauh, *LMRDA—Enforce It or Repeal It*, 5 GA. L. REV. 643 (1971).

[1] Silous Huddleston, President of a UMWA local in Tennessee has pleaded guilty to a murder charge, but has not yet been sentenced. N.Y. Times, May 4, 1972, at 1, col. 2. Albert Pass, Secretary-Treasurer of UMWA District 19, and William Prater, a District 19 field representative, are awaiting trial on state murder charges and have been indicted in Federal court for obstruction of justice and deprivation of civil rights. N.Y. Times, Apr. 13, 1972, at 20, col. 1; *id.*, May 3, 1972, at 9, col. 1; *id.*, July 25, 1972, at 27, col. 2.

One of those closest to the Mine Workers' election controversy, perhaps moved by a wish to rewrite its tragic history, has published a wide-ranging polemic in this *Review* accusing the Secretary of Labor of failing properly to administer the election provisions of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA),[2] and implying that rigorous enforcement of the LMRDA might have prevented the Yablonski murders.[3] Recent history has dramatically demonstrated that even the most carefully trained agents of federal and state government charged with the task of assuring the safety of a public figure cannot prevent a determined assassin from taking his life. Hence, it is highly unlikely that any statute designed to assure fair union elections, no matter how enforced, could prevent what the murder statutes cannot.[4]

Most of the specific contentions advanced by the commentator have been adequately canvassed elsewhere.[5] Some of them have been mooted by the Secretary's success in obtaining a court order voiding the 1969 Mine Workers' election and ordering a new one under Department of Labor supervision pursuant to section 402 of the Act.[6] However interesting these controversies may be to historians, political analysts, and the participants, most of the issues raised are legally and jurisprudentially too insignificant to warrant the extensive treatment required for proper analysis in the pages of a learned journal.[7] But the critique does

---

Four other persons, including Huddleston's daughter and son-in-law have been convicted of murder and sentenced, one (Huddleston's daughter) on the basis of a guilty plea. N.Y. Times, Apr. 12, 1972, at 1, col. 6; *id.*, June 24, 1971, at 1, col. 2; *id.*, Nov. 14, 1971, at 58, col. 3; *id.*, Mar. 3, 1972, at 35, col. 1.

[2] Labor Management Reporting and Disclosure Act of 1959, §§ 1-611, 29 U.S.C. §§ 401-531 (1970) [hereinafter cited as the Act or the LMRDA].

[3] *See* Rauh, *LMRDA—Enforce It or Repeal It*, 5 GA. L. REV. 643, 648, 650 (1971) [hereinafter cited as Rauh].

[4] Ohio U.S. Attorney Robert Krupansky has asserted that Yablonski was slain to prevent him from testifying before a federal grand jury probing the United Mine Workers election. N.Y. Times, Jan. 23, 1970, at 20, col. 4.

[5] *Hearings on Investigation of Mine Workers' Election Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 338-75 (1970) (testimony of George P. Shultz, Laurence Silberman and W. J. Usery) (hereinafter cited as *Hearings*).

[6] LMRDA § 402, 29 U.S.C. § 482 (1970). The decision is Hodgson v. UMW, 344 F. Supp. 17 (D.D.C. 1972).

[7] The contentions to which we refer relate to allegations which the Secretary concluded should not be included in his complaint and to other legal judgments made in the course of the litigation over the commentator's objections. *See* Rauh at 650-56. In addition, we do not deem it proper to correct what we consider to be the other factual and legal inaccuracies in Mr. Rauh's article.

raise one issue of legal importance. That issue is whether, under the Act as now written, the Secretary of Labor has the power to investigate allegations that union officials have violated or are about to violate Title IV of the LMRDA and to attempt to prevent subsequent violations by publicly disclosing the results of such investigation during the election campaign and by posting federal agents at the polls on election day.[8] That issue, it seems to us, raises important questions of law and principle left unexplored by Mr. Rauh. We are concerned that the

---

The Secretary's refusal to transplant the *Exchange Parts* doctrine to union elections (Rauh at 652-53) does have some legal significance. In NLRB v. Exchange Parts Co., 375 U.S. 405 (1964), the Supreme Court affirmed a long-standing Labor Board rule that an employer interferes with his employees' right to engage in union activities if he grants them an unusual wage increase just prior to an NLRB union representation election. The commentator argues that this principle should be applied to invalidate internal union balloting where an incumbent has obtained a benefit for represented employees to improve his chances of success. The Secretary rightly rejected the analogy. The vice in the employer granted increase is "the suggestion of a fist inside the velvet glove," 375 U.S. at 409, *i.e.*, the reminder that the employer has the power to grant, withhold, or withdraw increases as he wishes and that he might use that power to retaliate if he loses the pending representation election. A defeated union officer, however, is stripped of all power over the members if they vote him out of office. Hence, there is no "fist in the velvet glove," only an implication that the union official may be effectively representing the members who are free to decide what significance, if any, to attach to the pre-election benefit. *See* LMRDA § 401(e), 29 U.S.C. § 481(e) (1970) (members shall not be subject to "improper interference or reprisal" in voting). Further, the proposed election rule would inhibit collective bargaining for long periods prior to union elections since union officers would fear that concessions wrung from an employer could become the basis of an election contest. It is no secret that union officers facing an election contest drive very hard bargains. *See also* Blankenship v. Boyle, 329 F. Supp. 1089, 1107-10 (D.D.C. 1971) (pension increase, not "primarily motivated" by election considerations, held a breach of fiduciary duty on other grounds).

[8] Rauh at 645, 647-49, 660. The proposal is set out in more detail at pp. 9-12 *infra*. We have attempted to state it as accurately as possible. The commentator has not clearly spelled out his view of the Secretary's proper pre-election role, since the thrust of the argument is that the Secretary should have "investigated" prior to the Mine Workers' election, not that a proper administration of the Act generally requires certain specific steps prior to the conduct of union elections which seem likely to be voidable under the Act. Before he sought the Secretary's intervention, the commentator had succeeded in obtaining current relief for Landrum-Griffin violations which virtually assured that the election would be invalidated. *See* Hodgson v. UMW, 344 F. Supp. 17, 22-24, 27-28 (D.D.C. 1972) (voiding election, *inter alia*, because of these violations); Yablonski v. UMW, 305 F. Supp. 868, 871 (D.D.C. 1969) (enjoining the improper use of the union journal); Yablonski v. UMW, 71 L.R.R.M. 3041 (D.D.C. 1969) (restoration of Yablonski to his union post). A pre-election investigation of these events by the Secretary might have precluded reliance upon them in the suit to void the election, if a court had concluded that pre-balloting investigations exceeded the Secretary's authority. *See* Wirtz v. Local 125, Laborers' Union, 389 U.S. 477, 482 n.5 (1968); *cf.* Weeks v. United States, 232 U.S. 383 (1914).

drama of the events, the eloquence of the commentator and the absence of response could mislead the bar and the bench into thinking that the statute confers such power. We think it does not. It is to that issue that this Article is addressed. We begin by examining the statute.

II. The LMRDA

The relevant provisions of the Act are divided into six titles.[9] The first five impose substantive restrictions on the conduct of employers, labor organizations, and their officers and obligate them to file and retain certain documents and reports. Each substantive obligation is enforceable by one or more specific means spelled out in the LMRDA.[10] Thus, the statute authorizes civil suits by "[a]ny person whose rights . . . have been infringed by any violation"[11] of the provisions of Title I, the "Bill of Rights for Union Members." Section 104 of the Act,[12] the section of Title I requiring labor organizations to supply covered employees with copies of collective bargaining agreements upon request, is expressly made enforceable by the Secretary of Labor. Title II, containing the provisions governing the retention of certain records and the filing of certain reports and documents, is enforceable both by civil suits brought by the Secretary of Labor to restrain impending or future violations and, where the violation is willful, by criminal prosecution.[13] The trusteeship provisions in Title III of the LMRDA, except the reporting provisions, are enforceable by the Secretary upon complaint of a member or a subordinate body.[14] The Act gives these complainants an independent right to commence suit to redress Title II and III violations where they are affected by such violations.[15] Title IV, relating to elections, is enforced by the Secretary in a suit to set aside an election.[16] In addition, a bona fide candidate may sue prior to an election to compel compliance with provisions of Title IV relating to the use of union facilities in the distribution of campaign materials.[17] Title V, entitled "Safeguards for Labor Organizations," imposes fiduciary obligations upon union officials and employees. It provides specific civil remedies and criminal penalties for violation of the substantive obligations imposed.[18]

---

[9] A seventh title amended the National Labor Relations Act. LMRDA §§ 701-07, 73 Stat. 541 (1959) (codified in scattered sections of 29 U.S.C.).

[10] One of the objectives of the draftsmen of the Kennedy-Ives bill, which contained Title IV in substantially its present form, was to "provide an administrative or judicial remedy *appropriate for each specific problem.*" S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959) [hereinafter cited as S. Rep. No. 187]; NLRB, 1 Legislative History of the Labo Management Reporting and Disclosure Act of 1959, at 403 (1959) (emphasis added) [hereinafter cited as Leg. Hist.].

[11] LMRDA § 102, 29 U.S.C. § 412 (1970).

[12] LMRDA § 104, 29 U.S.C. § 414 (1970).

[13] LMRDA §§ 209, 210, 29 U.S.C. §§ 439, 440 (1970).

[14] LMRDA § 304(a), 29 U.S.C. § 464(a) (1970). The Secretary may enforce the reporting provisions of Titles II and III without receiving a complaint. LMRDA §§ 210, 301(b) 29 U.S.C. §§ 440, 461(b) (1970).

[15] LMRDA §§ 201(c), 301(b), 304(a), 29 U.S.C. §§ 431(c), 461(d), 464(a) (1970); Parks v IBEW, 314 F.2d 886, 923-24 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963); Schonfeld v Raftery, 381 F.2d 446 (2d Cir. 1967). One court has held that private suits may not b

Title VI of the LMRDA, captioned "Miscellaneous Provisions," *inter alia* clarifies the relationship between the Act and other laws,[19] imposes criminal sanctions upon extortionate picketing[20] and violent deprivation of rights accorded by the Act,[21] gives a civil remedy to any member disciplined for exercising LMRDA rights[22] and, in section 601, confers upon the Secretary a power to investigate "when he believes it necessary in order to determine whether any person has violated or is about to violate" the Act.[23] Section 601 also authorizes the Secretary to

---

brought until full resort has been had to the administrative remedies available before the Secretary of Labor. Flaherty v. McDonald, 183 F. Supp. 300, 304-06 (S.D. Cal. 1960).

[16] LMRDA § 402, 29 U.S.C. § 482 (1970).

[17] LMRDA § 401(c), 29 U.S.C. § 481(c) (1970). Title I of the Act also relates to election campaigns. *See* LMRDA §§ 101-05, 29 U.S.C. §§ 411-15 (1970) (equal right to vote, nominate candidates, freedom of speech and assembly, declared applicable to "every member"). As indicated, a private suit may be brought to enforce these rights. *But cf.* Calhoun v. Harvey, 379 U.S. 134 (1964).

[18] LMRDA §§ 501-04, 29 U.S.C. §§ 501-04 (1970) (fiduciary responsibility of officers of labor organizations, bonding of union officers, restrictions on loans to officers by union, prohibition against certain persons holding office). LMRDA § 505, providing for protection against employer anti-union conduct, amended § 302 of the Labor-Management Relations Act, 1947, 29 U.S.C. § 186 (1970).

[19] LMRDA § 603, 29 U.S.C. § 523 (1970).

[20] LMRDA § 602, 29 U.S.C. § 522 (1970).

[21] LMRDA § 610, 29 U.S.C. § 530 (1970).

[22] LMRDA § 609, 29 U.S.C. § 529 (1970). *See also* LMRDA § 102, 29 U.S.C. § 412 (1970).

[23] LMRDA § 601, 29 U.S.C. § 521 (1970). The entire section reads as follows:

> Sec. 601. (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except Title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.
>
> (b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of

report to "interested persons or officials" any matter which he deems appropriate as a result of such an investigation.

This, then, is the general scheme of the Act: a series of substantive commands enforceable by specific remedies tailored to each right and a general title containing criminal sanctions for certain violations, providing for the relationship between the Act and other laws and giving the Secretary a general investigatory power.

III. TITLE IV

We turn now to a closer examination of Title IV, which deals specifically with union elections.[24] Title IV requires unions to hold elections at minimum intervals. It assures members in good standing an opportunity to vote for and to support candidates, to be candidates (subject, *inter alia*, to reasonable, uniformly imposed qualifications) and to exercise these rights free of discipline, reprisal or interference.[25] The Act provides for notice of a pending election, election observers, counting of the ballots, publication of election results and the preservation of ballots and other election records.[26] It also assures that the elections will be conducted pursuant to a union's organic law,[27] and prohibits a candidate from using union or employer funds in furtherance of his campaign.[28] Finally, it gives candidates access to union mailing facilities and certain membership lists and prohibits discrimination in the distribution of campaign literature and the use of certain facilities.[29]

A. Election Remedies

There are three statutory avenues for securing Title IV rights. The first is section 402.[30] Subsection (a) of that section provides that after

---

books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

[24] *See also* note 17 *supra*.

[25] LMRDA § 401(a)-(e), 29 U.S.C. § 481(a)-(e) (1970). *See also* LMRDA § 609, 29 U.S.C. § 529 (1970).

[26] LMRDA § 401(c),(e), 29 U.S.C. § 481(c),(e) (1970).

[27] LMRDA § 401(e), 29 U.S.C. § 481(e) (1970).

[28] LMRDA § 401(g), 29 U.S.C. § 481(g) (1970).

[29] LMRDA § 401(c), 29 U.S.C. § 481(c) (1970).

[30] LMRDA § 402, 29 U.S.C. § 482 (1970). The entire section reads as follows:

> Sec. 402(a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

an election[31] a member who has exhausted available intra-union remedies (or attempted to do so for three months without obtaining a decision), may file a complaint with the Secretary of Labor alleging a violation of section 401. Thereafter, the Secretary is required to investigate and, if he finds "probable cause to believe" that a violation has occurred which he has reason to believe affected the outcome of the election,[32] to bring a suit to have the election set aside and a new elec-

---

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

[31] *See* text at pp. 12-13 *infra*.

[32] Although this requirement is not stated explicitly in section 402, some standard related to election outcome is implied by section 402(c)(2), which conditions court relief on a finding that the violation "may have affected" the outcome. Further, the legislative

tion conducted under his supervision. The court is directed to grant that relief if it finds "that the violation of section 401 may have affected the outcome of an election." The Secretary then certifies the results of the new election, which are embodied in a court decree.[33]

The second avenue of relief is available to a candidate who has been denied reasonable access to the union's mailing facilities or to certain membership lists or has been subjected to union discipline for exercising his Title IV rights. Sections 401[34] and 609[35] entitle a candidate to redress those wrongs in pre-election suits in a federal district court.[36] The third avenue of relief is section 610 of the Act.[37] That section imposes criminal sanctions for using, attempting, or threatening force or violence for the purpose of interfering with the exercise of rights provided in the LMRDA. Pursuant to section 607[38] of the Act and an agreement with the Department of Justice, the Secretary of Labor refers allegations of violations of section 610 to the Justice Department for immediate investigation and prosecution.[39]

A fourth avenue of relief for election wrongs, though not created by the Act, is expressly preserved by section 403.[40] That section preserves state "rights and remedies which union members have under existing law to insure compliance with provisions of a union's constitution and bylaws relating to elections *prior* to the conduct of an election."[41] But "the federal remedy is made the sole remedy for overthrowing an improperly held election and private litigation [is] precluded."[42]

---

history shows that the Secretary was not to bring suit unless he finds reason to believe that the violation probably affected the outcome of the elections. S. Rep. No. 187, at 21; 1 Leg. Hist. 417.

[33] LMRDA § 402(c)(2), 29 U.S.C. § 482(c)(2) (1970).

[34] 29 U.S.C. § 481 (1970).

[35] 29 U.S.C. § 529 (1970).

[36] Joseph Yablonski successfully sought such relief during the 1969 campaign. *See* note 8 *supra*.

[37] LMRDA § 610, 29 U.S.C. § 530 (1970) (penalty for deprivation of rights by violence).

[38] 29 U.S.C. § 527 (1970).

[39] This procedure was followed in respect to the two allegations of threatened and actual violence which were submitted to the Department of Labor by the Yablonski forces. No prosecution resulted because the ensuing Federal Bureau of Investigation report did not uncover facts evidencing violations of § 610. No facts relating to the Yablonski murder conspiracy that came to light following the terrible events of New Year's Day, 1970 were brought to the Department's attention. We assume that it is not contended that the results of such investigations into alleged criminal activities should be publicized.

[40] LMRDA § 403, 29 U.S.C. § 483 (1970).

[41] S. Rep. No. 187, at 21; 1 Leg. Hist. 417 (emphasis added).

[42] *Id.*

B. Pre-election Investigation—An Inherent Remedy?

The commentator sees in section 601 of the Act a fifth remedy, buttressing those expressly provided elsewhere in the statute.[43] That remedy is a Labor Department investigation. Thus, Rauh asserts that by not investigating his charges before the balloting, the Secretary refused to "*enforce* the law."[44] Rauh asserts that by this refusal the Secretary disregarded the "express mandate of the statute,"[45] *i.e.*, section 601's provision that the Secretary "may" conduct an investigation "whenever he believes it *necessary* in order to determine whether any person has violated or is about to violate the Act."[46]

We are familiar with the use (and occasional abuse) of congressional power to investigate allegations of wrongdoing in order to determine "the advisability for and the content of legislation."[47] And we are familiar with prosecutorial investigations designed to gather evidence for use in criminal proceedings. Indeed, before the UMWA election, the FBI investigated each incident reported to the Secretary which appeared to constitute a federal crime.[48] However, federal investigations during an election campaign of one candidate's charges that his opponent is committing or is about to commit *civil* violations of the election laws or that, unless restrained, he will engage in violence are less familiar, if not novel.

One who argues that the statute "mandates" the exercise of a power to conduct such investigations owes the reader an explanation, grounded in the statute, of the conditions, purposes and procedures governing its exercise. Rauh does not seriously trouble himself with these niceties. In fact, Rauh is remarkably imprecise in telling the reader what the Secretary is supposed to do with the facts he uncovers before the election. That question is unimportant to the commentator because the cardinal function of the "mandated" investigation has nothing to do with fact gathering. Rather, its purpose is to deter civil and criminal violations by keeping a candidate and his associates under surveillance and by posting Labor Department investigators at the polls.[49] Thus, Rauh asserts that "Boyle and his cohorts were free from that moment on [*i.e.*, when the Secretary decided not to conduct a pre-election investigation] to take action unhindered and unwatched,"[50] and urges that a federal presence should have been felt "throughout the campaign" in order to prevent the murder conspiracy from proceeding.[51] In short, Rauh reads the statute as "mandating" in appropriate cases an administrative injunction by surveillance.

---

[43] Rauh at 647-48. *See Hearings* at 72 (Postelection proceedings are an inadequate remedy for "'wrongs which plaintiff Yablonski is presently suffering.' Only you, Mr. Secretary, can correct this situation.").

[44] Rauh at 648 (emphasis added).

[45] *Id.*

[46] LMRDA § 601, 29 U.S.C. § 521 (1970) (emphasis added). For the full text of § 601, see note 23 *supra*.

[47] Barsky v. United States, 167 F.2d 241, 245 (D.C. Cir.), *cert. denied*, 339 U.S. 934 (1948). For an example of investigative abuse, see United States v. Rumley, 345 U.S. 41, 48 (1953) (Douglas, J., concurring).

[48] *See* note 39 and accompanying text *supra*.

A secondary purpose of the preballot investigation is apparently to identify the wrongdoers to the voters. Rauh writes:

> The Yablonski election was not lost on election day; it was lost, I believe, on the day that Secretary Schultz decided not to investigate the pre-election conduct of the UMWA.[52]
>
> * * *
>
> The road to change in a corrupt and dictatorial union is at best a lonely one. It was to be hoped that the Department of Labor, which is charged with the responsibility for the enforcement of the LMRDA, would have been somewhere in the neighborhood making clear its position on the side of honesty and decency.[53]

Although Rauh does not specify how the Secretary is to make his position "clear," he apparently contemplates that the Secretary will publicly announce his decision to investigate.[54] Such a procedure bristles with difficulties, all of which Rauh ignores.

Assume that the accused is innocent. Can the investigation be completed and the voters advised of the results in time to eradicate the prejudicial effect of the initial announcement? Assume instead that the accused has violated the statute but the preballot investigation, perhaps hurried by an imminent election, does not uncover any wrongdoing. Would a subsequent legal action based upon the statutory, postelection investigation be prejudiced?[55] Finally, assume that the Secretary believes, on the basis of the preponderance of the evidence that violations have occurred. Shall he publicize his conclusions without affording the respondent a hearing? Or does Rauh contemplate that the investigation will be followed by an administrative hearing and judicial review? We are not told.

---

[49] Rauh at 647. *See also Hearings* at 38 (Rauh letter urging Secretary to "monitor" local union nominating meetings).

[50] Rauh at 647.

[51] *Id.* at 650.

[52] *Id.* at 647.

[53] *Id.* at 660.

[54] *See Hearings* at 54 (Rauh letter urging Secretary to announce investigation of "illegal activities" to prevent "fraud and intimidation" at nomination meetings).

[55] *See* note 8 *supra*.

Unless Rauh proposes that preballot investigative surveillance with its attendant massive deployment of federal resources,[56] is to become the rule, rather than the exception, he must find, somewhere in the Act, a standard limiting the Secretary in the ordinary case to the section 402, postelection remedy. On the surface, Rauh does suggest two limitations on the Secretary's power, although they are in no way linked to the statute or its legislative history. A pre-election investigation should not be conducted, we are told, "when there is a substantial chance that the union itself will take corrective action,"[57] *i.e.*, in local elections where the international is "not involved" and has created an "independent appellate body . . . which has clear authority to make the final decision concerning the validity of the election."[58] But that is hardly a restriction. It would "mandate" preballot investigations in all international elections and in all but a few local elections, since only three unions have independent appellate bodies of the sort Rauh describes.[59]

Rauh's other test, apparently, is that the Secretary should intervene and investigate when he is presented with "massive" evidence.[60] Aside from the vagueness of the term "massive," which appears nowhere in the LMRDA or in any other statute of which we are aware, the "evidence" which Rauh submitted consisted of letters, unsupported by affidavits, alleging various acts of wrongdoing. If one side's unsworn representations were enough to trigger an investigation, investigations would be frequent, since the obvious electoral advantage stemming from the Secretary's published decision to "investigate" would invite exaggeration and reckless accusations, if not downright falsehoods, which are common enough in hotly contested union elections. Fairness, moreover, would seem to require that the opposition be consulted. If the facts are not contested, does the Secretary then "investigate" in order to prevent further violations? Apparently, Rauh's answer is "yes," since one basis of his demand for an "investigation" was the series of court decisions finding and remedying violations of the Act. In the ordinary case, however, there surely will be a factual controversy which would require that the Secretary proceed to find the facts himself. In short, the Secretary would have to investigate in order to decide whether to investigate, thus making pre-election investigations commonplace.

---

[56] The government spent approximately $4,000,000 and deployed slightly over 1,000 agents in supervising the rerun election pursuant to the court's order in Hodgson v. UMW, 344 F. Supp. 17 (D.D.C. 1972).

[57] Rauh at 649.

[58] *Id.*

[59] They are the Upholsterers' International Union of North America, the Marine Engineers Beneficial Association; and the United Auto Workers. *See* BLS Bulletin 1350 (1961) and further information on file with the Bureau of Labor Statistics.

[60] Rauh at 649.

IV. Congressional Policy and Judicial Interpretations

The basic argument for finding that the LMRDA confers pre-election intervention power on the Secretary seems to be that without it relief takes too long and that seeking relief at the hands of the offending union is an exercise in futility.[61] But however compelling those arguments may be as a matter of policy, they are of no moment if Congress, which clearly has the power to authorize the Secretary to afford an indirect pre-election remedy, has not done so.[62] It has not.

Although Congress created and preserved *private*, pre-election remedies,[63] it is plain from the face of the statute that the power Congress entrusted to the Secretary to remedy Title IV violations comes into play *after* the election is held. The statutory remedy is a suit to set aside an election already held, the supervision of a second one, and the issuance of a certification of the results to be embodied in a court decree. Suit may be brought only upon the complaint of a member who has invoked available union remedies without success or for a three month period without receiving a final decision.[64] The Secretary is instructed to investigate the complaint, and the election is presumed valid pending a final decision thereon,[65] a presumption that clearly contemplates that an election has been held. If the Secretary's investigation yields "probable cause to believe" that a violation has occurred, Congress contemplated that he would institute suit only if "there is reason to believe that the violation has probably affected the outcome of the election . . . ."[66] And as noted above, the court is authorized to void the election and authorize the Secretary to supervise a new one only if it makes a determination that the violation, if any, may have affected the result. Thus, the LMRDA contemplates that some Title IV violations will go entirely unremedied,[67] and also that unions will conduct invalid *first* elections. For, under the Act, the Secretary's power to supervise elections—for example, by posting government observers at the polls—attaches only after a court has heard the Secretary's evidence, afforded the charged union an opportunity to defend itself against the charges in a judicial proceeding, and made findings that a violation which may have affected the election outcome has occurred.[68] Finally, as we have already seen, the statute expressly preserves (and confers) private, pre-election remedies, while making the Secretary's section 402 postelection suit the exclusive avenue for overthrowing an improperly held election.[69] Thus, a fair reading of the LMRDA shows that Congress contemplated that the Secretary would remedy election violations only after the balloting.

---

[61] *See* note 43 *supra*.

[62] In reporting on the Kennedy-Ives bill, which contained Title IV in substantially its present form, the Senate Committee on Labor and Public Welfare followed the principle that

> remedies for . . . abuses should be direct. The committee rejects the notion of applying destructive sanctions to a union . . . for an offense for which the officers are responsible and over which the members have at best, only indirect control. Still more important, the legislation should provide an administrative or judicial remedy appropriate for each specific problem.

S. Rep. No. 187, at 7; 1 Leg. Hist. 403. *See also* Department of Labor, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Titles I-VI, 699 (1964) (remarks of Senator Kennedy on S. 3751). The minority complained that the Secretary's postelection remedies were not sufficiently expeditious or effective. *See* S. Rep. No. 187, at 70, 100; 1 Leg. Hist. 466, 496.

[63] See LMRDA §§ 102, 401(c), 403, 609, 29 U.S.C. §§ 412, 481(c), 483, 529 (1970).

[64] LMRDA § 402(a), 29 U.S.C. § 482(a) (1970).

No court has passed upon the question whether the Secretary may initiate an investigation either under section 601 or section 402 of the Act prior to the balloting.[70] Courts have, however, allowed the Secretary to conduct *post*balloting election investigations under the authority of section 601 without regard to whether a section 402 complaint has been filed by a member or whether a union has had an opportunity to consider the alleged violation in internal union proceedings.[71] But when the Secretary seeks to remedy the violations, the courts have barred relief for those violations which have not been presented to the union by a complaining member—even where the court knew well that seeking relief within the union was an exercise in futility. In *Hodgson v. Local 6799, Steelworkers*,[72] for example, the union had rejected the Department of Labor's demand that the union rescind its requirement that a member must have attended half the union meetings held in the preceding three years to qualify as a candidate. The union insisted that the requirement was valid in the face of threatened litigation.[73] It seemed plain that had the member complained to the union, it would have rejected his appeal. Nevertheless, the Supreme Court precluded the Secretary from attacking the rule because the member had not pursued his postelection, intra-union remedy, although the Court's decision obliged the Secretary to supervise a second election (the first had been voided on related grounds) under a rule which he believed was unlawful.[74]

---

[65] LMRDA § 402(a)-(b), 29 U.S.C. § 482(a)-(b) (1970).

[66] S. Rep. No. 187, at 21; 1 Leg. Hist. 417. *See also* Note, *Election Remedies Under the Labor-Management Reporting and Disclosure Act*, 78 Harv. L. Rev. 1617, 1632-33 (1965).

[67] *See* Hodgson v. Steelworkers, 403 U.S. 333 (1971) (Secretary may not challenge election on grounds known to member but not raised in his intra-union appeal); S. Rep. No. 187, at 21; 1 Leg. Hist. 417 (election not to be set aside for technical violations).

[68] LMRDA § 402(c), 29 U.S.C. § 482(c) (1970). *But cf.* Rauh at 645. "'[O]nly the Department of Labor had the authority and the resources to force any semblance of a fair [first] election.'" *Id.* "[The Secretary has] the admitted power on the basis of present record, to initiate an investigation today and to implement that investigation with a Government agent at every UMWA polling place on December 9th." *Id.* at 647.

[69] *See* pp. 4-8 *supra*.

[70] The only court that addressed itself to that question specifically reserved decision on it. Local 57, IUOE v. Wirtz, 346 F.2d 552, 555 n.1 (1st Cir. 1965). *But see* Rauh at 648-49 n.25. The issue has not been before the courts largely because the Department has never conducted a preballoting investigation. *See* pp. 18-19 *infra*.

The reason for the Court's unbending insistence that the Secretary stay his hand where the violation has not been presented in an intra-union, postelection appeal was that "examination of the relevant legislative materials reveals a clear congressional concern for the need to remedy abuses in union elections without departing from the long-standing congressional policy against unnecessary governmental interference with internal union affairs."[75] "Plainly Congress intended to foster a situation in which the unions themselves could remedy as many election violations as possible without the Government's ever becoming involved."[76] And, we note, Congress restricted the Secretary's remedial authority even though it found "from recent investigations in the labor and management fields, that there have been a number of breaches of trust, corruption, disregard . . . of the rights and interests of employees and the public generally as they relate to the activities of labor organizations . . . and their officers and representatives."[77] "Acts of violence on the part of certain local, regional, or national union officers," alleged domination of labor unions by criminal, corrupt, and disreputable elements, "crooked elections," "rigged elections" and "flagrant disregard of democratic procedures" which were brought to the attention of Congress in the course of several years of investigation,[78] underlay its findings. Nevertheless, Congress limited the Secretary's section 402 remedial power to election law violations that members had first sought to remedy by appealing to their unions.

---

[71] *See* Local 57, IUOE v. Wirtz, 346 F.2d 552 (1st Cir. 1965); Local 191, Teamsters v. Wirtz, 321 F.2d 445 (2d Cir. 1963). However in Wirtz v. Local 125, Laborer's Union, 389 U.S. 477, 482 n.5 (1968), the Court expressly left open the question of whether or not the Secretary may remedy a violation uncovered in the course of a § 601 precomplaint investigation even if a member complaint is subsequently filed. *See* note 8 *supra*.

[72] 403 U.S. 333 (1971).

[73] *Id.* at 335.

[74] The dissent argued that where an election is set aside on grounds properly presented to the union, the lower courts should be free to prevent the application of other invalid union election rules or practices during the second election, even though they had not been the subject of a timely intra-union complaint. *Id.* at 343-44 (White, J., dissenting).

In Trbovich v. UMW, 404 U.S. 528 (1972), the Court held that a union member may intervene in the Secretary's postelection suit, but limited the claims the intervenor may press to those alleged in the Secretary's complaint. Citing Justice White's dissent in *Steelworkers*, the Court also held that the intervenor may participate in fashioning a suitable remedial order governing the rerun election which, the Court said, would be conducted in compliance with Title IV. *Id.* at 537 n.8.

[75] Hodgson v. Local 6799, Steelworkers, 403 U.S. 333, 338 (1971).

The Supreme Court has read the legislative history of the Act as limiting not only the wrongs which the Secretary may right under the Act but also as limiting the timing of governmental intrusion into the election process. In *Wirtz v. Bottle Blowers Association*,[79] the Court wrote:

> The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its longstanding policy against unnecessary governmental intrusion into internal union affairs. . . . In the end there emerged a "general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts."[80]

After summarizing the substantive election rules Congress enacted in Title IV, the Supreme Court pointed out:

> Even when an election violates these standards, the stated com-

---

[76] *Id.* at 399.

[77] LMRDA § 2(b), 29 U.S.C. § 401(b) (1970).

[78] *See, e.g.*, Department of Labor, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Titles I-VI, 7, 10-11, 37-38, 102 (1964).

[79] 389 U.S. 463 (1968).

[80] *Id.* at 470-71 (citations omitted).

> mitment is to postpone governmental intervention until the union is afforded the opportunity to redress the violation. . . . And if the union denies the member relief and he makes a timely complaint to the Secretary, the Secretary may not initiate an action until his own investigation confirms that a violation of § 401 probably infected the challenged election. . . . And if the Secretary must finally initiate an action, the election is presumed valid until the court has adjudged it invalid. Congress has explicitly told us that these provisions were designed to preserve a "maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections."[81]

The limitations on the Secretary's power to remedy Title IV violations, heeded by the courts and apparent upon the face of the Act, reflect a deliberate choice by Congress to minimize governmental intrusion in the electoral process. Senate bill 748, the Eisenhower administration bill, introduced about a week after the Kennedy-Ervin bill, gave the Secretary of Labor plenary power to enforce its election provisions before or after the balloting.[82] Under that bill, "[*w*]*henever* the Secretary determined upon the basis of a complaint or otherwise that there is reasonable cause to believe" that the bill's election provisions have been violated, "and that appropriate corrective action has not been and will not otherwise be taken," the Secretary was instructed to institute administrative proceedings to determine whether such violations had occurred and to issue "such orders as may be necessary and appropriate to effectuate the provisions of this title and achieve compliance with any provision" of the bill.[83] Allegations of election violations could, at the Secretary's option, be referred to a hearing examiner or a Union Procedures Examining Board. Severe sanctions were created for failure to comply with an order resulting from the Secretary's proceeding, which was also enforceable and reviewable in the courts.[84] Although the proposal went on to provide that "such final order shall, where a violation of section 302 or section 303 [the election provisions] . . . is found to have affected the outcome of any election of officers, declare the election, *if any*, to be void and direct an election to be held under such supervision as the Secretary may by order prescribe."[85] There was no requirement that the Secretary act only upon the complaint of a member or that any internal, postelection union appeal be pursued. Even more important, the bill gave the Secretary authority to seek injunctive relief "whenever it shall appear that any person has violated or is about to violate . . . section 302 [or] 303 [the election provisions] . . . of this Act."[86]

---

[81] *Id.* at 472-73 (citations omitted). Union constitutions generally provide for appeal of local rulings, including those affecting elections, to the international level. In practice, such appeals often would extend well beyond the three-month period for exhaustion of postelection remedies specified in § 402(a)(2) of the Act, so that in many instances only the local union acts on the member's appeal of a local ruling before the member becomes eligible to file a complaint with the Secretary. *See also* Rauh at 649.

[82] S. 748, 86th Cong., 1st Sess. §§ 401, *et seq*. (1959); *see* 105 Cong. Rec. 1277-79 (1959); 2 Leg. Hist. 975-76.

[83] S. 748, 86th Cong., 1st Sess. § 408(a) (1959) (emphasis added). *See also* 1 Leg. Hist. 124.

[84] S. 748, 86th Cong., 1st Sess. § 409 (1959); 1 Leg. Hist. 130-34.

That bill was not enacted. Had it been, the "express mandate of the Statute" would indeed have compelled government intervention during union election campaigns in the legally appropriate form of administrative orders or court decrees. But the Senate committee rejected "paternalistic regulation" that would "attempt to prescribe detailed procedures and standards for the conduct of union business."[87] It "recognized the desirability of minimum interference by government in the internal affairs of any private organizations."[88] The bill it reported, which eventually became law, was drafted "within a general philosophy of legislative restraint."[89] Minority committee members objected to it on the same grounds that underlie the commentator's objections to the Secretary's pre-election restraint: "[I]f there are abuses in connection with an election prior to its being held, the bill provides no federal remedy at all. The union member's only relief can come only through whatever state law may exist on this subject."[90] Thus, faced with a choice between a bill which would have "mandated" pre-election intervention by the Secretary of Labor and one which appeared to foreclose any "federal remedy" before the balloting, Congress opted for

---

[85] S. 748, 86th Cong., 1st Sess. § 408(c) (1959) (emphasis added); 1 Leg. Hist. 127.

[86] S. 748, 86th Cong., 1st Sess. § 405 (1959) (emphasis added); 1 Leg. Hist. 123.

[87] S. Rep. No. 187, at 7; 1 Leg. Hist. 403.

[88] *Id.*

[89] *Id.*

[90] S. Rep. No. 187, at 104; 1 Leg. Hist. 500 (Minority Views, Appendix 13, "Gimmicks in the Committee Bill"). The minority's objection was partly met by providing for certain pre-election relief in a private civil suit. *See* pp. 6-8 *supra*. *Compare* S. 1555, 86th Cong., 1st Sess. § 301(b) (1959); 1 Leg. Hist. 372-73, *with* LMRDA § 401(c), 29 U.S.C. § 481(c) (1970). But the provision in the Senate committee bill conferring postelection remedial power upon the Secretary and the courts was enacted by the Congress virtually without change. *Compare* S. 1555, 86th Cong., 1st Sess. § 302 (1959); 1 Leg. Hist. 375-78, *with* LMRDA § 402, 29 U.S.C. § 482 (1970).

"minimum interference by Government in the internal affairs of any private organization" and a "maximum amount of independence and self-government . . ." for unions.[91]

The policy Congress preferred is critically involved here. The Secretary of Labor, like other members of the President's cabinet, is a political appointee. In that capacity, he is both an advisor and an instrument of the Chief Executive, charged with a critical role in formulating and effecting national policy. By right and tradition, he is also an active, political ally of the President. In both capacities, he finds himself allied with or against particular unions and their officers. Labor unions have played and should be free to play an active political role which often brings them into ideological or partisan conflict—or concert—with an incumbent administration.[92] Certainly, it is no disrespect to the men who have held the office of Secretary of Labor to suggest that the draftsmen of the LMRDA, concerned as they were about governmental interference in internal union affairs, would have shuddered at the prospect of the Secretary intervening in the midst of union campaigns to investigate charges of election law violations (charges that are frequently leveled at incumbents) and report on his findings without the due process protections contained in Senate bill 748's provisions for an administrative hearing and judicial review and assured by the provision in the present statute for a court test.[93] The exercise of such power by the Secretary would seem to constitute "governmental interference" in the internal affairs of unions of a most dangerous kind, which could muffle the hitherto unrestrained voices of some union leaders in the political arena.

In election cases, the Department of Labor has consistently refused to exercise its section 601 power to investigate and report until the balloting is complete, *inter alia*, on the ground that "*Congress* intended to preserve independence and self-government in the labor movement by giving unions opportunity to correct violations insofar as possible before the Secretary of Labor becomes involved in elections of union officers."[94] The Department's policy decision not to exercise the power literally conferred by section 601 to investigate and disclose in Title IV cases pending the balloting was not based upon administrative convenience or budgetary considerations, but upon a finely tuned appraisal of the statute, its legislative history, and the compromises which Congress struck between competing values.[95] A policy judgment based upon these considerations is rightly characterized as a judgment of law.[96] The analysis set out above demonstrates the validity of that appraisal.

---

[91] S. Rep. No. 187, at 7; 1 Leg. Hist. 408.

[92] On the political role of labor unions, *see generally* Pipe-fitters Local 562 v. United States, 407 U.S. 385 (1972) (unions may make political contributions with funds donated voluntarily); H. Wellington & R. Winter, The Unions and the Cities 72-73, 80-82 (1971).

[93] LMRDA § 402(c), 29 U.S.C. § 482(c) (1970). As we have seen, investigation before an election may foreclose the statutory remedy. *See* note 8 and accompanying text *supra*.

[94] Letter from George P. Shultz to Joseph L. Rauh, July 23, 1969, referring to § 402(b) of the Act. (emphasis added).

There is one further question that inevitably arises when the issue we have discussed is raised not in the context of a lawsuit but in the context of a challenge to the propriety of the Secretary's refusal to exercise powers which some argue he possesses and no court has ever expressly denied him.[97] It could surely be contended that given allegations of "massive" election law violations,[98] the Secretary should claim the power and let the courts decide whether he has properly done so. But we do not believe that such a course is appropriate for a public official who exercises statutory, quasi-prosecutorial functions as does the Secretary under Title IV. On the contrary, we believe that he must accept the restraints that he determines the law places upon his power.[99] For the government's resources are often greater than those of its opponents, and an unprincipled use of them could prove devastating to the citizens. Equally important, a public officer's construction of the statute he administers may well prove binding upon his successors and upon those who subsequently claim the benefits or seek the protection of that statute.[100] It is, therefore, improper for him to urge a construction of a statute which he believes is wrong. Finally, in a free society a public officer exercises power as trustee for the public. If he disregards the law, he subverts the rule of law, which is a vital component in the consensus that underlies his power.[101] Hence, when a public official exercises his prosecutorial functions lawlessly, he not only deserves criticism on moral grounds for betraying his trust, but also ultimately undermines the very government he is sworn to defend—even if that undermining does not become apparent until long after he leaves public service.

---

[95]

> We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.

Wirtz v. Local 153, Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968).

[96] In the letter quoted in the text accompanying note 94 *supra*, the Secretary claimed that the Department had the power to conduct a preballoting investigation but cited congressional intent that the Secretary act only after a member had sought intra-union relief as a reason for not exercising that power. Upon reflection, the Secretary came to the conclusion that the policy reflected a proper reading of the statute, not merely a departmental preference. Characterizing the Secretary's changed reading of his legal authority as a "startling about face," Rauh at 648, is a rhetorical flourish that obscures the close relationship between the proper construction of a statute and an enforcement policy based on the stated intent of the legislature.

[97] A student commentator has asserted that the Secretary has such power. Note, *Election Remedies Under the Labor-Management Reporting and Disclosure Act*, 78 HARV. L. REV. 1617, 1631 (1965). But the case upon which the writer relies, Goldberg v. Teamsters, Local 299, 293 F.2d 807 (6th Cir. 1961), did not involve an investigation of election conduct and the court's opinion is silent on the question.

[98] Rauh at 649. *See* pp. 9-12 *supra*.

[99] *See generally*, Arendt, *Reflections on Violence*, THE NEW YORK REVIEW OF BOOKS, Feb. 27, 1969.

V. CONCLUSION

Mr. Rauh's proposal for pre-election investigation, reporting and what amounts to ballot supervision by the Secretary runs headlong into the careful compromise Congress struck. Congress determined to stay the Secretary's hand pending intra-union proceedings; the commentator would have the Secretary preempt them. Congress afforded a charged union a court hearing before any findings were made that it had violated the Act; the commentator would have the Secretary issue an ex parte investigative report. Indeed, Congress carefully provided an administrative hearing where the Secretary is entrusted with the comparatively insignificant task of determining whether a union's organic law provides an adequate procedure for the removal of officers.[102] It is unthinkable that a statute affording such protections can be read to permit a pre-election report for which no hearing is provided.[103] Finally, Congress, over objections that the Act was inadequate to the task of assuring union democracy,[104] determined to minimize government interference in the internal affairs of unions. The commentator's proposal invites a political appointee of the President to intervene at a critical moment in the life of a union, gives him *carte blanche* to take whatever position he decides is appropriate, affords the charged union no statutory procedural protections, and does all this in the face of legislative history showing that the Congress explicitly rejected a proposal to allow the Secretary to intervene before an election and to disregard intra-union procedures. Fairly read, the statute does not permit the Secretary to administer the statute in that manner.

---

[100] *E.g.*, Sunbeam Television Corp. v. FCC, 243 F.2d 26 (D.C. Cir. 1957). When the FCC failed to follow its previous standards for granting a television license, the court of appeals remanded the decision to the FCC for further explanation.

[101] Arendt, *Reflections on Violence*, THE NEW YORK REVIEW OF BOOKS, Feb. 27, 1969, pp. 23-24. Arendt argues, cogently we believe, that governmental power rests on the consent of the governed—even where the consent is buttressed by terror. In a free society, fidelity to the law is a far more important source of governmental power than terror. *See id. See also Genesis* 18:25.

[102] LMRDA § 401(h), 29 U.S.C. § 481(h) (1970) (hearing to be in accordance with the Administrative Procedure Act).

[103] *See* S. 748, 86th Cong., 1st Sess. §§ 408(a), 409 (1959).

[104] *See* note 90 and accompanying text *supra*.

A court of law, pursuant to the statute, has now set aside the United Mine Workers election which gave rise to this controversy[105] and ordered a new one to be held under the supervision of the Secretary of Labor.[106] Nevertheless, it was beyond the court's power to order the remedy Congress had in mind. Joseph Yablonski's right to do battle in an election complying with the statute's requirements was taken from him forever by assassins' bullets. It may be that these terrible events justify a change in the statutory scheme. But that is a question for the Congress. What should not be and, we believe, is not questioned, is the obligation, even under the pressure of terrible events, of public officers, like judges, to respect the rule of law and to adhere to their best judgment of what the law is. The alternative is tyranny.[107]

---

[105] Hodgson v. UMW, 344 F. Supp. 17 (D.D.C. 1972); *see* note 8 *supra*.

[106] In the second election incumbent UMW President W. A. "Tony" Boyle was unseated by Arnold Miller. N.Y. Times, Dec. 18, 1972, at 19, col. 1.

The Secretary opposed and the court rejected intervenor Trbovich's proposal that a monitorship be imposed on the UMW, although the court did grant the Department's request that it be granted certain supervisory powers over the union and its subordinate bodies pending the election to prevent possible violations of Title IV. *See* 344 F. Supp. at 35-38.

Rauh's claim that the then Solicitor of the Department of Labor promised in 1970 to seek a monitorship is false. *See* Rauh at 658. To support his assertion, Rauh inserted a parenthetical expression referring to a monitorship or other third party supervisor "to preserve the union's assets" into a quotation from a letter written by Mr. Silberman to Senator Ralph Yarborough. The parenthetical does not appear in the original. *Compare* Rauh at 658, *with* Letter from Laurence H. Silberman to Ralph W. Yarborough, Aug. 24, 1970, in *Hearings on the Appointment of Laurence H. Silberman to be Under Secretary of Labor Before the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 37 (1970).

[107] J. LOCKE, SECOND TREATISE OF GOVERNMENT § 202 (J. Gough ed. 1956). *See also* Jones v. SEC, 298 U.S. 1, 27 (1936).

Senator McCONNELL. I have no further questions. Thank you, Mr. Silberman.

Mr. SILBERMAN. Thank you, Mr. Chairman.

Senator McCONNELL. The next witness is Paul N. Brown, of Texas, nominated to be U.S. district judge for the Eastern District of Texas.

Mr. Brown, if you would raise your right hand, do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BROWN. I do.

Senator McCONNELL. Mr. Brown, you have been a practicing attorney since 1951, including 2 years as U.S. attorney for the Eastern District of Texas. Now, you have been nominated for the position of U.S. district judge for the eastern district of that State. What do you feel will be the most rewarding aspect of serving in this capacity?

TESTIMONY OF PAUL N. BROWN, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Mr. BROWN. I think, Mr. Chairman, the ability to be in a position to make a contribution to a system of equal justice under the law.

Senator McCONNELL. There is frequently a conflict between the deeply felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between jurisprudence and precedent?

Mr. BROWN. Well, I would be bound to follow precedent, Mr. Chairman.

Senator McCONNELL. Mr. Brown, would you give us your own perspective on the recent trend in the Supreme Court toward stricter standards of standing?

Mr. BROWN. Well, I am favorably inclined toward that trend. I believe we need stricter enforcement of standards.

Senator McCONNELL. Mr. Brown, Thomas Jefferson remarked shortly after the ratification of the Constitution that "Our nation's particular security is the possession of a written Constitution. Let us not make it a blank paper by construction."

Mr. Brown, what do you think he meant by that warning, "Let us not make it a blank paper by construction?"

Mr. BROWN. Well, I think if that were carried to the extreme, the Constitution would become meaningless and stand for nothing. I think that is what he meant.

Senator McCONNELL. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

One of the codes of the American Bar Association says, and I am quoting, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." Can you tell me what you have done in that area?

Mr. BROWN. Well, I think I have done a good deal, Senator, over the years. I have always followed a practice of representing some indigents. In the past, we have had a legal aid society in which I have worked and taken my share of cases.

Senator SIMON. Has anyone asked you any questions that you considered improper in the course of your being considered for the Federal judiciary?

Mr. BROWN. Not at all.

Senator SIMON. When you went through this process, who asked you questions, in addition to your Senator?

Mr. BROWN. Well, I have been asked—of course, have been interviewed by FBI agents. I have been asked questions by people in the Department of Justice, but I have never been asked any questions that would attempt to—that I thought were improper.

Senator SIMON. No one asked you how you would rule on such and such a case?

Mr. BROWN. No, or my opinion on a specific case.

Senator SIMON. Did any organizations interview you other than the American Bar Association?

Mr. BROWN. No, sir.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator MCCONNELL. Thank you, Senator Simon.

Thank you, sir.

Mr. BROWN. Thank you.

Senator MCCONNELL. I would like to call now Mr. Alan McDonald.

Mr. McDonald, if you would raise your right hand, do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MCDONALD. I do.

Senator MCCONNELL. Mr. McDonald, you have been a practicing attorney for over 30 years. Now, you have been nominated to be a Federal district judge for the Eastern District of Washington.

I wonder if you foresee any difficulty in the transition from private practice to that of trial judge at the Federal district level.

TESTIMONY OF ALAN A. McDONALD, OF WASHINGTON, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WASHINGTON

Mr. MCDONALD. You mean other than the time involved in making the transition?

Senator MCCONNELL. Yes.

Mr. MCDONALD. I do not. Protocols, of course, are different, and it comes at a time in my life when that challenge should prove interesting. But I have been involved in a decisionmaking role in my own practice, in my own law firm, and in my own community, and I regard that as basic to the posting.

Senator MCCONNELL. Would you tell the committee that procedures you will follow in determining any potential conflicts of interest and how you intend to resolve them?

Mr. MCDONALD. I think like most private practitioners, I am more than sensitive to the difference in the way that matter is handled between State and Federal courts. Certainly, I feel very strongly that the appearance of justice would be best served by recusing when that is obviously the thing to do.

Senator MCCONNELL. Mr. McDonald, are there ever any circumstances under which a judge should attempt to establish new judicial precedent, and if so what are the criteria that you would consider in order to determine the propriety of reversing existing precedent?

Mr. McDONALD. Well, that is an area I would approach gingerly. I think, again, calling upon my experience as a practicing lawyer all these years that predictability is so important to those who labor in the vineyards of the law. And I think those occasions are going to arise only when the precedent is either nonexistent or ambivalent.

And I suppose as far as the factors are concerned that those would isolate themselves in the usual fashion to somebody who has a feeling for the law. The notion as to what is right always becomes evident.

Senator McCONNELL. In response to a portion of the committee questionnaire concerning judicial activism you stated, in part,

> While judicial legislation is inevitable to some degree if the common law is to provide growth and flexibility, the grand plan of our Constitution should inspire caution in providing that vitality.

Under what circumstances would you consider the matter of judicial legislation to be inevitable?

Mr. McDONALD. As I have indicated, I think it should occur in those situations, and there are enough of them. That is just a product of the evolutionary nature of the law, the common law. I think it should occur when precedent is either nonexistent or honestly ambivalent.

Senator McCONNELL. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

You heard me ask one of the previous nominees a question about membership in clubs that discriminate. Do you belong to any clubs that discriminate?

Mr. McDONALD. I belong to at least one club in my community where there are no lady members. I find nothing in its constitution or its bylaws or membership application that prohibits that.

Honestly, Senator, other than myself, the membership is so composed that it is possible that no other—that women would not care to join. But I think that as a matter of fact that they are not encouraged to join.

Senator SIMON. And do you intend to continue your membership?

Mr. McDONALD. Oh, yes. I do not—if there is to be a change made in that situation, if that is warranted, I say very seriously that the nature of it is such that I am not so sure that it would be interesting to someone of the other sex. But if it were and I were to support that, I would do it in a much better fashion were I a member of that organization than if I were someone who withdrew from it in some sort of meaningless protest.

Senator SIMON. You heard the bar association's concerns here and the judicial code of ethics, canon of ethics, that would indicate that it probably would be wiser for you not to continue that membership?

Mr. McDONALD. Yes, sir; I am aware of that before coming here.

Senator SIMON. Yes; I notice in your information you provided, you are a member of the Yakima Country Club, the Royal Duck Club, and the 26A Dining Club, and I do not know enough about any of those three to—which one are you talking about, the one that does not——

Mr. McDONALD. The last one, Senator, the one that is designated 26A.

Senator SIMON. You might want to reflect on that membership and inform the committee of whatever decision you make in that area.

Mr. McDONALD. All right.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator McCONNELL. Thank you, sir.

Mr. McDONALD. Thank you.

Senator McCONNELL. I would like to call now Alan H. Nevas of Connecticut, who has been nominated for U.S. district judge for the district of Connecticut.

Mr. Nevas, if you would raise your right hand, do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. NEVAS. I do.

Senator McCONNELL. Mr. Nevas, in reviewing your committee questionnaire, I noted that you are presently chairman of the Connecticut Organized Crime and Drug Enforcement Task Force Steering Committee.

Would you tell the committee what, in your opinion, have been the major accomplishments of the committee and what our law enforcement agencies can do to further deter illicit drug traffic?

TESTIMONY OF ALAN H. NEVAS, OF CONNECTICUT, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF CONNECTICUT

Mr. NEVAS. I think, Mr. Chairman, the major accomplishments in district of Connecticut have been twofold. One, we have been able to muster forces to combat major drug traffickers, people who bring major amounts, large amounts, of illicit narcotics into the district of Connecticut both by sea and otherwise, by combining agencies, having them cooperate—not only Federal agencies, but State agencies.

And I think the other—and we have made as a result of the task force some very, very major cases, cases that we would not have been able to make were it not for the fact that we had this cooperative effort.

And I think the other accomplishment has been a new spirit of cooperation that has developed amongst the Federal agencies themselves and as between the Federal agencies and State and local law enforcement agencies.

I have worked very hard in involving the State police and local police departments in our effort, and I think it has worked very well.

Senator McCONNELL. Mr. Nevas, it seems that many drug dealers, when arrested, are able to pay bond money easily and, in some cases, leave the country to resume their illegal activities elsewhere. What changes, if any, in bail reform do you feel should be implemented in order to prevent this type of activity?

Mr. NEVAS. Well, Senator, I think that the major change has already been accomplished, and that is in the Bail Reform Act of

1984, which took effect just about 1 year ago, last October, and which provides for the first time for basically what I call truth in bail.

I think now prosecutors have to be honest when they ask for pretrial detention. As you well know, sir, the Bail Reform Act does provide for pretrial detention, and it also provides—and the reason that I say truth in bail—it also provides that in the event that pretrial detention is not sought by the Government or if, in fact, it is sought but denied, then the judicial officer, whether it be the magistrate or the district judge, must set a bail that can be met. I think that that is a much fairer proposal, a much fairer method of dealing with people.

My experience in our district has been that I have been very, very careful in the cases in which we have sought pretrial detention. It is a requirement in my office that no assistant in my office can seek pretrial detention without my personal approval and I require them to explain to me why they think it is necessary.

And as a result, we have used it sparingly, but in those instances it has been worthwhile and has been salutory.

Senator McCONNELL. Mr. Nevas, in recent years Congress has given a great deal of consideration to reform of Federal habeas corpus procedures. Would you give us your thoughts on this subject?

Mr. NEVAS. Well, coming from a district that has a Federal prison within its boundaries, that subject is near and dear to my heart because habeas petitions coming out of the Federal correctional institution at Danbury create an enormous burden on my office and a tremendous problem.

I do not want to sound cavalier and to indicate that they are frivolous, but on the other hand, in all honesty and candor, I must say that an extremely small percentage of them are ever acted upon favorably and they are basically—many of them are the product of what we in the common parlance would call jailhouse lawyers.

And my feeling is the Congress should address that problem and perhaps fashion a remedy that still protects the rights of these inmates but does not burden the courts in the fashion in which we are currently being burdened, particularly those districts that have a Federal prison in the district.

Senator McCONNELL. Mr. Nevas, do you believe that changes in the law should be reserved to the legislature, whose members can be altered by the voters if the elected officials fail to reflect the values of the society?

Mr. NEVAS. Well, as a former legislator, Mr. Chairman, having served 6 years in the Connecticut General Assembly and having been responsible for shepharding and guiding legislation, I clearly feel that the legislature is the place for those laws to be formulated in response to the needs of the citizens.

Senator McCONNELL. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Has anyone asked you questions that you felt were at all improper as you were considered for the position?

Mr. NEVAS. No, sir.

Senator SIMON. I have no further questions, Mr. Chairman.

Mr. NEVAS. Thank you.

Senator SIMON [presiding]. I understand we have two more witnesses. Do you have the names?

Mr. SHORT. Lynn Williams and Anthony Martin-Trigona.

Senator SIMON. Would you raise your right hand? Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. WILLIAMS. Yes, I do.

Senator SIMON. If you can limit your statement to 5 minutes, we will enter a full statement in the record.

Ms. WILLIAMS. Pardon me, sir?

Senator SIMON. If you can limit your statement to 5 minutes, we will enter the full statement in the record.

TESTIMONY OF LYNN C. WILLIAMS, BRANFORD, CT

Ms. WILLIAMS. OK. The statement I have is in regard to the nomination of attorney Alan H. Nevas. I believe that attorney Alan H. Nevas is not worthy of becoming a Federal judge; he is not fit to become a Federal judge.

I have been involved with the Federal District Court of Connecticut and I have observed various news articles; I have looked at court records, and so forth. In two news articles, I came across information leading me to believe from the newspaper articles that he was derelict in conducting a Federal probe into controversial bribery allegations involving a Waterbury, CT, State prosecutor, and that he had given contradictory representations to the news media regarding his involvement.

The reason why I am bringing these issues up that I have brought up and that I am going to bring up is I feel that what I am going to disclose to the committee regarding my beliefs is indicative of what we could expect from attorney Nevas in the future.

He also was involved in a grand jury probe of an administrative law judge, and I believe he had a conflict of interest in this. I believe what he was doing was he was seeking a grand jury indictment at the same time that he was defending and his office was defending the same administrative law judge's Social Security denial appeal decisions. Now, that is my belief.

Further, he also was involved in litigation where he was a defendant along with a Federal judge, and the Federal judge was the judge that decided the case. Now, this is beyond attorney Nevas, but the Federal judge that decided the case—they were codefendants together, so therefore I feel that attorney Nevas should not have been—there was an interest that both of them had because they were both codefendants in this same lawsuit and it was totally improper that the Federal judge who was the codefendant was the judge on the lawsuit. I guess you would call it misfeasance on the part of attorney Nevas in this regard.

I am not an attorney. I am not schooled in the law, but I have assisted a pro se litigant and I have come to various conclusions, including that I feel that he has improperly manipulated the Federal grand jury system in Connecticut, especially with regard to the conflict of interest that I mentioned.

Also, I feel that he has violated ethical consideration 7-14, and further that he has made—this is from newspaper accounts, mind you—that he has made disparaging editorial comments against a civil litigant. And as an attorney, I feel that his comments were undignified and inappropriate.

From what I understand, lawsuit was brought in connection with the comments that he made regarding the civil litigant that I view as inappropriate for an attorney.

Further, I have been following the news accounts in regard to the Wells Fargo pending matter, and it seems that attorney Nevas withheld from the defense counsel representing the defendants the whereabouts of the defendants, and I feel that that is inappropriate. I feel that information should have been disclosed to the defense attorneys.

Therefore, I feel, you know, based on the totality of all of these various items that I have mentioned to the committee, that he should not become a Federal judge. A Federal judge wields an enormous amount of power, and just based on these various things that I have just mentioned now, I feel it would be a big mistake should he become a Federal judge.

Senator McCONNELL [presiding]. Thank you, Ms. Williams.

Mr. Nevas, do you have any reaction to this testimony?

Mr. NEVAS. I am not going to respond to Ms. Williams. However, I would be happy to answer any questions that any members of the committee have with respect to anything that Ms. Williams has said.

Senator McCONNELL. Senator Metzenbaum.

Senator METZENBAUM. Ms. Williams—is that your——

Ms. WILLIAMS. Williams, yes, sir.

Senator METZENBAUM. Have you had some particular experiences with the nominee either in the legal profession or otherwise?

Ms. WILLIAMS. I filed two grievances with the Federal grievance committee in Connecticut with regard to the U.S. attorney's office and attorney Alan Nevas, yes.

Senator METZENBAUM. And what were those about?

Ms. WILLIAMS. The first one was my belief that the U.S. attorney's office, under attorney Alan Nevas' leadership, violated ethical consideration 7-14. The second count of my complaint was the conflict of interest issue with regard to representing an administrative law judge's denial decision to social security appeals and at the same time having a grand jury probe of the same administrative law judge. I felt that that was a conflict, absolutely untenable——

Senator METZENBAUM. Repeat that for me; spell that out. What did he do? He had a grand jury investigation——

Ms. WILLIAMS. His office, under his leadership, they were—I would say attorney Alan Nevas was defending an administrative law judge's denial decisions to social security appeals. At the same time, the very same administrative law judge was under a grand jury probe for fraud and other charges.

I feel that that was an untenable position; that it was an absolute conflict of interest. And I filed a complaint; I was heard before the Honorable Peter Dorsey regarding the complaint. He returned a decision and his decision was that my complaint was unfounded.

But what I would like to stress to the committee is that the Honorable Peter Dorsey and Alan Nevas have an attorney-client relationship. They have an interest to advance each other's professional interests and personal financial interests, I feel.

Senator METZENBAUM. How is that?

Ms. WILLIAMS. Because Judge Dorsey was a codefendant in this lawsuit and he was serving as the judge to decide the lawsuit.

Senator METZENBAUM. But that is because he was a public official and had that responsibility, was that not true? He was not his private attorney?

Ms. WILLIAMS. Well, he was his attorney. I do not know the differentiation.

Senator METZENBAUM. Well, I mean, if you are a practicing lawyer, you are a private attorney. If Mr. Nevas retains you——

Ms. WILLIAMS. Well, they both had an interest.

Senator METZENBAUM. But was he not doing that as a public official?

Ms. WILLIAMS. Perhaps he was doing it as a public——

Senator METZENBAUM. Well, was he or was he not? You are a lawyer; you know whether he was or was not. Was he?

Ms. WILLIAMS. I am not a lawyer, sir.

Senator METZENBAUM. Oh, you are not a lawyer.

Ms. WILLIAMS. I am a lay person.

Senator METZENBAUM. I see.

Ms. WILLIAMS. I am unschooled in the law.

Senator METZENBAUM. I see. Then I am sorry.

Ms. WILLIAMS. OK?

Senator METZENBAUM. OK, very good.

Ms. WILLIAMS. OK, but what I am trying to point out is that I feel that it was a violation; it was masfeasance on attorney Nevas' part to be—he must have realized that the Honorable Peter Dorsey was a defendant in the lawsuit.

I think that the lawsuit—perhaps they should have gone to the Justice Department and say, look, we have to have somebody from outside this district decide this because we are named in this lawsuit.

There was at least an appearance of a conflict. That is my belief.

Senator METZENBAUM. I thank you.

Thank you, Mr. Chairman.

Senator McCONNELL. Just one question, Ms. Williams. Was the person on whose behalf you filed the grievance Richard Williams?

Ms. WILLIAMS. The person that I filed the grievance—wait a minute. Say that again, sir.

Senator McCONNELL. Was the person on whose behalf you filed a grievance Richard Williams?

Ms. WILLIAMS. I filed the grievance in my own behalf and in relation to my lay representation of Richard Williams.

Senator McCONNELL. I guess my question is are you related to Richard Williams?

Ms. WILLIAMS. Yes, I am.

Senator McCONNELL. Thank you very much.

That concludes the hearing. I want to thank all the witnesses for coming.

Ms. WILLIAMS. Thank you.

[Whereupon, at 3:19 p. m., the committee was adjourned.

[Prepared statement follows:]

LYNN C. WILLIAMS' STATEMENT OF TESTIMONY REGARDING ALAN H. NEVAS

Lynn C. Williams intends to testify Attorney Alan H. Nevas while acting in his capacity as United States Attorney for Connecticut misconducted himself and acted unethically and is therefore unfit and unworthy to serve as a member of the federal bar—let alone to serve as a lifetime member of the federal bench, as follows:

a. he was derelict in conducting a federal probe into controversial bribery allegations involving a Waterbury, Connecticut state prosecutor and has given contradictory representations concerning his truthfulness to the news media

b. he had made disparaging editorial comments against a civil litigant which comments were undignified and inappropriate—even if such comments were true

c. he has improperly manipulated the federal grand jury system on more than one occasion

d. he has demonstrated a lack of regard for his oath underlying his professional responsibility under the authority of the Code of Professional Responsibility of the American Bar Association

e. he has demonstrated an utter lack of regard concerning civil and human rights and constitutional values

f. he has assisted a Connecticut federal judge to act outside the bounds of the law in a civil lawsuit wherein he and such judge where co-defendants

g. he has violated Ethical Consideration 7-14

h. he has violated his professional code of conduct under the authority of the Code of Professional Responsibility of the American Bar Association in that he has simultaneously defended a former Administrative Law Judge whom he was reportedly conducting a grand jury probe—for the purpose of purportedly seeking a grand jury indictment to prosecute such Administrative Law Judge for fraud and other charges—for years

i. he has engaged in conduct prejudicial to the administration of justice and has himself acted outside the bounds of the law.

BIOGRAPHIES

LAURENCE H. SILBERMAN

NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT

Birth: October 12, 1935, York Pennsylvania.

Legal Residence: Washington, D.C.

Marital Status: Married to Rosalie Gaull Silberman, 3 children.

Education: 1957—Dartmouth College, A.B. degree. 1961—Harvard Law School, LL.B. degree.

Bar: 1962—Hawaii. 1973—District of Columbia.

Experience: 1961-1967—Moore, Torkildson & Rice (firm has had various other names) Associate & Partner. 1967-1969—National Labor Relations Board, Ofc of General Counsel, Enforcement Division, Attorney. 1969-1973—Department of Labor, Solicitor (1969-1970), Under Secretary (1970-1973). 1973-1974—Steptoe & Johnson, Partner. 1974-1975—Department of Justice, Deputy Attorney General. 1975-1977—Ambassador to Yugoslavia. 1977-1978—American Enterprise Institute, Senior Fellow. 1977-1978—Dewey Ballentine Busby Palmer & Wood, Of Counsel. 1978-1979—Morrison & Foerster, Partner. 1979-1983—Crocker National Bank, Executive Vice President. 1983-1984—State Department's Commission on Security & Economic Assistance, Vice Chairman. 1981-present—General Advisory Committee on Arms Control & Disarmament, Presidentially Appointed Member. 1983-present—Morrison & Foerster, Partner.

PAUL N. BROWN

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TEXAS

Birth: October 4, 1926, Denison, Texas.

Legal Residence: Texas.

Marital Status: Married to Frances Morehead, 2 children.

Education: 1943, 1944 & 1946-1947—University of Texas. 1947-1950—University of Texas, Law School, J.D. degree.

Bar: 1950—Texas.

Military Service: 1944-1946, 1950-1951—United States Navy.

Experience: 1951-1953—Keith & Brown, Associate. 1953—Brown & Brown. 1953-1959—Assistant U.S. Attorney, Eastern District of Texas. 1959-1961—United States Attorney, Eastern District of Texas. 1961-1965—Brown & Brown. 1965—Brown & Perkins. 1965-1967—Private practice. 1967 & 1971-1976—Brown & Hill. 1967-1971—Brown, Kennedy & Hill. 1976-1984—Brown, Hill, Ellis & Brown. 1984-present—Brown, Hill & Ellis.

ALAN A. MCDONALD

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF WASHINGTON

Birth: December 13, 1927, Harrah, Washington.

Legal Residence: Washington.

Marital Status: Married to Ruby K. McDonald, 3 children.

Education: 1946-1947, 1947-1968—Whitman College. 1948—University of Washington. 1949-1952—University of Washington, Law School, B.S. (1950), LL.B. (1952).

Bar: 1952—Washington.

Experience: 1952-1954—Deputy Prosecuting Attorney, Yakima County. 1954-1956—Halverson & Applegate, Associate. 1956-present—Halverson, Appelgate & McDonald, Partner.

ALAN H. NEVAS

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF CONNECTICUT

Birth: March 27, 1928, Norwalk, Connecticut.

Legal Residence: Connecticut.

Marital Status: Married to Janet Snyder Nevas, 3 children.

Education: 1945-1949—Syracuse University, A.B. degree. 1949-1951—New York University, School of Law, LL.B. degree.

Bar: 1951—Connecticut.

Military Service: 1952-1954—United States Army.

Experience: 1951-1952, 1954-1981—Nevas, Nevas & Robinson, (Currently Nevas, Nevas & Rubin), Associate and Partner. 1962-1970—Westport Board of Finance, Member & Chairman (1967-1970). 1970-1976—State Representative, Connecticut General Assembly. 1978-1981—Justice of the Peace, Town of Westport. 1981-present—United States Attorney, District of Connecticut.

CONFIRMATION HEARING ON: RICHARD H. BATTEY, JOSE ANTONIO FUSTE, JOHN S. RHOADES, SR., AND LYLE E. STROM

WEDNESDAY, OCTOBER 16, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:07 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon and Specter.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

The purpose of the meeting this afternoon is to hold hearings on several U.S. district judges.

The first is Richard H. Battey, of South Dakota, to be U.S. district judge for the District of South Dakota. We are very pleased to have the two able Senators here from South Dakota.

We will now hear from the distinguished senior Senator and then the junior Senator.

STATEMENT OF THE HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Thank you very much, Mr. Chairman.

I want to thank you and your staff for the expeditious way you have handled this nomination.

I want to introduce you to Dick Battey's wife, Shirley, who is here, if she would please stand. Shirley, we are very glad to have you here. Shirley and Dick have three children. Two sons, David and Russell, practice law, and their daughter, Dianne Raebel, resides in Chicago.

The CHAIRMAN. Are there any other family members or friends here that you wish to introduce?

Mr. BATTEY. Mr. Chairman, I have my longtime partner's son and his wife, Tom Gallagher and Nancy, who are here, and a longtime friend of mine, Col. Clifford Warfield, is also here, and I would like to have them recognized.

Thank you.

The CHAIRMAN. We are very pleased to have them with us.

Senator Pressler, you may proceed.

Senator **Pressler**. Mr. Chairman, this is one of the more pleasurable duties I have had, because Richard Battey is without question one of the leading citizens in our State. Out in South Dakota, being a U.S. Federal judge is the ultimate a lawyer can achieve. And Dick Battey represents the best in the profession in our State.

One of the most difficult duties of a U.S. Senator is the participation in the selection of these judges, but it is also one of the most rewarding experiences. But let me say that Dick Battey was selected by two committees in our State in the past—one committee, a State bar committee, and the other committee that Senator Abdnor and I established. He was selected bv these two committees as a finalist, by fellow lawyers, by consumers, by businessmen, and various people who were members of these committees.

So it is a great privilege to present him to this committee, and I recommended him to the President and the Attorney General for this appointment.

Dick Battey will bring to this Federal judgeship the dedication and hard work that make for the practical administration of justice. For the past 30 years, Dick Battey has been engaged in a successful law practice in Redfield, SD. From 1956 to 1963, he served as Redfield's city attorney, and was Spink County State's attorney from 1959 to 1965; and again from 1981 to the present.

He has held a number of State appointive offices, among which are: South Dakota Board of Regents of Higher Education, on which he served as president; and the South Dakota Higher Education Facilities Commission.

From 1976 to 1980, Dick served as a supreme court appointee to the South Dakota Board of Pardons and Paroles and has served as a special prosecutor for the State of South Dakota.

He has lectured and taught classes for the University of South Dakota on an extension basis on criminal justice and criminal law.

He attended the University of South Dakota, from which he received his law degree in 1953. He served in the U.S. Army as an infantry officer from 1953 to 1955.

I would also like to say that today is a special day for him, because it is also his birthday—he will not say which one, but the committee knows.

Dick Battey is held in very high regard among his colleagues in the legal profession. He has led an exemplary personal and professional life. He has maintained the highest standards for honesty, integrity, professionalism, and competence.

As I indicated on my blue slip which I returned to the committee, I am confident that Dick Battey possesses the ability, experience, judicial temperament, and philosophy to be an outstanding U.S. district court judge.

I urge this committee to recommend his confirmation to the full Senate, and I again want to thank you, Mr. Chairman, and your fine staff for the good work you have done on this nomination, and on our circuit court of appeals judge and on our previous district court judge.

Thank you very much.

The **Chairman**. Thank you very much.

Senator Abdnor.

STATEMENT OF HON. JAMES ABDNOR, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator **Abdnor**. Thank you, Mr. Chairman.

I, too, want to thank you for the expeditious way you have moved this nomination along. We appreciate it very much because we think it is very necessary in this particular situation, and we have an excellent candidate for you to confirm.

It is a distinct honor and a pleasure for me to join with my distinguished senior colleague, Senator Pressler, in presenting to the committee Richard Howard Battey of South Dakota, who has been nominated by the President to serve as a judge on the U.S. District Court for the District of South Dakota. He has been selected to fill the vacancy that occurred on that bench as Chief Judge Andrew Bogue elected to take senior status as of July 1, 1985.

I can tell you, Mr. Chairman, that I have known Mr. Battey for many, many years, both socially and in public affairs. I have no hesitation whatsoever in attesting to his credentials. He is known throughout South Dakota and is held in very high regard both in his legal profession and as an individual.

Mr. Battey, who grew up in Frankfort, SD, obtained his J.D. degree from the University of South Dakota in 1953. After graduation, and as a member of the South Dakota National Guard, he entered the U.S. Army and obtained the rank of first lieutenant prior to his discharge in 1955. He then commenced the practice of law in Redfield, SD, with Raymond A. Gallagher, a distinguished member of the South Dakota Bar and former National Commander of the Veterans of Foreign Wars, and Mr. Chairman, I am sure with all your keen interest in veterans' affairs, you will recall Ray Gallagher very well as he served in that important post.

Richard Battey has also served as State's attorney for Spink County for more than 12 years. During that period of time, he has prosecuted approximately 1,800 felony and major misdemeanor cases for the county and the State as special prosecutor. His court experience also includes 1,200 civil cases in State and Federal courts.

While specializing in trial practice, Richard Battey has demonstrated his unique abilities as a skilled litigator, and he has received the highest ratings from his peers for his legal ability and competence. He has served ably as a member of the South Dakota Board of Regents and represented the supreme court of South Dakota on the board of pardons and paroles.

So it was my privilege to join with Senator Pressler in recommending Mr. Battey to the President for this position, and I wholeheartedly support his nomination. I am confident that he will make an outstanding Federal judge, a judge who will perform his duties with diligence and a proper respect for the high standards of judicial restraint.

Mr. Chairman, I cannot say enough on behalf of this gentleman. I know that he is going to be an excellent judge.

Thank you.

The **Chairman**. Thank you, Senator.

Mr. Battey, I want to congratulate you upon being appointed by President Reagan to U.S. district court. It is probably one of the most desirable positions in the United States. To be a trial judge, you have to be in the court when the case is actually tried. And about 97 to 98 percent of them end right there, so you have got a great responsibility to mete out justice.

I also want to congratulate you on having both of your able and distinguished Senators come here in person and recommend you. They are held in high esteem in the Senate, and I am sure we will give great weight to your recommendation, based on their opinion, because they do not know you just like I do not know you, but I would take their recommendation.

I hope you will enjoy your service on the bench.

Please have a seat.

Next, we will hear from Senator Pete Wilson, in behalf of Mr. John S. Rhoades, Sr., of California, to be U.S. district judge for the Southern District of California.

Senator Wilson, we will be pleased to hear from you.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator Wilson. Thank you very much, Mr. Chairman.

I am most grateful to you and the committee for the opportunity to be able to present an old friend and a very distinguished lawyer who I think will make a superb district court judge.

In the interest of time, I will avoid the temptation to spell out in great detail the curriculum vitae of John Rhoades. It is a very distinguished story and deserves more time, but I believe the committee is familiar with it.

Mr. Rhoades is a graduate of Stanford and then of Hastings School of Law. He served in the U.S. Navy in World War II as lieutenant junior grade. Following his graduation from Hastings in 1951, he served as a city prosecutor for the city of San Diego, and later as a deputy city attorney on the civil side.

John Rhoades' private practice has been extensive. He has been involved in litigation in both the criminal and civil fields. Of particular note is his expertise in immigration law and planning and zoning issues. He is admitted not only to the U.S. Supreme Court, the Ninth Circuit Court of Appeals and various Federal district courts, but also to the Court of Claims and the Board of Immigration Appeals.

Perhaps Mr. Rhoades' most significant and most relevant experience relating to his future responsibilities as a judge in the Southern District of California was his tenure as Judge Pro Tem in the California Superior and Municipal Courts.

He has served with great distinction as an officer of a number of professional organizations. He is a member of the Board of Trial Advocates. He also served as president of the California Medical Legal Committee.

John Rhoades has had a distinguished career as an arbitrator. He served as a member of the Special Settlement Panels of the Superior Court and has served as an arbitrator for the Superior Court and for the American Arbitration Association. In 1982, he received the Special Award of Merit for Outstanding Achievement in Service to the Superior Court for his outstanding performance in the area of arbitration.

He has been a past member of the Judicial Selection Committee and the Superior Court Committee for the San Diego County Bar Association, he has also served on the San Diego County Bar Association's Professional Ethics Panel as well as the State Bar and the Appeals Court Ethics Committees.

He has been a contributor to a number of legal periodicals.

He has also found time to serve his community in a variety of ways too numerous to mention. One that was of particular interest and value to me, when I was mayor of San Diego, was his membership on the board of directors of the San Diego Transit Corp. from 1977 through 1979..

Mr. Chairman, in the interest of the committee's time, I will not further recite the lengthy and distinguished achievements of John Rhoades. I think you will agree that he will bring to the bench not only a wealth of experience, but also a record of obvious distinction. He has been accorded recognition for his work as a trial lawyer, as an arbitrator, and as someone who has served in the capacity of judge. He will assume this responsibility especially well-prepared to give the kind of service that will bestow credit upon the appointing authority and upon Mr. Rhoades himself.

Now, Mr. Chairman, if you will simply indulge me a bit personally. I have been privileged to know John Rhoades for, I guess it has been 15 years. And, my Judicial Screening Committee gave him the highest award that they give. The news that he had been selected by me for recommendation to the President was greeted in the community with, I think, an extraordinary degree of warmth—community support of a kind that I have not experienced in all the times that I have appeared before you. However, his was more than a popular choice. His nomination to the district court bench was also recognition of extraordinary professional skill and expertise, that is recognized by an A.V. rating in Martindale-Hubble. People who have been privileged to know John Rhoades either as opposing counsel, or judges observing him from the bench, or those who have been privileged to work with him, all have, I think, come to the common conclusion that he is prepared for a Federal judgeship not only by his skill and experience, but by an extraordinary judicial temperament.

He is tough-minded, and his intellect is such that he will bring to the job the qualities of scholar. He enjoys the law. He has been a practitioner for over three decades. But he is a man who is endowed with a greater sense of fairness and what we commonly call judicial temperament than perhaps anybody I have ever met.

I expect that he will be an even more popular judge than he was a lawyer. His combination of professional skill and scholarship and very keen sense of equity and I might add, something that I value in judges and in legislators, a very keen sense of humor, will probably mark him as someone whose courtroom is worth watching.

So I make no pretense of the fact, Mr. Chairman, that I do have an extraordinary personal interest in this nomination. Mr. Rhoades will be an extraordinary judge.

Indeed, as we were walking over here, he reminded me that once when I was about to introduce former Secretary of State, Dr. Kissinger, I had naively inquired of Dr. Kissinger how he wanted me to introduce him, and he said simply, "With whatever superlatives come to mind."

And Mr. Rhoades suggested that I might be guided in this instance in the same way. It is easy for me to do so because his career and the life that he has led in the community is one that prompts superlatives. It is easy to say that he is one of the finest men I have known, in addition to being one of the finest lawyers I have seen, and I am convinced that be will be an extraordinary judge, a superlative judge.

The **Chairman**. Mr. Rhoades, I want to congratulate you upon your appointment by the President and the very high endorsement that the able and distinguished Senator from California, Mr. Wilson, has given to you. Senator Wilson is held in high esteem here, and his opinion will go a long way with the entire Senate.

Senator Cranston has sent a statement endorsing Mr. Rhoades, and we will place that in the record at this point.

[Statement follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman, I am pleased that my colleague from California, Senator Pete Wilson, has recommended the nomination of John S. Rhodes, Sr., of San Diego for U.S. District Judge for the Southern District of California. Friends of mine who are lawyers in San Diego speak very highly of Mr. Rhoades' potential for the Federal bench; I, too, am delighted to express support for his appointment.

A resident of San Diego for over thirty years, Mr. Rhoades was born in Montana and graduated from Stanford University—my alma mater—in 1948, following three years of service in the Navy during World War II. He afterwards obtained his law degree at Hastings College of the Law—my son's alma mater—and passed the California bar in 1952. From that point on, John Rhoades has practiced law in San Diego, beginning as City Prosecutor and Deputy D.A. and culminating his career as senior partner in the law firm of Rhoades, Hollywood and Neal. He is well-respected by his fellow members of the bar, who value his universality—John Rhoades is extremely well-read and a student of English literature—his humanitarianism and his compassion. I know John Rhoades appointment would be well received in the San Diego community. And, speaking from a Democrat's point of view, I appreciate his reputation as a progressive, non-extremist Republican. I urge the committee to give Mr. Rhoades' qualifications favorable consideration and to recommend his speedy confirmation by the Senate. He has my full support.

The **Chairman**. Please have a seat, Mr. Rhoades.

Senator **Wilson**. Thank you, Mr. Chairman.

The **Chairman**. If any of the Members of the Senate or House have to leave, we will understand it.

Senator **Wilson**. Mr. Chairman, before we leave the table, I would ask your further indulgence to introduce Mr. Rhoades' wife, Carmel, who is in the audience.

The **Chairman**. We would be very pleased to have you do so.

Are there any other family or friends you wish to introduce?

Mr. **Rhoades**. No, Senator.

Senator **Wilson**. Mr. and Mrs. Rhoades are the parents of five grown sons, but none of them were able to be in attendance today.

The **Chairman**. Well, she looks pretty young to have five grown sons.

Thank you very much.

Thank you, Senator Wilson.

Senator **Wilson**. Thank you, Mr. Chairman.

The **Chairman**. Now, I notice the Nebraska Senators are here. Senator Exon and Senator Zorinsky, if you gentlemen will come around.

It is customary to take the senior Senator first, so we will take Senator Zorinsky first. You are here in the interest of Mr. Lyle E. Strom, of Nebraska, to be U.S. district judge for the District of Nebraska.

I was just wondering off-the-cuff if you are any kin to me. My mother was a Strom. They were Germans, and went to England, and the Queen of England sent them over here about 1670. Is that some of your crowd?

Mr. **Strom**. If they did, they split up somewhere on the east coast, because we all settled out in central Nebraska.

Senator **Simon**. I would like to say to the nominee, if you deny it too vigorously, that you may be in trouble here. [Laughter.]

The **Chairman**. We would be glad to hear from you, Senator Zorinsky.

STATMENT OF HON. EDWARD ZORINSKY, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator **Zorinsky**. Thank you, Mr. Chairman.

The Stroms are always very closely compatible in relationship, other than when Clemson appears against Nebraska in the Orange Bowl, and then we have a little problem.

The **Chairman**. Yes. I am sorry we had to beat you a few years ago, but I do not think we have played you since. I think we are afraid to try you again. [Laughter.]

Senator **Zorinsky**. Mr. Chairman, I am pleased to be here today to introduce a distinguished lawyer and nominee for the U.S. District Court in my home State of Nebraska, Mr. Lyle Strom.

Mr. Strom was born and raised in Omaha, NE. He received both his undergraduate and law degrees from Creighton University in Omaha, and has practiced law with distinction for over 30 years.

Mr. Strom's election to the prestigious position of Fellow to both the American College of Trial Lawyers and the International Academy of Trial Lawyers reflects the depth of respect which he has earned from his peers in the legal community.

Lyle Strom has proven himself to be an outstanding attorney and clearly possesses the requisite professional qualifications to join the judiciary. In addition, I believe that Mr. Strom has the type of personal qualities that will enable him to become a truly outstanding district judge. Many of his colleagues have taken it upon themselves to lavish praise on Mr. Strom, particularly citing his integrity, patience, compassion, and dedication to his family and his community.

Mr. Chairman, I am a small businessman by profession and not a lawyer, but from my vantage point, Lyle Strom appears to have the background, ability, and enthusiasm to uphold the common sense, even-handed legal traditions of our State of Nebraska. I urge the committee to approve Mr. Strom's nomination.

And Mr. Chairman, I would like to take this opportunity to introduce Mr. Strom's wife, who is here, Regina Strom, also his son who is here, Brian Strom, if they will stand up.

Thank you.

The CHAIRMAN. I would observe they have seven children. He is upholding the Strom tradition of big families.

Senator ZORINSKY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. We are very pleased to have you.

[Letters follow:]

LAW OFFICES OF
RICKERSON & WELCH
SUITE 1, 212 SOUTH 108 AVENUE
OMAHA, NEBRASKA 68154-2683
TELEPHONE 333-8608

JOHN A. RICKERSON
JAY L. WELCH
FRED H. BROWN

May 20, 1985

The Honorable Edward Zorinsky
United States Senator
215 North 17th Street
Omaha, Nebraska 68102

Re: Federal Judgeship

Dear Ed:

Please lend your support to the appointment of Lyle Strom to be our next United States District Judge in Omaha.

At sixty years of age, Lyle is in his intellectual prime and would have many good years of judicial service; younger judges occasionally either "burn out" before their normal judicial expectancy has been served, or they so lose sight of the practicalities of litigation that they also suffer a decline in the quality of true justice.

Best personal regards,

Jay

Jay L. Welch

JLW:mas

LAW OFFICES
ABRAHAMS, KASLOW & CASSMAN
8712 WEST DODGE ROAD
SUITE 300
OMAHA, NEBRASKA 68114
TELEPHONE 392-1250
AREA CODE 402

MILTON R. ABRAHAMS
BEN E. KASLOW
FREDERICK S. CASSMAN
HOWARD J. KASLOW
FRANK F. POSPISHIL
WILLIAM H. COATES
JOHN W. HERDZINA
JOHN S. KATELMAN
HARVEY B. COOPER
RANDALL C. HANSON
R. CRAIG FRY
PAUL R. ELOFSON
TERRENCE P. MAHER

May 14, 1985

Hon. Edward Zorinsky
432 Russell Office Building
Washington, D.C. 20510

Dear Ed:

We strongly recommend the appointment of Lyle Strom to be Judge of the United States District Court for the District of Nebraska.

We have known Lyle for more than 30 years and consider him to be of the highest character and integrity as well as one of Nebraska's outstanding attorneys. We believe him to be the most qualified candidate for appointment to the Court.

Any assistance you may be in a position to lend on behalf of Lyle Strom will certainly be appreciated.

Very sincerely yours,

Milton R. Abrahams

Frederick S. Cassman

FSC:cjy
cc: Mr. Lyle Strom

CREIGHTON
UNIVERSITY

School of Law

G. Michael Fenner

May 16, 1985

Senator Edward Zorinsky
Senate Russell Office Building
Constitution Avenue
Washington, DC 20510

Dear Senator Zorinsky:

Knowing that you are unusual for a Democrat, in that you have influence with this Republican administration, I am writing to you regarding the vacancy in the United States District Court for the District of Nebraska.

No one is more respected throughout the state, for his talents and his temperament, than is Lyle Strom. No one has given more of himself, to his family, his profession, and his community, than Lyle Strom. No one could bring more compassion, experience, or intelligence to a judgeship than Lyle Strom.

Lyle Strom is known for his integrity, for his intelligence, for his patience, and for his selflessness. From the Bar Association to the Boy Scouts, when help is needed, Lyle is always ready, willing, and most able. He has offered himself once again, and we would all be better off if, once again, we take him up on his offer.

Nebraska is fortunate to have people like Lyle Strom put themselves forward for these important a positions. I hope we are wise enough to take him up on it, and that you will do whatever you can to see that this right choice is made.

Thank you.

Sincerely,

G. Michael Fenner

G. Michael Fenner
Professor of Law

GMF:cm

The CHAIRMAN. Senator Exon.

STATEMENT OF HON. JAMES EXON, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator EXON. Mr. Chairman, thank you very much.

It gives me a great deal of pleasure to introduce to the Senate Judiciary Committee Lyle Strom. He is President Reagan's nominee for a vacancy on the district bench, and I enthusiastically endorse that nomination.

As Governor of the great State of Nebraska, I always considered judicial appointments one of my most important responsibilities. And certainly, the chairman of this committee and the other committee members have an important responsibility when they review recommendations from the executive branch.

The Chief Executive's influence on a State or a nation's legal system survives a long, long time after he or she leaves office. Similarly, when I was Governor, I always viewed the confirmation process of judges as tremendously important. Whenever I made those judicial appointments back a few years ago, I considered each and every one of them and tried to make the choice from the best available to me from our so-called Missouri plan system of appointment of judges.

Lyle Strom is the type of individual that I would be proud to appoint to any judicial office. He has a long and distinguished record of service in Nebraska, the Nation, and the legal profession.

Since his graduation with honors from Creighton University in 1958, Lyle Strom has enjoyed a reputation as one of Omaha's finest trial lawyers. He has been a leader in Omaha, NE in the National Bar Association and has been an active member of the American Trial Lawyers Associaion, the Nebraska Trial Lawyers Association, and the American Judicature Association.

I am pleased, therefore, Mr. Chairman, to make a commitment that he will go down as one of our outstanding jurists. Over the years, he has found time to teach trial practice at Creighton University. His generosity with his time has had a profound effect on a generation of Creighton attorneys.

Lyle Strom is a most qualified candidate for the Federal bench. I give him my strong endorsement and encourage this committee to promptly approve his nomination and send it to the floor, where I am confident it will be unanimously approved.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Exon.

Mr. Strom, I want to congratulate you upon your appointment by President Reagan, and I want to especially congratulate you upon having both of your Senators come here in person. That is not always the case for many appointees. The Senators have taken the time from their work to come here and speak in your behalf, and that means a great deal, because they are both able men and held in high esteem here. I hope we can get all of you nominees on the calendar for tomorrow's consideration.

Thank you very much.

We will excuse the Senators and come back to you in a few minutes with questions.

Now, for Mr. Fuste, Congressman Stangeland, if you will come around.

Congressman Stangeland, we will be very pleased to hear from you. This is Judge Jose Antonio Fuste, isn't it? Is that the way you pronounce it?

Mr. FUSTE. Fuste.

The CHAIRMAN. Thank you.

Mr. Fuste, we are very pleased to have you here.

Mr. FUSTE. Thank you, Mr. Chairman.

The CHAIRMAN. You may proceed, Congressman Stangeland.

STATEMENT OF HON. ARLAN STANGELAND, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. STANGELAND. Thank you, Mr. Chairman. Let me say it is a privilege to appear before you today to introduce to you Mr. Jose Antonio Fuste, who is the President's nominee for a position on the bench of the U.S. district court of the District of Puerto Rico.

Mr. Fuste, of course, is to my right. To his right is the Honorable Juan M. Perez-Jiminez, who is the Chief Judge of the District Court in Puerto Rico.

Also in the audience is Mr. Fuste's wife, Mary Katherine Harris.

The CHAIRMAN. Do you have any other friends or family you wish to introduce?

Mr. FUSTE. Yes, Mr. Chairman, Maria Maldonado, my cousin, who lives here in Washington, is here present sitting next to my wife.

The CHAIRMAN. Thank you. We are glad to have you with us.

Mr. STANGELAND. For the record, I would like to offer two strong letters of personal recommendation for Mr. Fuste, from men who have served Puerto Rico and our Nation well. The first letter is from a man whom I understand is a personal friend of your own, Senator Thurmond. The letter is from Mr. Louis Fere, the former Governor of Puerto Rico. Governor Fere states in his letter, and I quote, that "It is without any hesitation that I lend my full support and endorsement to Jose Fuste. He has served Puerto Rico honorably for over 20 years and has earned the reputation within our community as a man of unimpeachable integrity and, most important, common sense."

The Governor goes on to write, and I quote again, that he is "pleased and honored to recommend Jose Fuste to you as a man intellectually well-suited for the important public trust for which he is being considered."

The second letter is from a personal friend of mine, Mr. Balthazar Corrada. Mr. Corrada left Congress last year as Puerto Rico's Resident Commissioner to become the mayor of San Juan, PR. Mayor Corrada writes of Mr. Fuste, "He is an outstanding lawyer in our community who has a reputation of professionalism and a deep commitment to justice."

The letter goes on to describe Mr. Fuste's excellent moral character, personal integrity, and highly competent legal mind.

Now, these are powerful words from two men who know that such strong praise should be reserved for those who earn it. In my opinion, Mr. Fuste has earned such praise.

Now, you might wonder why a Congressman from Minnesota is introducing a nominee from the sunny isle of Puerto Rico. The fact of the matter is that I have a very dear personal friend of longstanding and a very strong supporter of mine by the name of Jack Thomas, in Little Falls, MN. Mr. Thomas has a daughter and son-in-law living in Puerto Rico, and Mr. Thomas has met Mr. Fuste, and Mr. Thomas' son-in-law happens to be a law partner of Mr. Fuste. So Mr. Thomas asked me to do this. I researched the record, and I asked President Reagan to nominate Mr. Fuste for the position.

It is my belief that Jose Fuste is exactly the type person we need on the Federal bench, and after this hearing, I hope you will agree with me and ask the full Senate to confirm his nomination.

I have requested of your very kind staff to duplicate some of Mr. Fuste's biographical data, and they are available for the committee, and I would request that afterwards Mr. Fuste be provided a couple of those copies.

I thank you very much, Senator Thurmond and Senator Simon.

The CHAIRMAN. Thank you very much, Congressman. We are glad to have you here, and your endorsement speaks very highly of him and I am sure it will be very beneficial to him.

Did the Judge have anything to add?

Judge PEREZ-JIMINEZ. Just to express my appreciation, Mr. Chairman, on behalf of the District Court, as chief judge, and the other judges there, for the fine work that your staff has done in behalf of the District Court of Puerto Rico and Mr. Fuste. I know that you are very pressed for time and you have quite a backlog, but because of Mr. Duke Short and the other members of your staff's help to our district, and considering that you are the honorary Senator from Puerto Rico, we appreciate your help to us.

Thank you very much.

The CHAIRMAN. Thank you. We are glad to have you.

I congratulate you, Mr. Fuste, on your appointment by the President, and the high endorsement here of this distinguished and able Congressman and the distinguished chief judge down there, I am sure, will put you in pretty good shape.

Mr. FUSTE. Thank you very much, Mr. Chairman.

The CHAIRMAN. If you would just have a seat back there, please.

We have a vote on, and Senator Simon, I guess we had better go and vote and come back.

Senator SIMON. Yes. It is apparently going to be a series of votes, three or your votes.

The CHAIRMAN. We will come back as soon as we can, and we will have some questions to propound to each of you four gentlemen. So as soon as we get through voting, we will be back.

[Recess.]

The CHAIRMAN. Now, the committee will come to order.

Would all the nominees stand and be sworn at one time? Do you swear the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BATTEY. I do.

Mr. FUSTE. I do.

Mr. RHOADES. I do.

Mr. STROM. I do.

The CHAIRMAN. Please have a seat.

We will take you in the order you are listed on the agenda. The first one is Mr. Battey, of South Dakota.

TESTIMONY OF RICHARD H. BATTEY, OF SOUTH DAKOTA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA

The CHAIRMAN. Mr. Battey, you have been a practicing attorney for over 30 years, I believe?

Mr. BATTEY. That is right, Mr. Chairman.

The CHAIRMAN. And you have been recommended to be a Federal judge for the District of South Dakota. Do you have one district in South Dakota?

Mr. BATTEY. Yes, sir.

The CHAIRMAN. And how many judges have you?

Mr. BATTEY. We have three active judges and two on senior status, Senator.

The CHAIRMAN. I wonder if you foresee any difficulty in the transition from private practice to that of a trial judge at the Federal district level?

Mr. BATTEY. I do not think so, Mr. Chairman; in fact, I welcome it. I have been 30 years in the arena, and I have had 4 years in quasi-judicial work on the board of pardons and paroles, and I think it is a natural transition.

The CHAIRMAN. Mr Battey, would you give the committee your views on penalties that should be imposed for second and third-time drug violators?

Mr. BATTEY. Well, sir, I believe in graduated punishment, and the second and third offenses indeed, I believe, ought to bear the brunt of second and third mistakes.

The CHAIRMAN. I do not know of anything today that is doing young people and others, too, more harm than drugs; they are destroying the lives of so many, causing a lot of suicides. It is just awful the way these drugs are sold to these people.

Mr. Battey, what kind of guidelines, if any, do you feel a judge should follow in determining the suitability of Federal intervention into State affairs?

Mr. BATTEY. Well, Mr. Chairman, I think since the Federal court is a court of limited powers that one ought to proceed with caution in those areas. The most difficult thing a person can do, whether he is a judge or any other person with responsibility, is to be called upon to make a decision and to exercise power where that may be difficult and he may not have the power.

So I would proceed with caution in that area.

The CHAIRMAN. Mr. Battey, are there ever any circumstances under which a judge should attempt to establish new judicial precedent, and if so, what criteria would you consider in order to determine the priority of reversing the existing precedent?

Mr. BATTEY. Well, sir, I think one has to follow the rule of stare decisis. But having said that, if the Constitution is going to be a living instrument for people in this time, I believe that based upon the set of facts that are presented, that one should have the integrity to change precedent if the facts call for it.

I mentioned in my statement that I do not believe that judges are free to roam at-large, but if the facts in any particular case dictate it, I think a judge should have the integrity to make that kind of a judgment.

The **CHAIRMAN**. I believe those are all the questions I have. I hope you have a happy tenure on the bench.

I will now turn to my distinguished colleague, the Senator from Illinois.

Senator **SIMON**. Thank you, Mr. Chairman.

Let me simply say that we have gone over the records on all four of these nominees. We find there are no problems; we have no objections to taking all four of these nominees up tomorrow.

Let me just read one brief item into the record. I just read a speech that Archibald Cox gave last month in which he talks about the responsibility of the judges to the law and not to friends and to other things.

He says: "My mind goes back to my days as a law clerk for Judge Learned Hand, one of the great Federal judges who never reached the Supreme Court.

" 'Sonny,' he said, 'to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, cannot make me decide as they wish. Everyone should be responsible to someone.

" 'To whom am I responsible?' Then he turned and pointed to the shelves of his library: 'To those books about us. That is to whom I am responsible.' "

And with that gentle admonition from Judge Learned Hand, I am going to have to leave the committee for another meeting, Mr. Chairman. But it looks like we have a group of four fine judges here.

Thank you.

The **CHAIRMAN**. Thank you, Senator, for being here.

That is all, Mr. Battey. We will excuse you.

Mr. **BATTEY**. Thank you, Mr. Chairman.

The **CHAIRMAN**. Next is Jose Antonio Fuste, if you will come around.

TESTIMONY OF JOSE ANTONIO FUSTE, OF PUERTO RICO, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF PUERTO RICO

The **CHAIRMAN**. Mr. Fuste, in reviewing your committee questionnaire, I noted that your litigation experience has been primarily civil in nature. Do you feel that your lack of criminal trial experience will in any way hinder you in the performance of your duties as a Federal judge?

Mr. **FUSTE**. Mr. Chairman, I do not think that that will be the case. Since my law school days, I have always liked criminal law, and even though the course of events took me to civil litigation, I have always tried to keep myself as much as I can up-to-date on criminal matters. It is something I like, it is something I study from time to time, or as much as I can, and I am going to devote all the time that I need, with the aid of the Federal Judicial Center, to put myself fully up-to-date and do my job in that aspect.

The CHAIRMAN. Mr. Fuste, during your career, you have had extensive litigation experience before Federal courts, I believe?

Mr. FUSTE. That is correct.

The CHAIRMAN. Would you give us your opinion on the suggestion that attorneys undergo special training before being allowed to practice in the Federal courts?

Mr. FUSTE. Mr. Chairman, if I am going to answer that question, I will have to relate it to my experience in the District of Puerto Rico.

I do believe that in our law schools, the teaching of Federal jurisdiction, Federal civil procedure, and Federal criminal procedure, is deficient. To that effect, the court to which I expect to belong is part of a pilot program to enhance the quality of lawyers who are admitted to the bar. Our court is administering a test, a bar examination, for all material purposes, to new lawyers who wish to become members of the bar. I believe that it is the duty of the Federal Bar Association—in our case, the San Juan Federal Bar Association chapter is doing this—of putting up seminars to assist and help in a continuing education matters for benefit of applicants to this examination.

I do believe that Federal courts, due to the nature of the cases that are tried before them, require certain expertise in Federal law, and I believe that in our case we are doing the best we can to attain the above.

I myself teach a course in Federal law at the University of Puerto Rico School of Law ad honorem, and in that sense, I am doing the best I can to assist. But I agree with you that there is a need for this special training.

The CHAIRMAN. Mr. Fuste, article V of the Constitution establishes the procedures by which the Constitution is to be amended or altered. Do you believe that article V specifies the only means by which the Constitution should be amended?

Mr. FUSTE. Mr. Chairman, I am convinced that the Constitution is to be amended the way the Constitution states it should be amended. Judges should not amend the Constitution. Judges are there to interpret the constitutional mandate, the laws and the treaties, and in that sense, I am a firm believer that restraint and due respect to the issues of standing, ripeness and jurisdiction should be exercised.

The CHAIRMAN. Mr. Fuste, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Mr. FUSTE. There are other ways of dealing with this type of problem. I believe that the system is designed with three branches, and the legislative and the executive have the responsibility to deal with certain problems which the judiciary should not intervene or should try not to intervene in a routine manner.

I am aware of the different doctrines and the different views which are being shared these days on judicial activism, and I belong to the school of thought that "restraint" is the word for this type of thing.

The CHAIRMAN. In other words, do you think a judge would have the right to act if the legislature failed to do its duty, or do you think that Congress is responsible for making the law, the executive branch for implementing the law and administering it, and the judiciary, to interpret the law?

Mr. **Fuste**. Correct. Congress makes the law. Executive orders may supplement through regulation certain aspects of the law, and the courts are there to interpret, uphold and defend those laws.

The **Chairman**. And because the Congress does not do its duties, does that give any excuse to the judiciary to come in and act?

Mr. **Fuste**. I do not think so, sir. The most a judge can do is point out in a decision the "lagoon," if we can call it that, and it will be up to Congress to deal with it.

The **Chairman**. Thank you very much. I hope you have a successful tenure on the bench.

[Letters follow:]

Luis A. Ferré
San Juan, Puerto Rico

Former Governor of Puerto Rico

October 11, 1985

The Honorable Strom Thurmond
Senator
United States Senate
Washington, D. C. 20510

Dear Senator Thurmond:

As former Governor of Puerto Rico and acting Chairman of the Republican Party of Puerto Rico, it is an honor for me to address you today concerning the nomination of Mr. José A. Fusté to the United States District Court for the District of Puerto Rico.

Because I am unable to travel to Washington, D. C., at this time to attend the confirmation hearings for Mr. Fusté, I ask that my letter be included in the record.

It is without any hesitation that I lend my full support and endorsement to José A. Fusté. He has served Puerto Rico honorably for over twenty years and has earned the reputation within our community as a man of unimpeachable personal integrity and most important--common sense.

I am well pleased and honored to recommend José A. Fusté to you as a man intellectually well-suited for the important public trust which is associated with such an appointment for which he is now being considered for.

With my very best wishes.

Sincerely,

Luis A. Ferré

BALTASAR CORRADA DEL RIO
Mayor
Capital City of San Juan

October 14, 1985

The Honorable Strom Thurmond
Senator
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

As the former Resident Commissioner of Puerto Rico in Washington, it is my pleasure to endorse and support President Reagan's nomination of my good friend José A. Fusté for the U.S. District Court of Puerto Rico.

Mr. Fusté enjoys a solid reputation as an outstanding lawyer in our community and has built up a reputation of professionalism and deep committment to the ends of justice. This nominee is of excellent moral character, personal integrity and is in possession of a highly competent legal mind.

I strongly endorse and support his nomination. His experience and intellectual capacity will add a very positive contribution to our judicial system.

With my best wishes.

Sincerely,

Baltasar Corrada del Río
Mayor of San Juan

Capital City of San Juan - Box 4355 - San Juan Puerto Rico 00905 - Tel. (809) 724-7171

The CHAIRMAN. Mr. Rhoades, would you come forward, please?

TESTIMONY OF JOHN S. RHOADES, SR., OF CALIFORNIA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

The CHAIRMAN. Mr. Rhoades, you have been a practicing attorney since 1952, I believe, and now you have been nominated for the position of U.S. district judge for the Southern District of California.

What do you feel will be the most rewarding aspect of serving as a Federal judge?

Mr. RHOADES. Mr. Chairman, I am particularly looking forward to being a trial judge in the trial court, because a trial judge is helping society deal with the problems of society, in the criminal justice system. You resolve disputes between citizens. You are there, making decisions on a day-by-day basis.

I think what you do not do is important in the sense that you do not make policy; you interpret the laws, as has been demonstrated by the previous nominee.

The CHAIRMAN. Mr. Rhoades, what are the primary purposes of the criminal justice system?

Mr. RHOADES. To efficiently, speedily, fairly, and within the framework of the Constitution, dispose of cases.

The CHAIRMAN. Mr. Rhoades, how does a responsible judge go about the process of interpreting such seemingly open-minded constitutional provisions as the "due process" or "equal protection" clauses?

Mr. RHOADES. The 14th amendment to our Constitution has been there since 1868. Because of that, there have been numerous decisions and precedents. I think one of the problems in the law today is that there has been an ignoring of precedents; it leads to anarchy in the law, because people do not know how to conduct their ordinary affairs.

So I would rely on precedent, No. 1.

No. 2, you would have to go through the usual process if there is no precedent, of constitutional interpretation of the legislative history of the Constitution, and then you have to use common sense as to what the framers of the Constitution meant.

The CHAIRMAN. Mr. Rhoades, to what extent do you see the American system of federalism, or division of responsibilities between the National and State Governments, as an institution for checking the abuse of governmental powers?

Mr. RHOADES. One of the problems in American society today is that we are getting further and further from the neighborhood, from the town, from the State, and to the Federal Government. Because of that, the conflict that exists between article VI of the Constitution and the 10th amendment, which has been kind of put into the judicial dustbin, that what is not given to the Federal Government is reserved to the States and people has been ignored. So I believe that there should be every effort made, and the judge has a responsibility to try and protect the concept that the local government can oftentimes usually do better than the Federal Government.

The **Chairman**. Mr. Rhoades, I think those are all the questions I have. I hope you enjoy your service on the bench.

Mr. **Rhoades**. Thank you, Mr. Chairman.

The **Chairman**. We are going to try to get all of these nominations up tomorrow, if we can, and get them on the agenda. I would like to get them confirmed by the committee tomorrow, if it is possible to do so.

Mr. Strom, would you come around?

TESTIMONY OF LYLE E. STROM, OF NEBRASKA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEBRASKA

The **Chairman**. Mr. Strom, you have engaged in litigation on both the State and Federal levels in the State of Nebraska. Do you believe that litigants in State courts receive the same level of fairness, due process, and equality of justice as litigants in Federal courts?

Mr. **Strom**. I certainly think that is true in Nebraska, Mr. Chairman. We have adopted the Missouri plan of selection of judges, and the judges that have been selected and placed on the bench of Nebraska, I think, on the State courts, are doing an outstanding job. I think the level of justice in both courts is high.

The **Chairman**. Some people have the idea that all the brains in the Federal system are either here in Washington, on the Federal bench, or otherwise. My experience has been that the people back in the States have just as much brains as those engaged in Federal positions.

Mr. **Strom**. If you go out into outer Nebraska and try cases before the District judges in the rural counties, you find that those judges are every bit as effective and knowledgeable as the judges in the cities.

The **Chairman**. Mr. Strom, would you tell the committee what procedures you will follow in determining potential conflicts of interest and how you intend to resolve them?

Mr. **Strom**. Well, obviously, for the next year or two, while the partnership of which I am presently a member and I are terminating our financial arrangements, I would have to recuse myself in every case in which they are involved.

Following the resolution of that financial settlement, I have thought that there would probably be a short period of time, maybe 6 months or 1 year, in which I would continue to take that position.

With respect to clients for whom I have had the primary responsibility in representing during the course of my trial experience, I just have to look at those cases, I think, individually after the time arises and decide whether or not there is any problem. I would bring to the attention of the attorneys involved my former representation so if they felt they wanted to move under title 28, section 144 of the judicial code, they could, and we could then examine the situation.

The **Chairman**. Mr. Strom, I consider judicial temperament to be a prerequisite for a Federal judge. I have seen some Federal judges embarrass witnesses and jurors and attorneys, without any reason, and just flaunt their power.

Would you give me your thoughts on this subject?

Mr. STROM. Well, I think the position of the judge, in Federal court or in State court, is to see that everybody who appears before him, whether it be a party litigant, a witness or an attorney, is treated fairly and with respect; that every person is given an opportunity to be heard, and that the decision that the judge makes, whether from the bench or in chambers afterwards, will reflect the conclusions he draws from their testimony. In the courtroom, he ought to engender respect not only for the position he holds, but for the system of laws that he represents.

The CHAIRMAN. Mr. Strom, in the committee questionnaire, you stated,

> I believe the charge of judicial activism is frequently levelled at courts by those who are very unhappy or dissatisfied with the action of the court. Every decision which the court hands down generally makes one person or group of persons unhappy and another person or group of persons happy. Merely making a decision which is unpopular does not constitute judicial activism.

What would you say does constitute judicial activism?

Mr. STROM. Well, I found that, Mr. Chairman, an interesting question when it was presented to me in the questionnaire.

I start out with the proposition—certainly, at the trial level, the opportunities for judicial activism do not exist as they do in the appellate, circuit court or the Supreme Court level. It seems to me that judicial activism primarily is a judge taking an opportunity in a case to establish a new line of decisions so as to institute, if he can, his philosophy or his thought as to what the policy of the law ought to be or what the morals of the community should be.

It seems to me a trial judge's primary responsibility is to resolve disputes which are before him in the light of the applicable law which is available and by which we are bound.

The CHAIRMAN. I have seen some Federal judges who have taken over running of school districts, hospitals, other State institutions, who seem to want to broaden their power instead of sticking to their job of deciding cases under the law and the Constitution. To me, it is very objectionable when they undertake to do things of that kind. We have a division of powers between the Federal Government and the States. The States ought to be allowed to handle their own affairs. In some cases, I think some Federal judges have abused that. To my mind, that is very objectionable. How do you feel?

Mr. STROM. I feel pretty much the same way. I have in mind as an example an incident in Nebraska where Judge Schotz—whose death has created the position I hopefully will fill—was in effect directed to take over the integration of the schools in Omaha. While he had rejected that position himself initially, the Court of Appeals and ultimately the Supreme Court directed him to do that.

Now, I do not feel like that is the job of a judge. I do not feel like I am competent to run a school district or anything else of that kind. I do not think I have been trained in that area. I think I have been trained to properly analyze the law and resolve the disputes between parties.

The CHAIRMAN. There is a temptation on the part of some people to just assume more power. Well, there is only so much power, the

Federal power and the State power. And if each would just abide by the Constitution, we will not have any trouble.

Mr. STROM. I would agree with you.

The CHAIRMAN. I think that is all. I hope you enjoy your service on the bench.

Mr. STROM. Thank you very much, Mr. Chairman.

The CHAIRMAN. We stand adjourned.

[Whereupon, at 3:50 p. m., the committee was adjourned.]

BIOGRAPHIES

RICHARD H. BATTEY

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH DAKOTA

Birth: October 16, 1929, Aberdeen, South Dakota.

Legal Residence: South Dakota.

Marital Status: Married to Shirley Ann Travis Battey, 3 children.

Education: 1947-1950—University of South Dakota. 1951-1953—University of South Dakota, School of Law, LL.B. degree.

Bar: 1953—South Dakota.

Military Service: 1953-1955—United States Army.

Experience: 1955-1956—Norbeck & Gallagher, Associate. 1/56-8/56—Norbeck, Gallagher & Battey, Partner. 1956-present—Gallagher & Battey, Partner. 1956-1963—City Attorney, Redfield, So. Dakota. 1959-1965; 1981-present—State's Attorney, Spink County, So. Dakota. 1976-1981—Board of Pardons & Paroles, State of South Dakota, Member 1976-1980, Chairman 1980-1981.

JOSE ANTONIO FUSTE

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF PUERTO RICO

Birth: November 3, 1943, San Juan, Puerto Rico.

Legal Residence: Puerto Rico.

Marital Status: Married to Mary Catherine Harris, 2 children.

Education: 1961-1965— University of Puerto Rico, BBA degree. 1965-1968—University of Puerto Rico, School of Law, LL.B. degree.

Bar: 1968—Puerto Rico.

Experience: 1966-1968—Rodriguez Ema & Rodriguez Ramon, Law Clerk. 1968-present—Jimenez & Fuste, Partner.

JOHN S. RHOADES, SR.

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA

Birth: March 18, 1925, Harve, Montana.

Legal Residence: California.

Marital Status: Married to Carmel Cole Rhoades, 5 children.

Education: 1942-1943, 1946-1947—Stanford University, B.A. degree (1948). 1948-1951—Hastings College of Law, University of California, LL.B. degree.

Bar: 1952—California.

Military Service: 1943-1946—United States Navy.

Experience: 1952-1956—Chief Prosecutor for City of San Diego and Deputy City Attorney. 1956-1964—Sole practitioner. 1964-1968—Holt, Macomber & Rhoades, 1968-1979—Holt, Rhoades & Hollywood. 1979-1982—Rhoades, Hollywood A.P.C. 1982-present—Rhoades, Hollywood & Neal, A.P.C.

LYLE E. STROM

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEBRASKA

Birth: January 6, 1925, Omaha, Nebraska.

Legal Residence: Nebraska.

Marital Status: Married to Regina Ann Kelly Strom, 7 children.

Education: 1946-1947—University of Nebraska. 1947-1950—Creighton University, A.B. degree. 1950-1953—Creighton University, College of Law, J.D. degree.

Bar: 1953—Nebraska.

Military Service: 1943-1946—U.S. Maritime Service.

Experience: 1953-present—Fitzgerald, Hamer, Brown & Leahy (1953-1964). Fitzgerald, Brown, Leahy, McGill & Strom (1964-1974). Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler. Associate 1953-1961, Partner 1961-present.

CONFIRMATION HEARING ON: STEPHEN J. MARKMAN AND CHARLES FRIED

THURSDAY, OCTOBER 17, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:04 a.m., in room SD-226 of the Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee), presiding.

Also present: Senators Hatch, East, Grassley, Specter, McConnell, Biden, Metzenbaum, Heflin, and Simon.

Staff present: Duke Short, chief investigator; Ruth Lucas, investigations clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order. Today we have met for the purpose of holding hearings on Charles Fried of Massachusetts to be Solicitor General of the United States, and Stephen J. Markman of Virginia to be an Assistant Attorney General (Office of Legal Policy).

I notice that Senator Warner is here from Virginia. You are here on behalf of Mr. Markman. We would be very pleased to hear from you at this time.

Senator WARNER. Thank you, Mr. Chairman, Senator Hatch. I hardly know what to do here this morning. How are you supposed to make it interesting? This is your man.

The CHAIRMAN. That is right.

Senator WARNER. Well, I will do my best.

The CHAIRMAN. He worked with Senator Hatch, and I stole him away for a while, and Senator Hatch cried like a baby, and I had to let him go back.

Senator HATCH. That is the truth. I stole him back, but it was very difficult to do so.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Well, now, the President has stolen him, and indeed, it is a pleasure for me to introduce Stephen J. Markman to the committee, as the nominee to be Assistant Attorney General of the United States for Legal Policy.

Mr. Markman has been a resident of Alexandria, VA, for more than 10 years, and in between undergraduate and legal education, attended graduate school in government at the University of Virginia.

Mr. Markman has worked as chief counsel of the U.S. Senate Subcommittee on the Constitution for approximately 7 years, first as the chief minority counsel for 2 years, and then as chief majority counsel for the past 5.

He has served in this capacity under the subcommittee leadership of the distinguished Senator from Utah, Senator Orrin Hatch.

For a period of time, Mr. Markman served as deputy chief counsel of the Judiciary under the distinguished leadership of the distinguished chairman, Senator Strom Thurmond.

Prior to this work in the U.S. Senate, he worked as legislative assistant for the ranking member of the House Committee of the Judiciary. Mr. Markman's abilities in the area of constitutional law are particularly well respected, both on and off the committee. I have consulted with him and relied on him myself for advice on matters relating to this committee.

I strongly urge, therefore, this committee to consider this nomination by the President in a most favorable and expeditious light.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. Chairman. I am of the opinion that both of the nominees before us today are exceedingly competent, intelligent nominees. But before I agree to support them for the very important positions for which they have been nominated, I would like to satisfy myself on the following points.

It is an important responsibility for Senators who serve on this committee to review the qualifications of a nominee for the position of Solicitor General. As the Official responsible for writing briefs and presenting oral argument on behalf of the United States in cases before the Supreme Court, and for screening all perspective Federal cases for possible appeal before the Federal Courts, the Solicitor exercises enormous responsibility over the legal affairs of the United States. Additionally, the Solicitor also has a pervasive impact on the development of Constitutional law through his filing of petitions for or against writs of certiorari and briefs as *amicus curiae* in cases in which the United States is not a party.

Traditionally, the Supreme Court has shown great respect for the views of the Solicitor because the position is one of extraordinary responsibility and persons appointed to that position generally are of proven legal ability. However, that respect has been maintained primarily because Attorneys General have afforded the Solicitor an exceptional degree of autonomy, and because Solicitors General in the past, including Charles Fahy, Thurgood Marshall, Erwin Griswald, Robert Bork, Wade McCree and Rex Lee have remembered that their first responsibility is to the people of the Nation. It is my hope and expectation that Mr. Fried will satisfy me that he will do this.

As for Mr. Markman, my concern is what his role will be in the selection of judicial nominees and how he will perform that responsibility.

Certainly, the President is entitled to choose conservative judges. But I do not believe he has the right to select or reject judicial nominees on the basis of how they will rule on particular issues.

If Mr. Markman can demonstrate that he will not engage in or encourage what has come to be known as "litmus test" selection of federal judges, then I intend to support his nomination.

Thank you.

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, I am pleased to have the opportunity to vote in favor of the nomination of Steve Markman to be Assistant Attorney General for the Office of Legal Policy. I have had the pleasure of working closely with Mr. Markman for several years on the Subcommittee on the Constitution. I have found him to be honest, hard working, forthcoming, and highly capable.

Mr. Markman has served as Chief Counsel on the Constitution Subcommittee during my tenure as ranking member of the Subcommittee, and I have worked with him on issues on which we agree and on issues which we disagree. I believe he has performed exceptionally well both as an ally and as an opponent. I believe that he will perform as Assistant Attorney General with the same honesty, diligence and ability that he has shown in his work with the Committee.

I am pleased that the President and Mr. Meese have sent us this nomination. I hope that it reflects an interest in opening up the process by which judicial nominations are made. I look forward to working with Mr. Markman in his new position and I offer him my congratulations and best wishes.

The CHAIRMAN. Thank you very much, Senator.

Senator WARNER. Mr. Markman is joined by his lovely wife this morning. Would you do the honors of introducing her.

The CHAIRMAN. We appreciate your presence and taking time to come here in person to endorse Mr. Markman so highly, and I am sure he greatly appreciates it.

Senator WARNER. I thank the Chair.

The CHAIRMAN. We would be glad to have you to stay here. I know how busy you are. If you wish to go, we will excuse you.

Senator HATCH. I want to thank you, Senator, for coming.

The CHAIRMAN. Senator Hatch, you had some comments to make?

STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Senator Thurmond, rather than sit down there with Mr. Markman, it is my honor and pleasure to say a few words of introduction on behalf of Stephen J. Markman who has been nominated by the President for the position of Assistant Attorney General for Legal Policy.

Mr. Markman does not need any introduction to this committee. At one time he served the chairman as deputy chief counsel to the full committee, and, for the past 7 years, he has been chief counsel and staff director of the Subcommittee on the Constitution which I chair. In those capacities, as well as in the previous position he held as counsel to the ranking minority member of the House Judiciary Committee, Mr. Markman has proven himself to be an able administrator, an excellent advisor, and an outstanding scholar. I personally consider Steve Markman to be one of the finest constitutional scholars and lawyers, I have ever met.

Time and again, he has impressed me with depth of his thought, and the clarity of his understanding, of that most important of all national documents—the U.S. Constitution.

And to my knowledge, during his time with the committee, he has drafted more significant reports of the Congress and worked on a wider and more diverse range of controversial issues than any other professional staff member.

He has demonstrated the highest standards of legal scholarship in doing so. In my opinion, the President has made an excellent choice.

The Office of Legal Policy serves as the principal policy staff of the Attorney General and coordinates the policies of the Department of Justice with respect to other Cabinet agencies In addition, it is the Office responsible for judicial selection within the Justice Department.

Given Mr. Markman's experience as a thorough and disciplined lawyer, and his extraordinary constitutional expertise, he is exceptionally well suited and qualified to serve as Assistant Attorney General of that Office.

Let me also say that, from a personal standpoint, Mr. Markman is an outstanding human being. His personal integrity and veracity are, in my judgment, impeccable. Over the hours and years we have spent together, I have been unfailingly impressed with his fairness, his judgment, and his counsel.

In addition to being my chief counsel for these many years, I am proud to include Steve Markman as one of my closest personal friends. So, I am just really very pleased that the President has given Steve this opportunity. I am very proud of you, Steve, and I look forward to continuing to work with you in this new capacity.

The CHAIRMAN. As I stated a few moments ago, I gave Mr. Markman employment on the full committee until Senator Hatch demanded he come back to him. I dreaded to give him up. He is a man of character, he is a man of dedication, he is a man of ability, and I think he has rendered an outstanding service to our country, here, on the Judiciary Committee, and I am very pleased to endorse him at this time.

Now, Senator Metzenbaum, do you have any opening statement to make, or do you want to wait?

Senator METZENBAUM. No, I have an opening statement.

The CHAIRMAN. Go ahead. The distinguished Senator from Ohio.

STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

It is quite obvious that both nominees testifying today have been selected for highly significant positions.

The Solicitor General represents the U.S. Government before the Supreme Court. In fact I had the privilege of hearing him argue just this week before the Court, and he certainly did admirably well.

The Assistant Attorney General in charge of the Office of Legal Policy has a major role in selecting nominees for Federal judgeships as well as other responsibilities.

Mr. Fried, who has been nominated to be Solicitor General, is clearly qualified for the position. I have no concerns in that regard. As far as I know, there is no indication that he has engaged in any improper conduct.

My concern has to do with how he views the Office of Solicitor General, and the role of the Justice Department in presenting constitutional and other legal arguments to the Supreme Court.

I am frank to say that the Justice Department, and particularly the Attorney General, have taken positions over the last year that are totally at odds with our constitutional traditions.

I think it is fair to say, in fact, that basic constitutional principles of this Nation have been under attack by the very arm of government, charged with the primary responsibility of preserving and protecting them. In recent weeks, the Attorney General has criticized the principle that the Bill of Rights applies to the States.

He has said that anyone who is suspect of a crime is guilty. He directed that the Department, for the first time, ask the Supreme Court to overrule a decision recognizing a fundamental liberty for individuals.

He said that the Supreme Court's decisions on the separation of church and State were bizarre, and accused the Court of having a, quote, "mistaken understanding of constitutional theory."

This is a new day, and a new concern, wherein the very individual charged with the responsibility of enforcing the laws of this country, sees fit to criticize that arm of government responsible for judicial interpretations. He has gone far to attempt to totally abrogate the concept that an individual is not guilty until proven guilty.

His comment that a suspect, wouldn't be a suspect if he weren't a criminal has caused even such prestigious papers as the Los Angeles Times to editorially absolutely chastize him, and say he is not qualified for the position.

It is impossible to read all these statements without concluding that the Attorney General wants to change the Constitution to eliminate individual constitutional rights that have been recognized for many years. Now, in all fairness, Mr. Fried, I do not hold you accountable for the statements of the Attorney General. You speak for yourself. Your views may be different from his. I am not certain about that. I do not know.

My concern is that you will take your marching orders from the Attorney General, in arguing positions to the Supreme Court, even if you believe many of these positions are misguided, and represent distortions of the Constitution.

If you were to do that, I would think that you are less than the legal scholar and the independent thinker that I think you are, and hope you are.

My concern is that there will not be a safeguard in the system preventing the Office of Solicitor General from being used to undermine basic constitutional principles.

And the question I think that we have in considering Mr. Fried's nomination, is to raise the question of whether or not there is an obligation on his part to say no to the Attorney General, if he is asked to argue a view of the Constitution that he believes to be fundamentally wrong.

I hope to explore that with you during questioning. Now in regard to the nomination of Mr. Markman, again, I am not aware of any problem with qualifications or any questions about his integrity.

Mr. Markman has served ably as counsel to the committee. My concern has to do with his views about how judicial nominees are to be selected. As I have indicated a number of times, I do not believe it is the role of the Senate to reject a nominee for a judicial appointment on the basis of his, or her, personal philosophy.

On the other hand, I do not believe it is appropriate for the President to use an ideological screening process test to make sure judicial nominees will decide cases the way he wants them decided, or, some particular way.

I do not believe it is right to pick judges in order to amend the Constitution from the bench, when the standard procedures for amending the Constitution have failed.

There are signs that that is exactly what the President has been doing. Because Mr. Markman will play an important role in the process, I will be interested in his views on these issues.

Mr. Chairman, I appreciate your bearing with me while I made a rather lengthy opening statement.

The **Chairman**. And did you have an opening statement, Senator Hatch?

Senator **Hatch**. No, that is all I cared to say.

The **Chairman**. The distinguished Senator from Illinois.

STATEMENT OF SENATOR PAUL SIMON

Senator **Simon**. Thank you, Mr. Chairman, I was startled, along with a great many others, to read the Attorney General's statement. It simply underscores the fact that he needs good people around him to help provide balances and, my conversations with the two nominees here today, indicate that we have two such people here today who will be an asset to the Justice Department.

I share Senator Metzenbaum's concern and I have expressed this to Mr. Markman, who is going to be involved in the judicial selection process.

I do not think we should have great ideological swings from one President of a particular party to another. It does not encourage stability in the courts and in the law. I think we each have a special responsibility here.

But I am pleased to be here, Mr. Chairman, and thank you for your courtesy.

The **Chairman**. Thank you. I would not attempt to defend Mr. Meese. He is perfectly capable of defending himself. On his statement about the "suspect", I understood, Senator, there was a clarification of that made, that I do not know whether you——

Senator **Metzenbaum**. I have not seen that and I would be very interested in seeing it because the statement, frankly, went so far that it would concern every lawyer in this country.

The **Chairman**. Now we are ready to take these nominees. If you will stand and be sworn. Raise your right hands. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Markman**. I do.

Mr. **Fried**. I do.

The **Chairman**. Thank you.

TESTIMONY OF STEPHEN J. MARKMAN, NOMINATED TO BE ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES FOR LEGAL POLICY

The **Chairman**. Mr. Markman, what will be your duties and responsibilities as head of the Office of Legal Policy?

Mr. **Markman**. Senator, the Office of Legal Policy is the main policy initiating branch of the Justice Department. It coordinates and develops policy initiatives that the Attorney General wishes to pursue. In addition to that, as has been noted today, the office plays a major role, it is the focus of the judicial selection process within the Justice Department. Beyond that, it has general coordinating responsibilities over the Freedom of Information Act, and it also serves as the liaison of the Attorney General with the Federal Legal Council and various other intercabinet, interdepartmental agencies.

The CHAIRMAN. Mr. Markman, what role will you play in the judicial selection process?

Mr. MARKMAN. Well, traditionally, the Office of Legal Policy has been the focus of the judicial selection process, and it has coordinated the process of selecting, of recommending new Federal judges for vacancies that may develop from time to time.

Traditionally, these responsibilities have included recruitment, interviewing and evaluation, and recommending qualified individuals to the Attorney General, and the Deputy Attorney General for their recommendation to the President.

The CHAIRMAN. Mr. Markman, in evaluating candidates for selection as Federal judges, would you advocate the use of a so-called litmus test, such as a candidate's personal views on abortion, or a belief in God?

Mr. MARKMAN. No, sir. I would feel that any kind of litmus test along those lines would not only be irrelevant, but it would be wholly inappropriate for the judicial selection process.

The CHAIRMAN. And Mr. Markman, would you describe the qualities you consider important for a Federal judge.

Mr. MARKMAN. Obviously, there is a large catalog of qualities that one would look for in a Federal judicial candidate. The more obvious ones are, we would look to individuals who have a reputation for a high degree of legal competency; people who have been experienced in the practice of law; certainly to the extent that an individual has experience on some prior judicial panel. That would weigh very heavily in their favor.

We would certainly look to determine the judicial temperament of an individual, and, beyond that, there would be a general cataloging of qualities that would be important in one's sense of judicial restraint, one's sense of fair-mindedness, one's commitment to work hard in the position, one's sense of justice.

The CHAIRMAN. Speak a little bit louder, if you do not mind.

Mr. MARKMAN. I am sorry. There are a large number of qualities that obviously would be looked to in making a decision as far as a judicial candidates goes. Because no single individual is probably equipped to make these kind of determinations in full, there is a collective decisionmaking process, I understand, that takes place at the Justice Department, and I would imagine that most candidates would go through a lengthy interview process with a variety of individuals with a variety of backgrounds, and perspectives.

The CHAIRMAN. Mr. Markman, will you be willing to work closely with all members of this committee, and of the Senate on judicial selection and other matters?

Mr. MARKMAN. Yes, sir. I would look forward to that.

The CHAIRMAN. Mr. Markman, will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. MARKMAN. Yes, sir. I would be prepared to do that.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Markman, what was your involvement in the questionnaire submitted to a judicial nominee, Mr. Joseph Rodriguez, by Senators Hatch, Denton, and East?

Mr. MARKMAN. Yes, sir. I had no role in the preparation or development of that questionnaire. It was a—the questions were prepared by other offices on the Judiciary Committee and they were, they were communicated to our office, and we joined in that questionnaire, unfortunately, without having scrutinized the questions as carefully as we should have. I think Senator Hatch indicated, at the subsequent hearing on Judge Rodriguez, that he had concerns about a number of those questions, and that, in retrospect, he would not have done that again, had that been presented to him.

Senator METZENBAUM. As Senator Hatch's aide-de-camp in this matter, do you think it would have been appropriate for you to have raised the question as to the propriety of the use of that questionnaire when you saw it?

Mr. MARKMAN. Yes, sir. I think, in retrospect, that is something I should have been more vigilent in calling to his attention. Over the years I have been responsible in coordinating Senator Hatch's role in approximately 400 or 500 hundred judicial nominations, and, to the best of my recollection, we have never, in the past, joined that kind of questionnaire. We have never joined in those kinds of questions at confirmation hearings, and I think that should have been enough to create a greater sense of vigilence in me about that questionnaire.

Senator METZENBAUM. Well, I appreciate your sensitivity and your answer, but now we are moving you, or rather, you are being moved to the executive arm of government, and we are asked to confirm your nomination, which I am sure we will do.

Now, earlier this year, the White House withdrew the nomination of a judicial nominee for the local Court of Appeals for the District of Columbia, after a questionnaire was sent to him similar to the one sent to Joseph Rodriguez.

Thirteen Senators sent a letter to the White House demanding that the President withdraw the nomination. Their objection concerned the nominee's personal policy views on abortion and gun control.

The President then complied with the request and withdrew the nomination. If you had been in the Attorney General's Office at that time, what would you have said or done concerning that matter?

Mr. MARKMAN. Well, of course Senator Hatch played no—I think you are referring to the nomination of Mr. Frey, of course, for the D.C. Superior Court, and we played no role, either in the questionnaire, or in the political process that took place at the White House.

Senator METZENBAUM. Nor have I suggested that you have.

Mr. MARKMAN. No, sir. I understand that.

Senator HATCH. Well, in fact I am on record as I would have supported his nomination, even though I was as concerned about those issues as anybody else, but I have never felt that any single issue should prevent anybody from being on the bench.

Senator METZENBAUM. So you understand, my inquiry is really no reflection upon my colleague for whom I have the greatest respect.

Senator HATCH. No, we understand. But we want to correct that record.

Senator METZENBAUM. So I am not in any way implying that. I am more concerned about tomorrow than I am about yesterday, and what I am saying is, 13 Senators write you, say that they have seen the answers to a questionnaire, and that on that basis they say the nomination should be withdrawn. You are consulted. What do you do?

Mr. MARKMAN. Well, it would have been my preference in the *Frey* case, as well as generally, that that individual be brought to the Judiciary Committee, and that the Senators address the candidate with regard to those questions that are appropriate in the process.

As I indicated in response to Senator Thurmond, I totally reject the idea of any kind of litmus test, and beyond that, I reject the idea that it is appropriate to be asking a judicial candidate a variety of questions. I do not agree that it is—I do not believe that it is appropriate to be asking judicial candidates how in fact—to predict how they would rule in cases that have not come down.

I do not agree that it is relevant to ask them their views on discrete public policy issues, since I would expect that a responsible judge would attempt to divorce his own personal policy views from his judicial work.

Senator METZENBAUM. You say you do think it is appropriate to ask him his personal views, or her personal views?

Mr. MARKMAN. I am sorry. I say I do not think it is appropriate to be asking him, or her, his personal views, since I would expect that a responsible judge would bring to that office a conscientious effort to divorce his own personal policy views with the responsibilities of interpreting the law.

Senator METZENBAUM. Well, it is clear that the Department and the White House ask potential judicial nominees a number of questions, in deciding whether to forward the individual's name to the Senate.

In a recent interview, White House counsel Fred Fielding was quoted as saying, quote:

> Now they—meaning the interviewers—may ask you about specific cases in the past, but the question is not directed to, would you decide the case the same way, but more to see how you would decide it, how you would approach the case.

What is your view about that kind of questioning, and whether or not they are appropriate, in determining whether the Department will recommend a particular judicial candidate?

Mr. MARKMAN. This is a very difficult question, Senator, and it is one that I have struggled with quite a bit since my nomination for this position, and I have talked with a great many people trying to find guidance, as far as where the line is drawn between appropriate questioning and inappropriate questioning.

It is a difficult question. I think there is not always a clear line. I think those questions that are clearly inappropriate would be those questions in which you ask an individual how they would rule in a prospective case.

Senator METZENBAUM. That is the easy question.

Mr. MARKMAN. That strikes me as being too close to the, too much in the form of asking a court to issue a declaratory judgment in some kind of case.

Clearly irrelevant in my opinion, Senator, would be those questions in which an individual is asked to comment upon their personal, social, or economic views.

I think those questions, as I have indicated, would generally be irrelevant. The difficulty comes, in the fact that sometimes questions that may be relevant, for example, in inquiring of a candidate their thought processes, or, whether or not they agree with the reasoning in a case, can be used to obscure, to masquerade what are inappropriate purposes.

On the other hand, sometimes those questions which I would consider irrelevant, such as asking somebody what they thought about the Equal Rights Amendment, can bring out useful information about a person.

It can bring out useful information in the course of his response about what he thinks of Federalism. It can bring out useful information about what he thinks about the depth of his commitment to equal opportunity.

So, I think sometimes it is very difficult to say that there is this line on the one side, there are questions that are appropriate, or relevant, and on the other side there are questions that are inappropriate or irrelevant.

But I can assure you that I have been giving a lot of thought to these questions, I am sensitive to the concerns that have been raised, and I look forward to talking at much greater length with the people involved in this process to make sure that we are not chilling, we are not chilling a candidate who comes before us, and appearing subtly to encourage him that one view is right and one view is wrong, as far as his personal philosophy goes.

Senator METZENBAUM. What will be your role in this questioning process? Will you be in charge of that, or, will there be others, and, if so, who are those others?

Mr. MARKMAN. It is my understanding, Senator, that within the Office of Legal Policy, there are a number of people who participate in the judicial selection process, and normally, when an individual is coming to Washington to be interviewed, and to be questioned about his perspectives, and to be interviewed generally by the Department, there would be a number of people within that Office, and in the normal course of things, people within the Office of the Deputy Assistant Attorney General, and also within the Office of the Attorney General, not to mention the White House itself.

So normally this would be, this process would take place as a collective process in which any individual candidate were normally subject to interview and evaluation by a fairly significant number of people.

The coordination responsibilities would basically be focused within the Office of Legal Policy.

Senator METZENBAUM. In heading up the Office of Legal Policy, do you think it might be appropriate for you to set out some guidelines as to the limits on questioning by others in the Attorney General's Office, vis-a-vis this entire area, since there seems to have been such an effort, so much further activism on the part of this administration? It would seem to me that you very well might provide some proscriptions, if there is such a word, that no one in the Attorney General's Office is to go beyond this point, or, is to ask an individual how he will rule, or she will rule on a particular case, to ask an individual what his, or her views are, with respect to some of the issues that are known and accepted as being sensitive in the whole judicial realm at the moment—gun control, bussing, abortion, et cetera.

What would you think of that, Mr. Markman?

Mr. MARKMAN. Yes, sir. I think in my leadership role in the Office of Legal Policy, it would be very appropriate for me to sit down with my staff and discuss these issues.

Obviously, the difficulties that many people have in drawing these fine lines suggests also that I could perhaps obtain a lot of guidance from talking with other people, not only in the Justice Department but certainly on this panel as well, and I would look forward to that.

Senator METZENBAUM. Well, I guess I am not exactly suggesting that there be standards of what the questioning be, but that there be proscriptions——

Mr. MARKMAN. Yes, sir.

Senator METZENBAUM [continuing]. That no one in the Justice Department in making inquiry of a prospective judicial nominee shall do any of the following.

Could we have some assurance from you, that you would move forward to establish such guidelines? Not guidelines on an affirmative basis, but guidelines on a negative basis?

Mr. MARKMAN. Yes, sir. You could have my assurance that we will do everything within our ability, to see that those people who are involved in the process of interviewing judges are given guidance as far as the appropriate lines of inquiry, as far as which lines of inquiry are clearly inappropriate or irrelevant to the process, and I would hope to be involved in that process very deeply.

All that I was suggesting earlier is that there are some very difficult questions involved here, and it would be certainly a matter of, I think, having some prior consultations and discussions in order to develop some wise and prudent guidelines in this area.

Senator HATCH. Well, there are no litmus tests on what should or should not be asked, I suppose, either. So it is a difficult area. I do not know what the answers are myself.

Senator METZENBAUM. Well, I would like to say to my distinguished colleague, that I think you could very well have a litmus test as to what should not be asked.

Senator HATCH. Sure, and I think he has indicated that.

Senator METZENBAUM. And that is the reason I am talking about proscriptions rather than prescriptions.

Senator HATCH. Sure.

Senator **METZENBAUM**. Now, let me read you some quotes from people who went through the interviewing process, and did not pass muster.

According to a report by National Public Radio, one woman who is a senior Republican in her State, and a well known State court judge said, quote:

> I guess most of us have accepted that we're not going to get these judgeships unless we're willing to commit to a particular position which we think would be improper.

Here is another statement from that report.

> Several judicial contenders told NPR they were asked directly about their views on abortion. One female State court judge said she was asked repeatedly, how she would rule on an abortion case if it came before her.

Have you heard of that NPR report? If you have not heard of it, do you know whether it is false, and, do you know whether or not those judicial candidates who have been so quoted have misrepresented the interview process?

Mr. **MARKMAN**. Senator, I am afraid I am not familiar with that specific National Public Radio report. Of course I have not been involved in the judicial selection process to this point. I can say, though, that to the extent that I do have influence in this process, if I am confirmed, that some of the questions that you have just mentioned would be the types of questions that we would look askance upon.

Senator **METZENBAUM**. During the Carter administration, the Justice Department regularly furnished names of potential nominees to the National Bar Association, an organization primarily representing black lawyers, and to a legal organization representing women lawyers.

This administration abandoned that procedure. Will you work to reinstitute that effort?

Mr. **MARKMAN**. I am aware that the previous administration did involve the National Bar Association, and I believe there was a women's bar association, too, that was involved in the process.

Again, I have not been involved in the process to this point. My own perspective would be that with regard to any judicial candicate, it is simply common sense, it is simply prudence to try to get the judgment and the evaluative contributions of as many outside organizations as possible.

Now whether that would be structured in a formal way, or an informal way, I am not sure, but I certainly am committed to the idea of involving as many outside bar associations and other community organizations as possible, not only in the evaluation process, but also in the recruitment process.

Senator **METZENBAUM**. Do I interpret your response to indicate that affirmatively, you would intend to consult with the National Bar Association, which is the black lawyers organization, and women's legal organization, the name of which I am not sure of? Am I correct in that, that you would?

Mr. **MARKMAN**. Yes. I would look forward to consulting with them in the context of the nomination process.

Senator **METZENBAUM**. And if there were to be any reason that you not so, and if by reason of some order from a higher up, will you then assure this committee that you will advise us promptly, that you will not be doing that, and further advise us as to who has given you that order?

Mr. **Markman**. Well, Senator, I am not sure the extent to which you would want to formalize this process in the context of every individual nomination, and establishing them in the same precise role as the American Bar Association. I just do not know at this point, but I certainly would be very open to exploring that as a possibility.

But at the very least, I can assure you that we would be consulting on a regular basis with outside organizations such as the National Bar Association.

I have already spoken with the National Bar Association. I understand the National Bar Association as being a broadly reflective organization of those lawyers in the minority of our community, I respect what their contributions have been, and I certainly would expect to be consulting with them on a regular basis.

The **Chairman**. Would the Senator mind an interruption here? I believe at present we get the opinion, or at least the administration does, of the American Bar Association, which represents all lawyers—white, black, male, female, and everybody. I am just wondering about contacting individual groups. There are a whole lot of different groups of various kinds, and I am just wondering about the advisability of trying to contact every organization in existence that may be concerned with lawyers in any way.

The American Bar is generally considered to represent all the lawyers, and that was considered the organization that should be contacted.

I presume there is no special objection to getting the views of anybody if they want to present them, and so I just thought I would make that observation.

Senator **Metzenbaum**. But I would point out to my chairman, that as I understand it, many members of the National Bar Association are not members of the American Bar Association.

I think it is a fact that for many years, blacks, in the past, were not that much involved in the American Bar Association activities, although that has changed quite radically, and as far as I know, the National Bar Association is a well recognized and respected organization of black attorneys, and during the Carter administration they were consulted regularly.

I am not sure of the name of this women's bar association but I think that I am a little bit concerned at Mr. Markman's responses that "I intend to be consulting with a lot of different groups and hope to get a lot of different views," but I guess I am more specifically saying: Will you consult with the National Bar Association and the women's bar association that exist?

Mr. **Markman**. Yes, Senator.

The **Chairman**. As I understand the policy today, you do not consider whether they are men, do not consider whether they are women, do not consider whether they are white, do not consider whether they are in the majority or in a minority, but just try to pick the best people, because the cases that have been brought by civil rights and other groups today, as I understand it, are trying to merge, and they claim, treat everyone alike.

And now if you go polarizing this group, and polarizing this group and this group, I am not too sure where you are going to end up. I just thought I would throw that out.

Senator METZENBAUM. Well, I appreciate the chairman throwing that out.

Senator HATCH. Would the Senator yield.

Senator METZENBAUM. Sure.

Senator HATCH. If the National Bar Association, or women's bar association contacts you, you are going to give them full credence and listen to them, and pay attention to what they have to say as well?

Mr. MARKMAN. Yes, sir.

Senator HATCH. Is that fair?

Mr. MARKMAN. I would look forward to sitting down with them.

Senator HATCH. But you are not sure if the policy of the administration or of the Justice Department will be to go and search out specific groups outside of the American Bar Association for each nominee—I think that is basically what you have said—and you do not know that you can, one way or the other, make that determination at this time.

But you certainly are not going to ignore any particularly regularly organized authentic bar association group that wants to participate in the process. As I understand, that is your position?

Mr. MARKMAN. Yes, Senator.

The CHAIRMAN. In other words, you would not ignore any of them?

Mr. MARKMAN. That is right; not any of them.

The CHAIRMAN. And you would be glad to have anybody to express the views from any organization; but so far as going to all these different groups and asking them who they recommend, now that is a different thing.

I think we ought to hear from anybody who wants to be heard, and give attention and consideration to whoever any group recommends.

But so far as searching out those groups and saying who you want for judge, or who you do not want for judge, I think that might be going too far.

Senator METZENBAUM. Well, I want to point out to the chairman that it is my understanding that even if——

The CHAIRMAN. And just because the Carter administration did it does not make it right.

Senator METZENBAUM. No, but I want to point out that it just conceivably might be right, and that when you say going to the different bar associations to ask whom they recommend, I do not believe that is done at the present time.

I believe that the people who make the recommendations these days are Members of the U.S. Senate and then——

The CHAIRMAN. And the President.

Senator METZENBAUM. Pardon?

The CHAIRMAN. And the President because he appoints.

Senator METZENBAUM. That is right, and we make those recommendations or——

The CHAIRMAN. And they are, I believe, screened, or, more or less, the American Bar is asked its opinion because the American

Bar is supposed to represent all the lawyers of any color, any creed, any religion. You see what I mean?

Senator METZENBAUM. I understand that, Mr. Chairman, but I also understand that up until 1952, the American Bar Association, if it were representing all the lawyers in this country, did not have a black member in its organization.

The CHAIRMAN. Well, that has been changed, though. A lot of things have changed in the last several years.

Senator METZENBAUM. Right. And I just want to be certain how I am leaving this matter with the nominee. I very much respect the views and the thinking of the chairman and the Senator from Utah, but it is this nominee who will have to stand on his own, and who will be calling the shots, as I see it, once he gets in that Department. I want to be certain that there is no confusion.

I think you have already answered that you will seek and obtain the opinion of the National Bar Association, the American Bar Association, and I now find the name of that women's organization. It is the Federation of Women Lawyers. Do I understand that correctly?

The CHAIRMAN. Are you going to seek it, or will you consider it, if they recommend? I think there is a big distinction, in seeking the opinion of all these different groups, or considering it, if they recommend anybody, either pro or con.

Senator METZENBAUM. The chairman is right. There is a distinction.

The CHAIRMAN. A great distinction, I think.

Senator METZENBAUM. And it is obvious that the chairman and the Senator from Ohio have a different point of view.

The CHAIRMAN. Well, we frequently do on many matters, but we are together on some important matters, too.

Senator METZENBAUM. Listen. After I said such nice things about you in an interview yesterday for The New York Times, I may want to call that fellow back.

Now Mr. Markman, let's get down to you. Do you see their views, or do you accept them only when they are proper?

Mr. MARKMAN. Well, Senator, I think I would be in agreement with both of——

[Laughter.]

Senator METZENBAUM. You are not up for judicial appointment.

Mr. MARKMAN. I think, on the one hand, it has traditionally been recognized that the National Bar Association, and some of the other smaller bar associations are not involved in the process in the same way that the American Bar Association is. Because of the broad representation of the American Bar Association, we have established a formal process of consultation.

What I would certainly look forward to doing in my capacity would be to not only not to ignore the advice of these organizations, but to ensure that there are opportunities that I would have, and that others would have in the office, to sit down with them on some kind of regular basis, so that we were apprised of their opinions, and that we were able to establish some effective lines of communication.

I think that is a different thing, though, than saying that we are going to give any organization a veto power over an individual nominee, but we are certainly going to work with them.

Senator METZENBAUM. Well, I think the real question is, that at a certain point in the process, the Department now gives those names to the ABA.

Mr. MARKMAN. Yes, sir.

Senator METZENBAUM. And my question is: Will they also be given to the National Bar Association and the Federation of Women Lawyers?

Mr. MARKMAN. That is something I guess I would feel much more comfortable discussing with the Attorney General. This goes to a very fundamental matter of procedure down there. I am not sure what their procedures are with respect to these other bar associations.

Senator METZENBAUM. Well, let's assume he says to you, "Well, as our new man on the team, what do you recommend, Mr. Markman?" What would you tell him?

Mr. MARKMAN. My recommendation would be that we do involve these organizations in a much—in roughly the same manner that the Carter administration did.

Again, my understanding of what the Carter administration did was that they would not pass each of these nominations on as a matter of course, but that it was made clear to these bar associations that they are always welcome to introduce their opinion into the process, that their opinion was valued and respected, and that should they have particular difficulties in the context of an individual nomination, that those concerns would be communicated and addressed in the course of things.

That certainly is a role that I think would be appropriate. I would just be concerned about formalizing it in the same way that we do the American Bar Association, because I can see some costs there that might not be welcomed by anybody in the selection process.

Senator METZENBAUM. Will you work with the ABA to ensure that the ABA Panel on Judicial Nominations provides more information to the committee? For example, the reason that some of the panel grade a nominee as unqualified. What happens now is that we get a rating from some panel members, unqualified, and we on the Judiciary Committee do not know the reason for that, we want to find out the reason and sometimes we cannot find it out.

Would you be willing to work to get the ABA to provide us with more detailed information than that which they presently do when they bring in an unqualified recommendation?

Mr. MARKMAN. Of course I think as a practical matter, in many of the instances in which individuals are rated "not qualified," there is a fairly strong suspicion among members of the committee as far as what the reasons are, but I understand the question you are asking, and that is, given the importance of the American Bar Association to this process, given the importance of the ratings that they confer upon individuals, I would think it would be appropriate for them to explain the reasons for conferring negative ratings upon individuals.

I do not know why they do not do that. I do not know what the situation is right now, but I think to the extent that their ratings are going to be influential at the committee, one would expect to know why those, some general idea as far as why those ratings were—how they were reached.

Senator METZENBAUM. Mr. Markman, the White House record in appointing minorities and women to the bench has not been very impressive. Out of a 160 appointments there were 11 who could be considered minority appointments, or 6.9 percent, and 12 women, or 7.5 percent.

Would you be willing to work to try to bring about some increase in the number of minorities and women appointed to the bench? That was in the first term, I might say, those figures that I gave you.

Mr. MARKMAN. Well, Senator, as I have indicated, of course, I have not been involved in the details of the process that have taken place over the past 5 years. I am aware of the statistical data that exists.

To the extent that I am influential in this process, I certainly would commit myself to making sure that there was no individual who is denied an opportunity to be introduced into the judicial selection process because of their race, or their color, or their sex, or because of other characteristics such as that.

I would certainly do everything possible to make sure that we were not overlooking people who were otherwise qualified because they were involved in perhaps nontraditional career paths, or whatever.

I would be very aggressive in trying to make sure that we were not overlooking people who were otherwise qualified for the position.

Senator METZENBAUM. Do you know what the steps are that the White House presently employs to find qualified minority and women judicial candidates?

Mr. MARKMAN. I am not sure of the specific procedures. No, sir. I do think that it is worth noting, though, that—and this is just a fact of life—but in the context of the district court nominations, as the members of this committee well know, a great deal of deference is given to the recommendations of those Members of this body who belong to the President's own party, and it is my understanding to this point, there have been very few district court recommendations that have included members of some of these minority groups.

So, there are some constraints in this process, but I certainly would hope to look at the procedures very closely, and see if there is anything we can do that would ensure that we are not closing off opportunities for people who ought to be considered for the bench.

Senator METZENBAUM. My colleague from Illinois has appropriately raised a question in this committee just recently concerning membership in restrictive clubs by judicial nominees. Do you think that that issue is an appropriate one to raise at an earlier level, even prior to its getting to the Judiciary Committee, that is, at your level?

Mr. MARKMAN. Yes, sir. This has of course been the policy of the Judiciary Committee for some years, introduced under Senator

Kennedy when he was chairman, and I think in order to ensure that a judicial candidate is not only committed to the idea of equal opportunity and equal justice, but further, gives the appearance of equal justice, I think that is a wise policy on the part of this committee, and obviously, to the extent that anybody, any judicial candidate has to eventually go through this committee, I certainly think would be something that the administration ought to be looking at as well.

Senator METZENBAUM. Would you move to implement such a program so that that screening, or that issue be raised at an earlier point than it is getting to us?

Mr. MARKMAN. I am not aware that there have been many instances in which this has been a problem, but certainly, judicial candidates would be apprised of the fact that this is something the Judiciary Committee has established a policy against, and that we are—you know—we certainly would want to be supportive of that policy.

Senator METZENBAUM. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. On that point, I might say that it seems to me that if a person just belongs purely to a social club, or if a man belongs to just a men's club, that that should not disqualify him from becoming a judge. If a woman belongs to a women's club, is she going to be disqualified because there are no men in that club? There are a lot of women's clubs. It seems to me it would be unfair to eliminate a woman because she was a member of a club.

Griffin Bell, I believe was a member of some club in Atlanta when he was Attorney General, and he never did resign, I do not believe, and I have often felt that that probably is going a little too far.

It is not a matter of discrimination because it seems to me that men have a right to form their own club, if they want to, and women, too, and that does not mean discrimination. It just means that they care to join that club for a social reason, or some other reason, and, if there is any discrimination, that is different, and that should be strongly opposed. I just thought I would throw out that point because I realize there are some of the other sex that want to join everything, and I am not too sure that, if that is not going a little bit too far.

Senator METZENBAUM. Well, Mr. Chairman, I just want to point out to you that, if you have a men's club and women cannot get into it, if you have a luncheon club, or a golf club, or whatever kind of club it may be, and it does not permit blacks or Jews or Hispanics, or whatever, to get into it, that there is some reason to have concern that such an individual would not only be able to mete out justice fairly, but that those who would appear before him would always have that suspicion in their mind as to whether justice could be meted out fairly under those circumstances.

I recommend for your reading, and consideration, a very interesting and good paper on the subject prepared by the nominee for Solicitor General. He has written rather extensively on this issue, and he shared with me a copy of that treatise, I guess it would be. I guess it was not really a treatise. I think it was an analysis.

I think that this committee has established a policy to determine whether a nominee was or was not a member of a club that had restrictions. I, for one, think—and I think I speak for many others—would feel that any individual who belonged to such a club and refused to resign, should not be confirmed.

And I must say that, going back to Griffin Bell, if he did not resign, then I would guess—and my recollection is not good enough to confirm this—but I would guess that then he, somehow, misrepresented, or did not state all the facts to the committee, because I know that there are many of us who would have stood firm against his being confirmed as Attorney General, had we known that he was not going to resign, and I certainly would have been one of them.

The CHAIRMAN. I am not sure he did resign. I know he was a member of a club, and the question came up. I know he felt that he should not be barred from serving for that reason, but just as a matter of taking that issue out, the way he may have resigned, just like there is a judge now, Mr. Silberman who is a member of a club. Well, he just said he would get out rather than have the question raised, and have people arguing over it. That is a men's club, here, in Washington.

I am just wondering if you cannot have Boy Scouts, if you want Boy Scouts without girls coming in, or Girl Scouts without boys joining, if there is no discrimination. Now I am opposed to discrimination in any form whatsoever, but so long as you do not have discrimination, I think it is a different matter, unless it is some club that the public supports with public money.

But private. I think we are losing our freedom in this country when any group that wants to organize, be just a social club, cannot do it.

Senator METZENBAUM. Well, Mr. Chairman, I want to be certain that we do not confuse the issue. We do not have pending before us a piece of legislation making it illegal to have a club that discriminates.

What we are saying is that an individual who belongs to such a club, and feels that he, or she, must maintain that membership, that it would be difficult for some people, in appearing before that judge, to feel that justice would be meted out fairly, and that there might not be the element of discrimination to an individual who could not get into the club, if he were submitting, or she were submitting, their case to a person who belonged to a club that had such restrictive covenants.

The CHAIRMAN. I expect some of these people charged with a crime have a perception, if they go before a judge who stands for strong law enforcement, that they may not get a fair trial anyway. Don't you think so?

Senator METZENBAUM. Well, if they were charged with it, they would probably be guilty anyhow—that is what Mr. Meese says, so——

The CHAIRMAN. Well, I think that statement was explained later, that you are referring to. But at any rate, we will move on.

Senator METZENBAUM. All right.

The CHAIRMAN. The distinguished Senator from Utah.

Senator **Hatch**. Mr. Markman, the only thing I would like you to do is introduce your wife to us. You did not have that opportunity earlier, so——

Mr. **Markman**. Thank you very much, Senator. My wife, Mary Kathleen is in the audience here. I would like to introduce her to the committee.

Senator **Hatch**. We are happy to welcome you, Kathy.

Mr. **Markman**. Thank you.

Senator **Hatch**. That is all I have, Mr. Chairman.

The **Chairman**. The distinguished Senator from Alabama.

Senator **Heflin**. Mr. Markman, we welcome you to this hearing. We have observed you for quite a while. Our biggest problem is how Senator Hatch is going to get along without you. We affectionately refer to you sometimes as the whisperer. You would whisper in Senator Hatch's ear, provide him with words and——

Senator **Hatch**. I could not speak without him.

Senator **Heflin**. How will you get along without Mr. Markman?

Senator **Hatch**. I do not know. I am worried to death about it, I tell you.

Senator **Heflin**. This issue about the various bar associations does raise some thinking. Sometimes, the bar associations interview various people on a issue, and there may be a conflict between a statement that is reported by a member of a bar association's judicial nominee evaluation committee, and another member. Sometimes those conflicts can develop even on witnesses—you might call them witnesses—and when they do develop, or if issues are reported, and reported differently by bar associations.

It seems to me, then, before the President moves forward, that there should be some type of a resolution of that conflict, and I am not exactly sure how this can be done. I have noticed this on some occasions in reading the reports on nominees of one bar association and another.

It very well may be that the FBI, when areas of conflict arise as to a certain issue, that they should be involved.

The problem on bar association evaluations, and I think each bar association endeavors to do the best it can, is that there is not enough staff. The staff depends on lawyers to contact, generally, other lawyers or other people on an issue, and sometimes conflicts develop on the reports that one bar association may give concerning to an individal on a particular issue.

When that occurs, it would appear to me that it raises probable cause for an independent investigation of that issue, or of that witness.

And you, in this responsibility, as you read and evaluate these reports, I think should endeavor to resolve these conflicts, and to resolve them as best you can, impartially, and I would make a suggestion to you that when a conflict does arise, that some independent—we would like the FBI, or another agency to investigate—to help resolve those conflicts, if they are substantial.

And I pass that on for whatever it might be worth, but I have observed those things sometimes, and I think it might be well worthwhile. We might then be able to eliminate some problems that do arise in the hearing process.

We have confidence in you. It is our observation that you are a highly intelligent man, and that while you have been influenced by your mentor, hopefully, that can not influence you too much as you look at these issues impartially. But we welcome you and we know that you will do a fine job.

The **Chairman**. The distinguished Senator from North Carolina.

Senator **East**. Thank you, Mr. Chairman. I am sitting on this side since it was a little bit difficult to get over there.

The **Chairman**. I understand that is the reason. If you had been on this side, you would have been next, so I am calling you next. I did not think you had agreed to change parties.

STATEMENT OF SENATOR JOHN P. EAST

Senator **East**. No, no, I have not done that yet, Mr. Chairman. [Laughter.]

I know the chairman is anxious to move this hearing along and I am certainly sympathetic to that. I think that there is one point, however, that I cannot resist commenting upon. I do not have any questions.

It occurs to me that the discussion between the distinguished Senator from Ohio and our distinguished chairman dances around the edge perhaps of a metaphysical question, namely whether you can strip values out of the judicial selection process.

Now the Senator from Ohio is saying that it is very important, as he sees it, that no questions be asked on such matters as abortion, because I gather that he feels that a person's value judgments on those matters would be of no concern in the selection process. Yet, he would have certain groups consulted for the purpose of getting their evaluation, their value judgments on particular judicial candidates.

I am not suggesting we can resolve that question this morning. I am saying that we should be candid with one another, whatever our differences, partisan or philosophical. You simply cannot strip values out of the judicial selection process, and to say that you can is not to be intellectually candid, in my judgment.

I agree that you cannot have an extensive list of litmus tests. I do not know where that would lead. But I do know that Presidents and U.S. Senators, are concerned about judicial philosophy, are concerned about the values of given nominees. Let's admit that and do the best we can to pick the best qualified person, however we define "best qualified," and move from there. I could not resist commenting upon that and I am not asking anyone to respond to it. It was just a thought I had on it.

As far as Mr. Markman goes, I of course am very much in his corner. I support his nomination to be Assistant Attorney General in the Office of Legal Policy.

As a Senator from North Carolina, I would like to note that Mr. Markman is a graduate of Duke University, one of the most distinguished universities in the United States.

He has served as the chief counsel on the Constitution Subcommittee with great effectiveness. He is a most able, intelligent man, as the Senator from Alabama has noted, and I recommend him very highly to my colleagues here, on the committee, and to the

U.S. Senate. I will cease there, Mr. Chairman, because I know you are anxious to move on. Thank you.

The CHAIRMAN. Thank you very much.

The distinguished Senator from Illinois.

Senator SIMON. Thank you. I shall be very brief.

I agree with my distinguished colleague from North Carolina. Obviously values are considered, and political philosophy is a factor in any nomination process, but I think we have to be awfully careful in this area. Inevitably, when there is a Democratic administration there is going to be more of a liberal swing; when there is a Republican administration more of a conservative swing. But we do not want to create a judicial branch with a loyalty to a political philosophy rather than loyalty to the law.

And I think we are all in agreement on that.

Senator EAST. But if I might interrupt the distinguished Senator.

Senator SIMON. I would be pleased to yield to my colleague.

Senator EAST. I think that is a distinction without a difference. You say that you would want their commitment to the law but not to particular values.

Well, of course the law encompasses values. I am simply saying that it is inherent in the nature of the human condition that you cannot strip values out of our choices for Senators, or Congressmen, or President, or Governor and, I would submit, for members of the judiciary who do in fact make value judgments, as much as those people in the political arena do.

And you say a commitment to the law is required. What is the law? I guess I would raise that question. The law of course itself encompasses values. Excuse me. Go ahead.

Senator SIMON. I think it is one thing to elect a Member of the U.S. Senate where policy is set, where we establish the laws, where we determine the future of our country in that way. I think there is a real danger if we start having some ideological test, for judges. If we do we are going to have great swings in court decisions, and bring about instability in our country as a result.

Senator HEFLIN. Would the Senator yield.

Senator SIMON. I would be pleased to yield to my colleague.

Senator HEFLIN. Is the Senator referring to activism?

Senator SIMON. Well, I will let you put whatever term you want on it, Mr. Justice.

Senator HEFLIN. All right.

Senator SIMON. But I think we have to be careful, and I have talked to our witness on several occasions about this. I think he is going to make a fine public servant in the Department of Justice, and I am pleased to be able to vote for him.

I think he has a sensitivity to the problems that we are talking about here. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Any other questions? Senator Metzenbaum, you had no more questions?

Senator METZENBAUM. No, Mr. Chairman.

The CHAIRMAN. Mr. Markman, thank you very much. I think that completes your testimony and we will now excuse you and I hope you will enjoy your new appointment in the Justice Department. I think the Justice Department is fortunate to obtain you. I have always found you fair and square, and honest and upright. Of course you have to carry out the dictates and policies of the Justice Department.

On the other hand, you will have a chance to express yourself and exert influence on the positions they take.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. I would just like to point out that Steve Markman's wife is a lawyer as well, and Kathy Markman has won distinguished service awards at the Department of Transportation for her work in the general counsel's office. So we are very proud of that as well and I just thought it would be a nice note to end this particular hearing on.

Senator METZENBAUM. You know, I would like to point out, that having checked the number of appointments that the distinguished Senator from Utah has obtained for members of his staff around this administration, that they have certainly "hatched" in an awful lot of them.

Senator HATCH. Howard is just jealous because Jimmy Carter never listened to him——

Senator METZENBAUM. You are 100 percent right.

Senator HATCH. And I have to admit, that was one of the redeeming qualities of Jimmy Carter, is all I can say.

Senator METZENBAUM. Touché. [Laughter.]

Mr. Chairman, it is my understanding that Mr. Herman Schwartz, who is a former staff member of mine, is here, not testifying on behalf of me, that is for sure, but on his own behalf concerning Mr. Markman. My question is, Do you intend to hear from him before we hear from Mr. Fried, or——

The CHAIRMAN. Well, if he is just concerning Markman only, yes, I think we might as well hear him. Any other witnesses who are just concerning Mr. Markman only, we can hear from them now.

I might mention one point that was brought out, about the low percentage of minorities, and women who have been appointed by the administration, and I believe, Senator Metzenbaum, you brought some figures out.

Most of the judges are District Judges, and the President generally follows the Senators in making those recommendations, so I am not too sure that President Reagan could be criticized altogether for that, because it is customary, I think, to follow the Senators of his party in connection with those appointments.

Senator METZENBAUM. You know, we just spoke about President Carter, and let me say, that in his administration, there definitely was an advice to those of us who were Democratic Senators, that the administration did wish to make a substantial number of female appointments as well as minority appointments, and I think that that kind of a message coming from the President did cause many of us to at least think about the subject, and as a consequence, there certainly were far more women and minorities appointed during the Carter administration than has occurred during this administration.

And I agree that the Senators make the recommendations, but I do not think that there has been any active urging on the part of the President, to the Senators, as to this particular point.

The **Chairman**. I have heard Mr. Fielding say that they would like to have more women and minorities, and I think that talk has been passed along, and I hope they will give more consideration to the point you make.

Senator **Metzenbaum**. Mr. Chairman, just to clarify the record. I had mentioned some statistics. I just want to be certain that I point out, that in the second term, there were 6 minorities out of 64 or 9.4 percent, and 5 women out of 64 or 7.8 percent, a very, very slight improvement over the first term, not significant, but I just did not want to leave the record unclear.

The **Chairman**. Well, maybe we had better talk to the Senators.

Senator **Metzenbaum**. You are in an excellent position to do that, Mr. Chairman, and I would hope maybe you would send a letter to them.

The **Chairman**. I have talked to a lot of them on that line. I would personally like to see more women, and more minorities, appointed as judges.

Senator **Metzenbaum**. Well, I think it would be great.

The **Chairman**. And Mr. Markman, did you want to make some closing statement?

Mr. **Markman**. Yes, sir. I did not have an opportunity to deliver an opening statement, so I wonder if I could deliver just a very brief closing statement?

The **Chairman**. Do you want to make it now or put it in the record? Which do you want to do?

Senator **Metzenbaum**. The usual rule is, when you have made the sale, Mr. Markman, to pack up your bag and go home. [Laughter.]

The **Chairman**. I believe you have got our case won, and you can just put it in the record, if you wish, although we will give you time, if you want to make it.

Mr. **Markman**. No. I would like to thank the committee and I would look forward to, if confirmed, to working very closely with the committee. Thank you very much.

The **Chairman**. We hope you enjoy your work in the Justice Department.

[Prepared statement and response to written questions follow:]

Prepared Statement of Stephen J. Markman

Mr. Chairman, it is a privilege for me to appear today before the Senate Committee on the Judiciary as nominee for the position of Assistant Attorney General for Legal Policy. Since I am accustomed at the hearings of this committee only to seeing the backs of the heads of the members, this morning's hearing is offering me an entirely new perspective on the legislative process.

I, of course, wish to thank President Reagan for this nomination, as well as Attorney General Edwin Meese, Jr. In addition, I wish to thank the members of this committee and their staffs for their courtesy to me, not only in the past few weeks, but in the time that I have worked for this body. I would like to extend special appreciation to Senator Warner for his kindness in introducing me this morning.

Finally, I would like to thank two members of this committee who have allowed me the opportunity to participate in the legislative process—the chairman, whose sense of personal integrity offers a lesson to all who work for him, and Senator Orrin Hatch whose counsel and personal friendship have meant so much to me over the years. I look forward to this hearing, and again thank this committee for the opportunity to be here today.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

STROM THURMOND, S.C., CHAIRMAN

CHARLES McC. MATHIAS, Jr., MD.
PAUL LAXALT, NEV.
ORRIN G. HATCH, UTAH
ROBERT DOLE, KANS.
ALAN K. SIMPSON, WYO.
JOHN P. EAST, N.C.
CHARLES E. GRASSLEY, IOWA
JEREMIAH DENTON, ALA.
ARLEN SPECTER, PA.

JOSEPH R. BIDEN, Jr., DEL.
EDWARD M. KENNEDY, MASS.
ROBERT C. BYRD, W. VA.
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZ.
PATRICK J. LEAHY, VT.
MAX BAUCUS, MONT.
HOWELL HEFLIN, ALA.

VINTON DeVANE LIDE, CHIEF COUNSEL AND STAFF DIRECTOR
DEBORAH K. OWEN, GENERAL COUNSEL
DEBORAH G. BERNSTEIN, CHIEF CLERK
MARK H. GITENSTEIN, MINORITY CHIEF COUNSEL

SUBCOMMITTEE ON THE CONSTITUTION

ORRIN G. HATCH, UTAH, CHAIRMAN

STROM THURMOND, S.C.
CHARLES E. GRASSLEY, IOWA

DENNIS DeCONCINI, ARIZ.
PATRICK J. LEAHY, VT.

STEPHEN J. MARKMAN, CHIEF COUNSEL AND STAFF DIRECTOR
RANDALL R. RADER, GENERAL COUNSEL

October 23, 1985

Senator Joseph Biden
Committee on the Judiciary
SH-308
Washington D.C. 20510

Dear Senator Biden:

Attached are my responses to your written questions relating to my nomination as Assistant Attorney General for Legal Policy. Please do not hesitate to let me know if I can clarify or elaborate upon any of these responses.

Sincerely,

Stephen Markman
Stephen Markman

RESPONSES

Question: There is a lot of confusion over what exactly you will be doing as Assistant Attorney General for Legal Policy. The Legal Policy office is the office that has screened potential judicial nominees during most of the Reagan Administration, but according to virtually every press report I've seen since Mr. Meese was confirmed, the person now doing the screening is one of Mr. Meese's special assistants, Grover Rees, who is on leave from the University of Texas Law School.

> -- Is it your understanding that you will take over primary responsibility at the Justice Department for the screening and selection of federal judges?
>
> -- Will judicial nominations take up most of your time? All of your time?

Follow-up Question: Is it your understanding that you will sit on the White House judicial nominations screeing committee? Can you tell us who is on that committee?

Answer: In the absence of a permanent head for the Office of Legal Policy, Mr. Rees since his arrival at the Department last Spring has been heading up the staff work for the judicial selection process within the Department of Justice. I understand that the arrangement was intended as a transitional solution until an Assistant Attorney General for the Office of Legal Policy could be confirmed. Upon my confirmation, I assume that the traditional role of OLP as the principal advisor to the Attorney General on judicial selection will be restored, although of course the selection process has always involved Department officials in the Attorney General's and Deputy Attorney General's office and other key offices in the Department, as well as OLP.

I anticipate that, given the importance of the judicial selection process and the demands involved in interviewing potential candidates, I will be devoting a significant amount of time to judicial selection issues. The Office of Legal Policy has a variety of other responsibilities within the Department, of course, so judicial selection will not be my exclusive focus.

Regarding the White House committee on judicial nominations, I have not discussed my exact status with the Attorney General but I understand that OLP's role will continue to be, as it has in the past, to support the Attorney General in his role as a principal advisor to the President on judicial nominations. The Assistant Attorney General for OLP has sat as a member of the committee in the past, but the exact membership of the committee is up to the Attorney General and the President. Although the membership of the committee has changed over time, I understand that those actively involved at present, in addition to the Attorney General, include Fred Fielding, Donald Regan, and M.B. Oglesby.

Question: In your October 1981 article in Harper's magazine, you condemn Supreme Court decisions which "declared unconstitutional such previously accepted practices" as racially segregated schools, mandatory and vocal prayer by elementary school students, and which effected one-man, one-vote State legislative reapportionment. Your central contention is that such decisions "explicitly contradicted political solutions" and that "presumably everyone would have preferred to see legislatures rewriting the necessary statutes or amending the Constitution." In essence, you content that "there is not source of legitimacy in a polity where laws are made and changed without the sanction of the popular will, expressed through legislatures."

Now, my question is simple. Do you believe that the central purpose of the Bill of Rights set forth in the Constitution is to limit the power of the legislatures and, in Justice Brennan's words as set forth in his speech Sunday at Georgetown University, "to declare certain values transcendent, beyond the reach of temporary political majorities"?

Answer: Although there were aspects of Justice Brennan's speech with which I disagreed, I am in full agreement with the quoted provision. The purpose of the Bill of Rights (indeed of the Constitution generally) was to limit the exercise of authority by the national legislature, as well as by the executive and judicial branches of government. The central focus of the Bill of Rights was to clearly articulate those fundamental individual rights which were not to be diminished by the State, whatever the temporary passions of the majority. I am in full agreement with the observation made by Justice Brennan. The original understanding of the Bill of Rights has, of course, been modified substantially in recent decades as judicial decisions have interpreted the Fourteenth Amendment to have "incorporated" (and thus made applicable to the States) most of the individual rights delineated in the Bill of Rights.

If I might be permitted, I would also like to clarify one aspect of my October 1981 Harper's article. It was not my intention in that article to "condemn" any particular Supreme Court or lower federal court decision, including those expressly mentioned. Indeed, I do not necessarily agree or disagree with any of them. It was merely my purpose to observe that, increasingly, the judicial branch of the national government has become a principle policy-making branch of this government, rendering increasing numbers of decisions having widespread impact upon public policy in the United States.

In addition, I believe that the proper context for my observations on "sources of legitimacy" for changes in law is that the popular will may be expressed either through the representative process or through the process of strict constitutional interpretation. The personal set of values or ethic of a judge would not, in my judgement, constitute such a "source of legitimacy".

Question: The position between you and the Attorney General is the Associate Attorney General. But that slot is vacant since this Committee declined to confirm William Bradford Reybolds to that post. Have you been told whom you will report to when you are Assistant Attorney General for Legal Policy? Will you report directly to the Attorney General?

Follow-Up Question: Have you been told that you would report to William Bradford Reynolds?

Answer: I haven't been told about the precise lines of reporting authority from OLP to the Attorney General. In the past, however, I understand that OLP has had a close, direct relationship with the Attorney General on a wide variety of issues, and I anticipate that I will be able to continue that close relationship. Of course, I will work within whatever framework of responsiblity the Attorney General chooses for OLP and for Mr. Reynolds.

The **Chairman**. Now Mr. Schwartz I believe is going to testify in connection with Mr. Markman. Mr. Schwartz, where are you? If you will come around, Mr. Schwartz. Mr. Schwartz, do you want to stand up and be sworn.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Schwartz**. I do.

TESTIMONY OF HERMAN SCHWARTZ, PROFESSOR OF LAW, THE AMERICAN UNIVERSITY, WASHINGTON, DC

Mr. **Schwartz**. Let me first thank Senator Metzenbaum, and the chairman of the committee for taking me out of order. I have to get back to teach a class, and I am grateful to them, and to the other witnesses for letting me come at this time.

I appear here today to support the nomination of Stephen Markman to be Assistant Attorney General. I have known Steve for many years, both during my service on the Judiciary Committee and subsequently. Although I think it is fair to say that he and I disagree on many, and perhaps most issues. I have always found him fair and reasonable. We have worked together on some things, we have worked against each other on some things. Because of that background, I often asked him to come to my class to talk about his perception of the kinds of issues that this committee deals with, and that my class deals with in constitutional law. I can say that even those who disagree with him, and that includes myself not infrequently, have found him objective, fair, and articulate. So I support the nomination without any reservation.

Fairness and objectivity are particularly important in the post in question, which involves a major role in judicial selection. I would like to devote the balance of my testimony to this matter, and particularly, as judicial selection is practiced by this administration.

We are seeing an effort today to impose a rigid, ideological viewpoint on the Federal judiciary, an effort that is virtually unprecedented in recent memory.

So deeply conservative a man as Professor Philip Kurland of the University of Chicago Law School, said last week in U.S. News and World Report that the purpose—and I quote, is to "rewrite the laws and the constitution to the administration's liking. Reagan's judges are activists in support of a conservative dogma." I have written a paper on this matter for People For The American Way, and I would like to attach that to my testimony.

The purpose of this campaign is not judicial restraint. It is an activism of a very energetic variety. It calls for overruling congressional enactments, like the application of the Fair Labor Standards Act to State employees. It includes overruling long-standing doctrines like incorporation of the Bill of Rights to make it binding on the States. It includes seeking broad and expansive rulings where narrow grounds are available, as happened in the *Leon* case a while back, and it includes other forms of activism in order to make sure that a certain view of the rights of defendants is put into the Constitution.

It is an effort that is virtually unprecedented. During the last half of the century, ideological criteria have almost never been imposed on the lower courts, and I am talking primarily about the lower courts.

Conservative Republican Presidents have appointed judges who could be described as "liberals", and liberal Democratic Presidents have appointed conservatives.

Just looking at party lines, today's judiciary probably contains at least as many judges appointed by Republican Presidents as by Democrats. I counted that since 1952, 30 years or so, some 1,200 judges have been appointed, of whom Presidents Eisenhower, Nixon and Ford have appointed some 650.

As a result we have a diverse judiciary, which is an important thing, and which this administration nevertheless condemns as unbalanced.

It is claimed that President Franklin Roosevelt's choices were largely ideological. I think that is not quite true, for a variety of reasons, and the differences are very significant.

President Roosevelt sought judges who would sustain legislation overwhelmingly passed by Congress. President Reagan is seeking judges to achieve what Congress and the courts have refused to give him, and over which the Nation is, to say the least, sharply divided.

Now, I do not want to say that President Reagan's efforts and of those who support that effort, that those efforts are necessarily illegitimate or unconstitutional. He has a constitutional right to do what he is doing. The Constitution gives him, after all, the power to nominate, and it does not impose any particular restrictions on that.

I do, however, think it is unwise. Apart from turning the Federal courts away from their historic role of protecting individual rights, a role that goes back to John Marshall, and has been acknowledged by such deeply conservative lawyers as former Solicitor General Rex Lee, the effort will politicize the courts and deprive them of both the substance and appearance of that fairness on which so much of their legitimacy depends.

This effort I think imposes special obligations on the Senate. As Senator Hatch said a few years ago, in what he considered comparable circumstances, and I quote: "Senate procedures, such as Senatorial courtesy, that can be justified when nominations are considered at sporadic intervals, are simply inappropriate when an entire branch of the national government is literally being refashioned over a period of months." In this case, obviously, over a period of years.

I hope the Senate, and this committee in particular, will heed Senator Hatch's wise observations. I hope Mr. Markman will also, and, I would like to conclude by saying again, that I am pleased that Mr. Markman has been nominated. I am sure he will perform more than adequately. I am sure he will perform superbly, and I support his nomination.

[The statement follows:]

PREPARED STATEMENT OF HERMAN SCHWARTZ

I appear hear today to support the nomination of Stephen Markman to be Assistant Attorney-General, Office of Legal Policy.

I have known Steve for many years, both during my service on the Senate Judiciary Committee and subsequently. Although he and I disagree on many and perhaps most legal issues, I've always found him fair and reasonable. We have worked on some issues on the same side and some on opposite sides and I've always found him either a worthy adversary or a valued associate.

So much so that in my Constitutional Law classes and seminars I routinely invite Steve to give one class. Although, like every other teacher, I try to be as objective as I can about the issues taken up in class, my own view points and attitudes inevitably creep in. In order to give students a different view point and attitude I have invited Steve and the response is invariably favorable. Even those who disagree with him admire the objectivity, the articulateness and the fairness with which he puts his position.

Fairness and objectivity are particularly important in the post in question which involves a major role in judicial selection. I would like to devote the balance of my testimony to that matter as practiced by this administration.

We are seeing today an effort to impose a rigid, ideological view point on the Federal Judiciary. This effort is virtually unprecedented in recent memory. In the words of University of Chicago Professor Philip Kurland, a deeply conservative man on such issues as affirmative action and school desegregation as well as other matters, the purpose is to "rewrite laws in the constitution to the administration's liking. Reagan's judges are activities in support of a conservative dogma." U.S. News and World Report, p. 65, Oct. 14, 1985. I have written a paper on this matter for People For the American Way and I should like to attach that to my testimony.

Some of these appointees have gone so far that even people who might ordinarily be pleased at the outcomes have raised questions about their approach. For example, Judge Richard Posner's efforts to rewrite the anti-trust laws, recently moved even a business lawyer sympathetic to Judge Posner to comment on his "almost religious zeal" and lack of a "judicial and restrained approach to finding the law." Brett, Monsanto: Great Expectations Unfulfilled, 30 Anti-Trust Bull. 39, 55–56.

The purpose of this campaign is not really judicial restraint. It is an activism that calls for overruling congressional enactments, like the Fair Labor Standards Act in the *Garcia* case, overturning long-standing constitutional doctrines like Selective Incorporation, broad and expansive rulings when narrow grounds are available, as in the *Leon* good-faith test case, and overriding state courts in criminal matters. See *Michigan* v. *Long* and *Massachusetts* v. *Upton*.

This effort is virtually unprecedented. During the last half of the century, ideological criteria have almost never been imposed on the lower courts. Conservative Republican Presidents have appointed judges who could be described as liberals, and liberal democratic Presidents have appointed conservatives. Just looking at party lines, today's judiciary probably contains at least as many judges appointed by Republican Presidents as by Democrats—since 1952 some 1200 judges have been appointed, of whom Presidents Eisenhower, Nixon and Ford appointed some 650. As a result we have a diverse judiciary which this administration, nevertheless condemns as unbalanced.

It is often said the President Roosevelt's choices were ideological. But his choices were different in several important ways:

1. President Roosevelt sought judges who would not strike down statutes overwhelmingly passed by Congress and supported by the nation. President Reagan is seeking judges to achieve what Congress and the Courts have refused to give him, and over which the nation is, to say the least, divided.

2. President Roosevelt was concerned only about one issue: the judicial veto of congressional efforts to deal with the economy. This administration's agenda covers virtually every facet of the federal courts work over the last 30 years.

I do not mean to say that President Reagan's effort is illegitimate. He has a constitutional right to do what he is trying to do. I do, however, think it is unwise. Apart from turning the federal courts away from their historic role of protecting individual rights, a role that goes back to John Marshall, and is acknowledged by such deeply conservative lawyers as former Solicitor General Rex Lee, this effort will politicize the courts and deprive them of both the substance and appearance of that fairness on which so much of their legitimacy depends.

This effort imposes special obligations on the Senate. As Senator Hatch said a few years ago in what he considered comparable circumstances and I quote: ". . . Senate procedures, such as Senatorial courtesty, that can be justified when nominations are considered at sporadic intervals, are simply inappropriate when an entire branch of the national government is literally being refashioned over a period of months. Reagan and the Courts, Washington Legal Foundation, 1980.

I hope the Senate and this Committee in particular will heed Senator Hatch's wise observations.

The New Right's Court Packing Campaign

By Herman Schwartz*

For almost 200 years, Americans have depended on our courts to preserve liberty and promote justice. They may not be able to much longer. Having failed to persuade Congress or the courts to curb individual rights, President Ronald Reagan and the New Right are concentrating on the appointment of federal judges committed to curtailing judicial protection of individual liberties. Their goal is to undo a judicial tradition dating to the birth of the republic.

If this assault succeeds--

- limitations imposed by the Bill of Rights will erode and states will be free to sanction religion, censor communications, deny women the right to an abortion, impose cruel and unusual punishments, and trample on the rights of the accused;
- voting rights will be threatened;
- state and federal officials will be prevented from adopting voluntary affirmation action plans;
- citizens with grievances will not get their day in court;
- the Constitution and civil rights laws will be narrowly read, setting back the fight against racial and sexist prejudice.

---

* Herman Schwartz is a professor of Constitutional Law at The American University Law School and former Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the U.S. Senate Judiciary Committee.

These are the stated goals of the New Right. And though it is unlikely that all of this will come to pass, the opportunity exists to make many of these goals a reality.

The Supreme Court is the most obvious place for court-packing, with five Justices over 76. But President Reagan's opportunity to reshape the High Court turns on fortuities of health and retirement. No such uncertainties overhang his opportunity to reconstitute the 12 regional Courts of Appeals and the 94 District Courts.

I. THE SIGNIFICANCE OF DECISIONS MADE BY FEDERAL APPEALS AND DISTRICT COURTS

During his first term, President Reagan put 31 judges on the federal appellate courts and 129 on the district bench. Another 160-175 judges can be expected to retire, resign or die during his second term. Moreover, in late 1984, Congress created 85 new judgeships. By 1988, therefore, President Reagan will probably be able to name about 400 judges, more than a majority of the 744 in active service. This is more than any President in history; in the last half century, only Franklin D. Roosevelt and Dwight D. Eisenhower were able to name a majority of the active judges.

The importance of this can be seen from a few numbers. Between July 1, 1984 and June 30, 1985, the federal courts of appeals decided 31,387 cases. In most of these, the appeals courts are the last stop, since the Supreme Court only reviews about 100-150 federal appellate cases.

The courts of appeals are particularly significant in the regulatory area, which affects almost everything from the price of natural gas to the safety of children's toys. Regulatory law is a joint product of initial agency action and review by the courts of appeals. These courts usually examine about 2,500-3,000 agency actions per year, no more than 10-15 of which will undergo further review by the Supreme Court. Until recently, many of the appellate courts exercised some check on the Reagan administration's campaign to dismantle 50 years of bi-partisan effort to deal with the problems of an industrial society. As more Reagan judges take office, that check is weakening.

Who sits on the district courts is also crucial. In 1984-85, those courts issued 306,987 decisions. Most of these rulings and thousands of others during the course of a trial are not reviewable by an appellate tribunal.

Alexis de Tocqueville's observation 150 years ago that "the authority of a judge is invoked in the political occurrences of every day" and "is invested with immense political power" is truer today than it was then, as the federal government has become more dominant in our society. Historical and current examples abound. In the antebellum period, the Compromise of 1850 and the Kansas-Nebraska and Fugitive Slave Laws made the federal courts responsible for resolving the sectional controversy over slavery. More recently, lower federal court judges in the South were the ones who bravely insisted that Brown v. Board of

Education[1] and its progeny be enforced and who led the way in recognizing the rights to decent treatment of prisoners, juveniles, mental patients, and other institutionalized people.

II. WHAT THE NEW RIGHT WANTS FROM ITS JUDGES

With such power, lower federal court judges can achieve many of the New Right's goals. And these goals are not modest. They constitute nothing less than a radical alteration of our form of government. The target is not just the specific decisions on abortion and school prayer, but the very legitimacy of judicial protection of individual rights and social justice. This is why they castigate not just the Warren Court of the 1960s, but the Burger Court as well, six of whose nine current members were appointed by Presidents Nixon, Ford and Reagan.

A. "Judicial Restraint"

The Administration and its allies claim to be looking only for judges who will exercise "judicial restraint." Court of Appeals Judge Robert Bork, a Reagan appointee and one of the Right's most prominent theoreticians, writes that a "continuing and self-conscious renunciation of power...is the morality of the jurist."[2] White House Counsel Fred Fielding says that the administration seeks judges "who view the courts as interpreting the law, rather than enacting it."[3]

Judicial restraint in this context does not, however, mean what it sounds like. To the administration and the New Right, it means compliance with the 1980 and 1984 Republican Party platforms pledging to:

> appoint ... women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens...is consistent with the belief in the decentralization of the federal government and efforts to return decision-making power to state and local elected officials...[and] who respect traditional family values and the sanctity of innocent human life.[4]

In practice, this turns out to be "restraint" only when it comes to protecting individual rights and promoting social justice. In other respects, it calls for extreme activism: overruling over 60 years of judicial precedent, ignoring part of the Constitution, and returning to the 1885-1937 period when the federal courts were largely indifferent to the claims of the unpopular and the weak. It involves not a renunciation of power, but an aggressive drive to overturn the rulings and views of most of the Justices who have sat on the Court during this century.

The specific constitutional agenda, as laid out by one of the New Right's more forthright spokesmen, former Associate Deputy Attorney General Bruce Fein, includes reducing access to the federal courts for the redress of grievances; allowing greater state involvement in religious matters; weakening the rules requiring fairness in election district reapportionment; striking down voluntary and other kinds of affirmative action; overturning the 12 year old abortion decision; diluting the laws against race and sex discrimination; and virtually eliminating most legal protections for the accused.[5]

B. Abandoning the Incorporation Doctrine

The centerpiece of this program and probably the preeminent doctrinal goal is to overturn the doctrine of incorporation by in the Fourteenth Amendment which guarantees of the Bill of Rights like freedom of speech, press, association, religion, privacy, counsel and freedom from excessive punishment have been made binding on state and local officials. Although the doctrine has been solidly established since the 1920s, Attorney General Edwin Meese III declared in a speech before the American Bar Association in July 1985 that it is contrary to what he calls the "Original Intention" of the framers that "the Bill of Rights did not apply to the states...." After lambasting the Supreme Court for deciding cases on "policy" grounds rather than on the basis of "constitutional principles" --an attack precipitated by the Court's refusal to abandon its almost 40 year commitment to governmental neutrality in religion--his speech attacked the incorporation doctrine as "intellectually shaky," "constitutionally suspect," and "politically violent" toward Federalism.

Nothing better illustrates the radicalism of the New Right's attack on the courts. For the Meese argument goes not only to the role of the federal courts but to the very substantive law binding state and local authority.

If the incorporation doctrine were abandoned, what provision of the Constitution would stop state and local officials from putting people in jail for criticizing the government, which some states have tried? From deeply entangling state and church or denying religious freedom, which are common in our history? From denying the effective assistance of counsel to someone charged with murder, as Alabama did in the Scottsboro case? From brutally coercing a confession, a common local practice before the Supreme Court stepped in? From imposing cruel and unusual punishments, or imposing double jeopardy? From restricting the press, or denying the right to associate? In short, all the protections of the Bill of Rights that were held inapplicable to the States prior to 1868 when the Fourteenth Amendment was adopted, would again be inapplicable.

Mr. Meese seems to have forgotten the Civil War, the Fourteenth Amendment, and other post-war civil rights enactments. The Fourteenth Amendment is, after all, the textual source of the incorporation doctrine. As the conservative Justice Potter Stewart said for a unanimous Supreme Court in 1972, the Fourteenth Amendment was

> an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era--and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.

Nor is the brand of "judicial restraint" demanded by the New Right limited to constitutional law. It also includes weakening laws passed by Congress to protect the environment and promote safety and health; narrowing the writ of habeas corpus; and limiting the congressionally created rights of pensioners, the handicapped, prisoners, and others. One influential academic has gone so far as to argue that wage-hour laws, the National Labor Relations Act and most other New Deal legislation, are all unconstitutional.[7]

C. Reducing Protections for Individuals and Minorities

The New Right's ultimate goal is to reduce judicial protection for individual rights to a minimum and to relegate such protection to the legislature and the executive branch. In Fein's words, "the first place to get resolution or redress would be in your legislative offices or in your executive branch offices. The judiciary should be there only to police the outer perimeters which legislators and executive officials have in formulating policy."[8]

Reliance on the popular branches of government for the protection of individual liberty is a contradiction in terms. Justice Robert H. Jackson (a severe critic of what he called "libertarian judicial activists") observed years ago that the Bill of Rights was created to protect the individual and the minority against the popular will. The majority, after all, needs no judicial protection for by definition, it controls the legislature and the executive. As Alexander Hamilton wrote in The Federalist No. 78, the Constitution imposes "certain exceptions to the legislative authority," in order "to guard the rights of individuals from the effects of those ill humors" which can oppress the minority or "injur[e]...the private rights of particular classes of citizens by unjust and partial laws." The Bill of Rights manifests democracy's awareness of its own need for self-restraint. Obviously, a majority-controlled institution like a legislature is not likely to restrain that same majority, especially when the legislature's own "ill humors" produce the "unjust and partial laws." For that kind of check, an insulated institution is necessary, which is why the courts have the primary responsibility for providing this protection, and why federal judges were given life tenure and an immunity to legislative reduction of their salaries. As Justice Jackson declared:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

The federal courts' authority, going back to Marbury v. Madison (1803) and earlier, has been reasserted time and again, on the bench and off, by Republicans and Democrats, liberals and conservatives. Thomas Jefferson, no admirer of judicial power, wrote to James Madison in support of a Bill of Rights:

> "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary."

To take this check from the judiciary and to rely solely on the legislature and executive for these protections does violence to a constitutional design that has generally served us well these 200 years. This is not conservative restraint. It is radical activism at its most extreme. It is not in accord with the "original intention," but contrary to it and profoundly anti-constitutional.

D. The Right Kind Of Judicial Activism

This exaltation of "judicial restraint" also seems to be only a sometime thing. Where the protection of property or judicial curtailment of individual rights is concerned, the New Right urges judicial activism.

Consider Garcia v. San Antonio Metropolitan Transit Authority (1985). In 1976, in National League of Cities v. Usery, four conservative Justices joined uneasily by Justice Harry Blackmun overturned Congress' 1974 extension of wage-and-hour standards to state and local employees. This was judicial activism at its most energetic, for judges rarely review Congressional action in economic matters. In Garcia, after nine years of confusion, uncertainty and acrimony over the application of League of Cities, Justice Blackmun joined the 1976 dissenters to overrule it, advising the states to look to Congress for protection against federal action, a principle more than 150 years old.

One would have expected applause from the Right for this judicial deference to the representative organs of government. Instead, these devotees of judicial restraint have assailed the decision for leaving the states to the tender mercies of "political officials," bereft of a judiciary to "protect...the States from federal overreaching."[10]

This same slipperiness can be observed in the Court's criminal law decisions. For example, in Michigan v. Long (1983), the Justices overturned a century-old doctrine limiting Supreme Court review of state court criminal cases. And in Florida v.

Casal (1983) the Chief Justice not too subtly suggested to Florida voters that they legislatively overturn state court decisions that granted defendants more rights than the federal courts.[11]

The New Right has also called on the courts to exercise "strong judicial review" to protect "economic civil rights" and to resume the pre-1937 economic interventionism in order to protect the right of property and the free market. At other times, they have called for annulling a Hawaii land-reform statute upheld in 1984 in deference to the Hawaii legislature, rent-control laws, and the Federal Election Campaign Act.[12]

In their arguments for "restraint," Mr. Meese, Judge Bork, and others have called for exclusive reliance on the framers' intentions. In Judge Bork's words, "the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed."[13]

This nostalgia is deceptive. For one thing, as Mr. Meese, Judge Bork and everyone else knows, judges and lawyers make unreliable historians. Although the historical record is often spotty, confusing or nonexistent, lawyers and judges always manage to find historical support for the result they want. Dred Scott and Plessy v. Ferguson[14] relied heavily on historical evidence which, on analysis, turned out to be feeble at best.

More importantly, our Constitution was not adopted to apply just to the world as the Framers knew it. We were then a tiny, largely rural society with a weak national government and predominantly local loyalties. We are certainly none of those today, and the inevitably limited vision of a handful of 18th century statesmen, no matter how farsighted they were, should not straitjacket us. As Woodrow Wilson said, the Constitution was meant to be "a cornerstone, not a completed building. It is a root, not a perfect vine."[15]

E. Other Consequences.

1. Loss of objectivity. If the New Right assault succeeds, not only will our liberties be in jeopardy, but the courts will lose the aura of objectivity and fairness without which they cannot effectively function.

2. Strife. Politicization and polarization of the selection process, is also likely to produce the kind of bitter strife and partisan conflict which we have usually avoided in lower court appointments. Recent American history shows very few ideological challenges to such nominations. Between 1952 and 1984, about 1,200 federal judges were appointed. Few encountered philosophic opposition. Conservatives attacked Judge Abner Mikva for his stand on gun control and campaigned against Judge Patricia Wald for her alleged views on the family. On the other side, civil rights groups attacked both Judges L. T. Senter and Cornelia Kennedy. There was no opposition, however, to Judges Richard Posner, Antonin Scalia, Robert Bork, and Frank Easterbrook.

Indeed, the last full-scale philosophic battle over lower federal court appointments was when John Adams and the Federalists lost the Presidency and Congress to Thomas Jefferson and his party. The Federalists tried to make the judiciary a conservative bastion against Jeffersonian democracy. As part of a much-needed reform of the federal judiciary, the outgoing Federalist Congress enacted the Judiciary Act of 1801, and in the process, created 16 new judgeships. Adams filled them with true-blue Federalists, the "midnight judges" of March 1801. Outraged Jeffersonians moved to repeal the entire Act and to abolish the judgeships. After one of the most bitter party disputes in American history, the Jeffersonians prevailed and abolished the judgeships. Ronald Reagan is the first President since John Adams to try to win through extensive court-packing what he has either lost or cannot win in Congress.

3. Loss of diversity. New Right success will also deprive our lower courts of a vital and creative diversity. Senators of the President's own party from the state in which the judge will sit, usually have a great deal of influence in selecting district judges. Until recently, these Senators also influenced the appointment of appeals court judges. Influence and even control over these lower court nominations has also extended to important Congressmen and to other political figures such as Governors or political bosses.

Diffusing the power of judicial selection and the absence of strict ideological conformity have usually produced a lower court judiciary of great diversity reflecting different regional, ethnic, racial, political, and social interests. This vital diversity is now threatened by the New Right's campaign for ideological conformity.

III. THE STRATEGY

A. Ideological Pre-Screening

The New Right's strategy for packing the federal courts is designed to achieve blanket ideological conformity. Political scientist Sheldon Goldman at the University of Massachusetts has described the process as "consistent ideological or policy orientation screening."[16] This often requires nominees to prejudge specific issues that may come before them. Under such rules of judicial nomination and confirmation, Justice Sandra Day O'Connor might not have been nominated or confirmed. During her confirmation hearings, she objected to ideological interviews, saying, "I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position."

The New Right campaign is not just a presidential initiative. District judges in North Carolina, Alabama, Utah and Texas, for example, are being selected on the recommendations of such New Right Senators as Jesse Helms and John East, Jeremiah Denton, Orrin Hatch, and Phil Gramm, respectively. The overall impact on the federal judiciary of such New Right power is diluted by recommendations by moderate Republican Senators. More often than not, however, these moderates are finding their suggestions rejected as too liberal.

B. Appointing Young Judges

Choosing young judges is a key element of the New Right's strategy. As Senator Phil Gramm of Texas said, speaking of a 31-year old he had recommended for the district court in Texas, the idea is to pick judges who will "be there for a long time...making rulings after I'm dead."[17] White House Counsel Fielding has acknowledged such a strategy. In Texas, three Reagan judges were under 40 at the time of their appointment. A Dallas Times-Herald study in March 1985 found that during President Reagan's first term, 11.4 percent of all his appointees were under 40, a higher percentage than under any recent President, and that the average age of his judicial appointees is declining substantially,.

Other examples include the appointment of then-42-year-old Richard A. Posner, a leading New Right theoretician, and 35-year-old Frank Easterbrook--both from the School of Law of the University of Chicago--to the Seventh Circuit (Illinois, Indiana, Wisconsin); J. Harvie Wilkinson, 39 when nominated to the Fourth Circuit (Maryland to South Carolina); Kenneth Starr, an assistant to former Attorney General William French Smith, named to the U.S. Court of Appeals for the District of Columbia when he was 36; Alex Kozinski, 34, nominated to the Ninth Circuit, which covers the West Coast; and Edith Jones (one of Reagan's few female nominees), 36 when appointed to the Fifth Circuit (Texas, Mississippi and Louisiana).

C. The Role of Academics

The Administration's penchant for law professors is not accidental. Academic lawyers are trained to criticize existing law and have less respect for precedent and legal tradition. Also, their views are usually well-known, so there is little chance of making a mistake about such a nominee's views.

D. Rejecting those Insufficiently Pure

Ideological uniformity is a major factor not only in selecting nominees, but also in rejecting those not sufficiently pure. Indeed, Fielding acknowledged that someone "active in prochoice...or for defendants' rights" wouldn't make "the final cut."[18] Four specific instances of this kind of rejection have come to public attention so far; there are probably many more.

1. Judith Whittaker. Associate general counsel of Hallmark Cards, first in her law school class, rated highly by the American Bar Association, and described as "outstanding" by the Chief Judge of the U.S. Court of Appeals for the Eighth Circuit, Whittaker was slated for nomination to that court in 1981. However, she committed the unpardonable sin of supporting the Equal Rights Amendment, which was also supported by the Republican platform until 1980. The New Right charged her with being a closet Democrat, anti-business and pro-abortion. In fact, she is a well-connected Republican, has represented business interests for more than a decade, and has never stated her views on abortion

publicly. Nevertheless, after her opponents complained to Lyn Nofziger, a top Reagan political adviser, the White House eliminated her from consideration.

2. Andrew Frey. Deputy Solicitor General of the United States and the government's chief advocate on criminal matters in the Supreme Court, Frey was proposed for the Court of Appeals for the District of Columbia, Washington, D.C.'s highest local court. He has probably won more prosecution victories in important cases than any lawyer in practice, and was expected to be a forceful law-and-order judge.

He was not sufficiently pure of heart, however, for the New Right. First Senators John East and Jeremiah Denton subjected him to a questionnaire including questions such as whether the Supreme Court has properly decided its cases dealing with abortion, religion, school prayer, the death penalty, affirmative action, school desegregation, labor law, and the E.R.A. They also asked him views about certain pending legislation. (The full text of this questionnaire is reprinted as an Appendix.)

It is not know whether Frey's answers were right enough. In any event, he had made small contributions to Planned Parenthood and the National Coalition to Ban Handguns. Thirteen Senators led by Denton demanded that because of these contributions, President Reagan not press the nomination. And Mr. Reagan promptly obliged, the first time that a President has reversed himself on a selection to the local Washington courts.

Nothing better illustrates the scope of the Right-wing insistence on ideological purity than the Frey episode: the candidate is a law-and-order advocate and it didn't really involve a federal court, but only a local tribunal. Yet as in the Whittaker case, the lack of total purity--even on actions protected by the First Amendment and almost certainly irrelevant to the nominees' future duties--aroused the New Right and the President acquiesced.

3. William Hellerstein. The third example harks back to old-time McCarthyism for the key actor is Roy Cohn, former counsel to Senator Joseph McCarthy.

Hellerstein, appeals chief of the New York City Legal Aid Society, is one of the most respected lawyers in New York and a solid member of the legal establishment. In 1984, he was recommended for a district court slot by Senator Daniel Patrick Moynihan and approved by Republican Senator Alphonse D'Amato. The senatorial agreement alone would normally be enough to secure a nomination by the President. But, Hellerstein was also endorsed as "outstandingly able" by 24 former federal prosecutors, backed by prominent Republicans in New York including President Ford's former Deputy Attorney General Harold Tyler, and selected by a screening panel headed by Leonard Garment, who recently represented Mr. Meese.

About 15 years earlier, however, Hellerstein had written an article on court congestion which, in passing, commented critically on the practice of imprisoning people convicted of minor drug-possession crimes, prostitution and gambling. Calling him an "ultraliberal," Cohn loudly objected to him, and the administration again acquiesced. An outraged Senator Moynihan wrote Fielding: "There is a word for the ideological tests for the judiciary which are seemingly now in place in the White House and the Justice Department. The word is corruption." Fielding replied that Hellerstein was "not consistent with what the [White House screening] committee was looking for."[19]

4. Joseph Rodriguez. The Public Advocate of New Jersey, a member of the Governor's Cabinet, and former head of the state Bar Association, Rodriguez was proposed by Republican Governor Thomas Kean and nominated for a district judgeship in the Spring of 1985. As usual, he was investigated by the White House, the American Bar Association which rated him "exceptionally well-qualified," and Senator Strom Thurmond, Chairman the Judiciary Committee. Apparently dissatisfied with these inquiries, Senators Hatch, Denton and East sent Rodriguez most of the lengthy questionnaire sent to Frey and demanded that he list his political contributions of the past 10 years.

This time, the New Right went too far. Chairman Thurmond's irritation at this challenge to his authority, plus the political muscle behind Rodriguez, caused them to abandon whatever opposition they may have contemplated and Rodriguez was confirmed.

Moreover, in August 1985, National Public Radio's Nina Totenberg reported that several prominent Republican women being considered for federal judgeships--all with solid political backing--told her they had been asked directly by Justice Department representatives how each would rule in abortion cases. None has been nominated. "I guess most of us have accepted that we're not going to get these judgeships unless we're willing to commit to a particular position which would be improper," said one well-known state judge, who, like the others, insisted on anonymity.[20]

All this is probably one reason why after five years in office, the Administration has added only one Black to the federal bench and only a handful of women, with the overwhelming bulk of the appointments going to white males.

E. The Role of Ideology: Past and Present

The zeal for appointing ideologically pure judges shown by this administration is unprecedented. In fact, very few other Presidents have consistently applied broad-ranging ideological criteria. Patronage and politics have been the primary factors, for better and for worse. According to one study of appointments from 1921 through 1955, "ideology seems to have been of no great importance in circuit appointments except in the administration of Franklin D. Roosevelt. And even in his case, master politician that he was, he never let this interfere with a good political stroke." With respect to the district courts, it was found that "the constitutional ideology of nominees has had little to do with District Court appointments. Conservative Presidents have appointed liberals and liberal Presidents have appointed conservatives."[21]

Earlier in the century, according to a recent American Bar Foundation study, there were ideological elements in some of the appointments by Theodore Roosevelt and Woodrow Wilson but again relatively infrequently. The 1955-1980 record shows even less weight to such factors. President Eisenhower, no great civil rights devotee, appointed Judges Elbert Tuttle, John Minor Wisdom and Frank Johnson, who have been in the forefront of judicial protection for civil rights; John F. Kennedy, by contrast, appointed segregationists like Harold Cox of Mississippi. President Nixon appointed former NAACP General Counsel Robert Carter, and President Carter appointed Cornelia Kennedy to the Sixth Circuit and L. T. Senter to the District Court in Mississippi, both of whom were bitterly opposed by civil rights groups. According to Michael Egan, Associate Attorney General under President Carter, "we never talked about whether this guy would support the policies of the President; there was no going into ideological or thought processes."[22]

Even Franklin Roosevelt's appellate court appointments--more ideological than most--were hardly uniform in their overall thinking because Roosevelt's interest in his nominees' philosophy focused on their views of federal power over the economy. The New Right concern is many times more extensive, for it touches on almost everything that courts do.

F. Court-Packing and The Popular Will.

The Reagan court-packing effort is virtually unprecedented in another crucial aspect. Roosevelt's effort to reshape the courts was induced by their persistent veto of economic recovery programs overwhelmingly passed by Congress and almost universally approved by the American people; the 1936 election focused on such programs and court rulings.

By contrast, President Reagan like the Federalists of 1801, is seeking judges who will promote what Congress and the country have refused to give him. Congress has consistently rejected the social positions he is looking for in judicial nominees. It has also refused to destroy the Legal Services Corporation or to weaken the civil rights laws. All indications are that the American people share Congress' attitude for unlike 1936, the courts were not a central issue in the 1984 election. The President has no mandate to undo the Bill of Rights, either directly through legislation or constitutional amendments, or indirectly by judicial appointments.

G. The Future

So far, the New Right has not achieved its goal of insuring that each nominee to the federal judiciary is cast in Jerry Falwell's image. Although few Reagan judges could be called liberal, some are responsible and moderate conservatives. The New Right's failure in Congress and elsewhere, however, has impelled it to intensify its efforts with the judiciary.[23]

IV. THE RECORD OF THE REAGAN JUDGES

The administration's appointment strategy is already bearing fruit. A study of the Reagan judges' performance during 1981-82 by Craig Stern of the Center for Judicial Studies, a New Right think tank, concluded with satisfaction that:

> President Reagan's appointments are redefining the role of the Federal Judiciary...the President has, in general, kept his pledge to appoint men and women to the bench who exercise restraint.
>
> * * *
>
> Of the sixty-two judges evaluated in this study under the standards specified [i.e., adherence to the Republican Platform of 1980]...thirty-one judges exercised restraint in all of their significant cases without exception... sixteen exercised restraint in nearly all their significant opinions...nine... exercised restraint in no more than half of their significant cases...and six published no [pertinent] opinions....The conclusion is inescapable that the Reagan judiciary, so far, has lived up to expectations.[24]

The Center's founder, James McClellan, a former aide to Senators Helms and Hatch, concluded in April 1985 that "the President has done exceedingly well at the appellate level and fairly well at the district level."[25]

The rulings of Judges Bork and Posner, often mentioned as possible nominees to the Supreme Court, have rarely displeased the New Right. Judge Bork, has frequently ruled that plaintiffs seeking access to the federal courts either have no standing or were not entitled to a private right of action under federal statutes. Such rulings further one of the New Right's most important goals--closing the federal courthouse door to those seeking redress for governmental or other abuses. Bork also refused to allow a homosexual to assert a right of privacy for his sexual preference, voted to deny a noncustodial parent the right to continue visiting his child, and generally votes against the claims of prison inmates, parolees and the homeless. On the other hand, he has often upheld agency action loosening restraints on business.

Judge Posner has been quoted as saying, "I hate 'justice.' The word is meaningless. If it's used in a judicial opinion, it's used to obscure the grounds. I think we could do without it."[26] For him, free market economic theory provides a divining rod to all wisdom, and it generally points to conservative results. Thus, he argued against appointing a lawyer for a prison inmate who claimed to have been rendered functionally blind by prison doctors' malpractice (which included operating on the wrong eye). Posner argued--in lone dissent--that the inmate should be relegated to the lawyer-client market. In antitrust matters, even business lawyers have criticized his "almost religious zeal" and lack of "a judicial and restrained approach to finding the law." [27]

Other Reagan appointees have also come through as expected: San Francisco District Judge Eugene F. Lynch struck down a county affirmative action plan for construction projects; Texas District Judge James Nowlin refused to require minimum standards for county jails; Seventh Circuit Court of Appeals Judge Frank Easterbrook upheld the denial of Social Security benefits because close judicial scrutiny of such denials would clog the system.

The overall performance of the Reagan judges in 1981-82, as described by Stern, shows unmistakably what the New Right is looking for: Any ruling that denies a plaintiff challenging public or private authority the right to sue or to prevail, or a criminal defendant any procedural right, is considered commendable "restraint." Anything going the other way is inappropriate "creativity." Thus, Judge Posner is praised for dissenting from an order requiring Indiana to pay for school desegregation and from a ruling allowing an employee to sue for the birth of a deformed child. But he is criticized for reading a federal statute to allow a private litigant to sue.

"Judicial restraint" is found and commended in the dismissal of suits by medicare patients whose funding was terminated without a hearing, by union members suing their union, and by public assistance claimants, refugees, trustees for American Indians, handicapped children, citizens seeking to put questions on a referendum, claimants under the Age Discrimination in

Employment Act, victims of Securities Act violations, public housing tenants, antitrust plaintiffs, county welfare departments, and, of course, prisoners and people suing under any of the various Civil Rights Acts.

The law, even when fairly applied, does not provide redress for all grievances, and it is the business of judges to apply the law, not to exercise a free-wheeling commission to do justice. The significance of the Stern study is its characterization and evaluation of the decisions: If the result is against a challenge to public or private authority, that is good "restraint." If it favors the challenge, then it is branded "activism," with no examination or even discussion of whether the decision is analytically right or wrong under the statutes or precedents.

V. THE PRESIDENT AND THE SENATE: THEIR RESPECTIVE ROLES

There is certainly nothing wrong with a President trying to pick judges who will further the policies he thinks the country elected him to pursue. Every President since George Washington has tried.

But a President has a right only to try to remake the federal judiciary in his own image. He is not guaranteed success. The Constitution divides the authority to choose Supreme Court and other federal judges between the President and the Senate. Just as the President will be concerned about the views of his judicial nominees because of their power over his programs and goals, Senators have a responsibility to exercise independent judgment about whether the nominee will further or impede what that Senator believes are appropriate goals and ideals for the nation. Since the Constitution obviously contemplates and expects that Senators will often differ with the President on these goals, there can properly be conflict.

A judge, after all, is not a member of the President's administration where, within the limits of integrity and fidelity to law the President is entitled to his own people to execute the law as the President sees fit. The judiciary is an independent branch with a constitutional obligation, when appropriate, to say "no" or "you must" to either or both the other branches of government. To ensure this independence, one of the devices employed in the Constitution is to divide the appointing power so that judges are beholden for their appointments to both, and thus--ideally--to neither.

All this is axiomatic, yet many think that a Supreme Court nominee's philosophy and views concern only the President. They mistakenly believe that as long as the President's choice is honest and capable, nothing more need concern the Senate. That is not the way things were during our first century and a half. From 1789 through 1938, 26 out of 110 presidential nominees were rejected, one out of three during the 19th Century. Even George Washington lost one -- the Senate turned down John Rutledge to be Chief Justice in 1795. Today, people as far apart as the liberal Professor Laurence Tribe of Harvard and the conservative Justice William H. Rehnquist agree that the Senate is not supposed to be a rubber stamp.

The Senate's responsibility raises difficult issues about what should be asked at a confirmation hearing, how to reconcile obtaining relevant information about a nominee's outlook while avoiding what Justice Rehnquist referred to as "the suggestion that, in order to obtain favorable consideration of his nomination, the nominee deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge."[28] This concern is part of the reason why the Denton Hatch-East questionnaire was improper: It was a pre-screening device that demanded responses (often through leading questions) on very specific constitutional, statutory and legislative issues, many of which would probably come before the court and are very controversial.

CONCLUSION

During the O'Connor nomination hearings, Senator Howell Heflin, a conservative who was formerly Chief Justice of the Alabama Supreme Court, declared, "[the Supreme Court] is the guardian of our most cherished liberties....The criteria for judicial selection must therefore include a passionate love of justice, the great cement of a civilized society, the guardian of all life and liberty."[29]

The centrality of this principle has been recognized by the American people throughout our history. Judges as diverse as Felix Frankfurter and William O. Douglas have adhered to it as did adversaries like Jefferson and Marshall 200 years ago.

The New Right's radical assault on the courts is thus profoundly anti-constitutional. It would fundamentally alter our constitutional framework without resort to the amending process. It threatens "our most cherished liberties."

NOTES

1. 349 U.S. 294 (1954).

2. Bork, *Tradition and Morality in Constitutional Law* 11 (American Enterprise Inst. 1984).

3. Werner, *Judicial Nominee's Rejection Assailed*, New York Times, B2, April 2, 1985.

4. 38 Cong. Q. Weekly Rep. 2046 (1980).

5. Fein, *A "Reagan Court" Would overturn Past Errors*, Human Events (July 6, 1983).

6. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added).

7. Richard A. Epstein, in *Crisis In The Courts*, 5 Manhattan Report on Economic Policy 3, 5, 11 (1985).

8. Interview with Nina Totenberg, Nat'l Public Radio, Oct. 2, 1984.

9. *West Virginia State Bd. of Educ.*, 319 U.S. 624, 638 (1943) (emphasis added).

10. *Garcia v. San Antonio Met. Transit Auth.*, 105 U.S. 1005, 1029 (1985) (quotations from dissent); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

11. *Michigan v. Long*, 463 U.S. 1032 (1983); *Florida v. Casal*, 103 S.Ct. 3100 (1983).

12. Editorial, Wall St. Journal, July 5, 1985; see Kinsley, *Conservatives Have Their Own Brand of Judicial Activism*, Wall St. Journal, Aug. 8, 1985, p. 23.

13. Bork, *supra* n.2 at 10.

14. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

15. Quoted in Cooper, *The Warrior and The Priest* 45 (1983).

16. Goldman, *Reorganizing the Judiciary: The First Term Appointments* 68 Judicature 313, 315 (1985).

17. Dallas *Times-Herald*, March 19, 1984, p. 1.

18. Interview with Nina Totenberg, Nat'l Public Radio, Aug. 28, 1985.

19. Fielding, supra n.3.

20. Totenberg, supra n.18.

21. Burke, The Path to the Court (Unpub. Doctoral Dissertation 1958).

22. Friedman and Wermiel, Stacked Bench, Wall St. Journal, Sept. 6, 1985, p. 1.

23. Cohen, Conservatives Step-up Efforts to Promote Reagan-minded Judges to U.S. Bench, Nat'l Journal 1560 (July 6, 1985).

24. Stern, Judging the Judges: The First Two Years of the Reagan Bench, 1 Benchmark 3 (1984).

25. Rees, Dr. James McClellan, The Review of the News, 31, 37, (1985).

26. Caplan, Is the Supreme Court Ready for This Kind of Free Market Justice, Wash. Post Outlook, D1 (Sept. 30, 1984).

27. Brett, Monsanto: Great Expectations Unfulfilled, 30 Antitrust Bull. 39, 55-56 (1985).

28. Laird v. Tatum, 409 U.S. 824, 836 n.5 (1972).

29. Nomination of Sandra Day O'Connor before the U.S. Senate Judiciary Committee, 97th Cong., 1st Sess., pp. 26-27, (1981).

Senator HATCH. Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. I want to thank you. I have had a lot of respect for you through the years as you know, and I just want to personally thank you, because I think so highly of Mr. Markman, and I think it is very nice of you to come and testify here today. Thank you so much.

The CHAIRMAN. We appreciate your presence and thank you for coming.

Senator EAST. Mr. Chairman.

The CHAIRMAN. Senator Metzenbaum.

Senator EAST. If I might indulge just a quick question to Professor Schwartz, for whom I have the greatest admiration. I certainly do appreciate his support for Mr. Markman.

If I might, though, get back to a point that I made earlier. You are making somewhat of a broadside at the administration here—that it seems to have something of an ideologically value-oriented view of the courts. Implicit in that statement is the idea that preceding administrations did not engage in that kind of activity.

And I realize that this is not the time or place to pursue this particular thing. We are interested in Mr. Markman being confirmed for his position.

But I really wonder if one could say, honestly and candidly, without reservation or hesitation, categorically, that the Carter administration, or other administrations, or others involved in the judicial selection process, be they Democrat, Republican, liberal or conservative, do not consider the values, the policy orientation of judicial candidates.

After all, as a professor of constitutional law, you know as well as I do, that modern constitutional law, by definition, involves values and policymaking.

Metaphysically you cannot escape that. It inheres in the nature of the beast. And what is my point? Namely, I do not disagree with you, that this administration does show an interest in the policy judgments and values of nominees; but I am simply saying this has been true before. This has been true before.

It inheres in the nature of the thing, does it not?

Mr. SCHWARTZ. It inheres but only to a very mild degree. For example, Mr. Michael Egan who was in charge of judicial nominations for the Carter administration said: "We never asked about ideology. We checked into competence. We checked into ethics and that——

Senator EAST. Well, naturally he would say that, and so would those in the judicial process of the Reagan administration. Invariably, those involved in the process will say, that of course, we never considered judicial philosophy, we do not consider values. We merely look at qualifications. And perhaps they think that they do. But it is a little bit of self-deception. I cannot believe that one could take his role in the judicial selection process seriously and be totally oblivious to the values and the policy orientation of judicial candidates. To say so is to engage in self-deception. It is impossible to do.

Mr. SCHWARTZ. Senator, it depends on the values you are talking about. If one is talking about certain commonly accepted values which are almost universally accepted, about the need for protecting First Amendment rights, the role of the courts, that kind of thing, that kind of question makes sense, and the truth is that most of the time the answers to the question will not be very interesting.

Most candidates who are nominated share the view. What we are talking about here are the kinds of questions that were in the questions submitted to Mr. Rodriguez and to Deputy Solicitor General Andrew Frey, a wide variety of questions on what, for example, they thought of the dissent in the abortion case.

Frankly, I wonder to myself, what relevance a question on abortion has for a nominee for a lower Federal court. His role on these matters is to follow what the Supreme Court has done. His view of whether a fetus is a human being is largely irrelevant, and it is difficult to know how it could be even a factor in any decision that he made.

Senator **HATCH**. Mr. Schwartz, I might add that it may be, the purpose of the question is to have him say that it is irrelevant to him, and frankly, that is precisely what Mr. Rodriguez did say. I will give you another illustration.

On the issue of capital punishment which many Senators on this committee are concerned, and rightly so, it is a litmus test issue to some Senators.

Gun control. It becomes a very important issue to some Senators in this 100-man-and-woman body, that literally has to confirm these people.

Mr. Rodriguez, for instance, he said, although he was against capital punishment—and by the way, everybody who was criticized for that questionnaire voted for Mr. Rodriguez, as I recall, in the end.

But he said although he was basically against capital punishment, he would enforce the law. That was a very significant answer to people on this committee.

So, you know, there are reasons, even with ineptly drafted questions, which some of those were in my opinion, there may be reasons for any Senator to ask any question he cares to in this confirmation process, even though you and I might disagree and Senator Metzenbaum and I might disagree on some of them. I am not trying to justify the questionnaire. We have gone through that time after time. But I am saying that there are legitimate answers that can be given, as important as philosophical answers, you see. I thought in Mr. Rodriguez' case, he did a very, very good job. I had a great deal of admiration and respect for him even though I disagree with him.

Senator **METZENBAUM**. But let me point out, that the questions we are talking about are not just questions about human values. We are talking about, "do you believe that a viable fetus is a human being? If so, do you agree with the Court's finding that a viable fetus is not a person? * * *

If so, on what basis can a valid constitutional distinction be drawn between a human being and a person? * * *

Is a child who is born alive after an abortion, a person under the 5th and 14th amendments? Does the right to an abortion that the

Court created with its *Roe* decision have any application after a child is born alive, as the result of an abortion?"

So I think that we are not just talking, as my colleague from North Carolina suggests, generalized value judgments. We are talking about specific inquiries that were made, in Mr. Rodriguez, by the Senator from North Carolina, the Senator from Alabama, and the Senator from Utah, on specific case issues, and certainly, I think that what Mr. Schwartz is saying, and in response to Mr. East, as I understand it, is that you can want to know people's general views and general philosophical bent, but when you get into the specifics of court decisions and when you try to amend that which the Supreme Court has done by trying to get lower district court judges to commit themselves as to what they are going to do in the future, I think you are really going a long way beyond what this committee has already decided should be done, since we have already decided such questionnaires are inappropriate.

Senator EAST. Well, if I might, Mr. Chairman, just responding to the able Senator from Ohio. He may disagree with the questionnaire sent to Mr. Rodriguez. We were pleased with his responses. We did vote for his confirmation.

Senator Hatch has pointed out he could answer the question by simply saying that he did not think it was a pertinent question, or, that he did not think that a particular question was relevant.

I am not questioning any of that, and one may question the use of a questionnaire. What I am saying is that I do not see how, unless one engages in self-delusion, that you can deny that you are interested in the values of nominees as much as we are. I just think that that inheres in the process, and at some point we have to acknowledge it.

Senator METZENBAUM. Well, I think it is a question of your interpretation of that which is, and that which is not value judgments, or value evaluations, and I think that no administration has gone to the lengths that this administration has gone, in attempting to change court decisions by being certain of the minds and the thinking processes of the nominees.

The CHAIRMAN. It seems to me we are maybe kind of getting off the track here, Senator. I do not want to cut anybody off. Go ahead, Senator East.

Senator EAST. No. That is all right, Mr. Chairman. Go ahead.

The CHAIRMAN. I just wondered if we could not move on.

Senator EAST. I do have a statement on the Markman nomination that I would like to have included in the record, Mr. Chairman.

The CHAIRMAN. Without objection it will be admitted.

[The statement follows:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I am pleased to speak this morning in support of President Reagan's nomination of Stephen J. Markman to be Assistant Attorney General in the Office of Legal Policy at the United States Department of Justice.

As the junior Senator from North Carolina, I take pride in noting that Mr. Markman is a 1967 graduate of one of my state's—and the Nation's—most distinguished institutions of higher learning, Duke University. After earning his undergraduate degree at Duke in 1974, Mr. Markman completed his legal eduction at the University of Cincinnati School of Law, the graduates of which have an unusually strong record of public service. Indeed the University of Cincinnati Law School is the only one in the Nation that numbers among its alumni men who have headed all three branches of the Federal Government. Upon his confirmation by the Senate, Mr. Markman will add his name to that rich tradition.

As a member of the Senate Committee on the Judiciary, I also take pride in Mr. Markman's nomination. After service on the staffs of three members of the House of Representatives, in 1978 Mr. Markman joined the staff of the Senate Judiciary Committee as an aide to my distinguished colleague from Utah, Senator Hatch. Since 1981, Mr. Markman has served with distinction as the Chief Counsel and Staff Director of the Subcommittee on the Constitution, which Senator Hatch chairs so ably. In that capacity, I have had occasion to work with Mr. Markman, and I rank him among the Senate's ablest and most effective staff members. He is widely respected among Senators and his peers on the Senate staff for his intelligence and professionalism.

As a Senate Judiciary Committee staff member whose record of service and accomplishment has earned him a major nomination by the President of the United States, Mr. Markman stands in distinguished company. In the recent past, a Chief Counsel of this Committee, Emory Sneeden, an aide to Senator Thurmond, became Circuit Judge of the United States Court of Appeals for the Fourth Circuit in 1984. And Stephen Breyer, who served as the Committee's Chief Counsel under Senator Kennedy, was named to the First Circuit Bench in 1980.

Mr. Chairman, Mr. Markman's strong academic background and his rich experience as a Capitol Hill lawyer will serve him very well in his new capacity. As Chief Counsel of the Constitution Subcommittee, he has addressed the same wide range of complex legal issues with which he will be dealing at the Justice Department's Office of Legal Policy. I am confident that he will perform as well there as he has done here. I urge prompt approval of Stephen Markman's nomination by this Committee.

Thank you.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Thank you, Mr. Chairman. I have to go on to another meeting. I just wanted to indicate my support for both of these nominees, and I ask permission to put a statement in the record at the appropriate place.

The CHAIRMAN. Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I'm pleased to be here today to hear from these distinguished nominees for the Office of the Solicitor General and the Office of Legal Policy.

The Office of the Solicitor General is one of the most important in the Department of Justice, and, indeed, within the executive branch of Government. It is the office involved with the process of evaluating cases that present important questions of public policy, and of advocating those policies in the Supreme Court of the United States. That Court, of course, is actively engaged in shaping and reshaping the course of American society. Questions of constitutional interpretation arise daily in that Court, involving issues from the right to the unfettered exercise of free speech and of religion, to equal protection, to Federalism. Even more frequently, petitions are considered by the Solicitor General for presentation to the Supreme Court. These petitions for certiorari are purely discretionary, and are up to the Solicitor General to present or not, in consultation with the Attorney General. This is an important power.

I believe that Mr. Fried has clearly demonstrated, in his capacity as Acting Solicitor General as well as in his prior professional endeavors, that he has the intellectual capacity and the quality of judgment necessary to carry out the duties of that office. He has represented the Department of Justice and all of the agencies of the Government ably, and with a high degree of integrity. In that capacity, it has been sometimes necessary to advocate seemingly controversial positions, positions that are not always popular with those who often control the tenor of public opinion in this country. But he has done so, as I said, with skill and integrity, and I'm confident that he will continue to do so when confirmed as Solicitor General.

With respect to the Office of Assistant Attorney for the Office of Legal Policy, it is in its own way an equally important office. We wouldn't be having this confirmation hearing were it not so. This particular office, in my view, is perhaps more important because, among other things, it is involved with the question of judicial selection. Long after the policies and legislation that we deal with here have lost all relevance or efficacy, the results of the work of that office go on. With the average age of Federal judges at the time of their appointment being less than 50 years, these people are there to make a lasting mark on the law and the society it regulates.

I'm convinced that Mr. Markman will skillfully and faithfully carry out the duties of that office. His experience with this committee has been exemplary, as has been his stewardship as chief counsel of the Subcommittee on the Constitution. I look forward to supporting his nomination to this office.

Thank you, Mr. Chairman.

The CHAIRMAN. We would like to act on these nominations this morning as soon as we get through the hearing, or shortly afterwards. Thank you very much.

Mr. MARKMAN. Thank you.

The CHAIRMAN. There are no other witnesses, I believe, on Mr. Markman.

All right. Now, Mr. Fried, if you will come up. Now, we have already sworn you. Would you care to introduce your family who are here, and friends.

TESTIMONY OF CHARLES FRIED, NOMINATED TO BE SOLICITOR GENERAL OF THE UNITED STATES

Mr. FRIED. Thank you very much, Mr. Chairman.

I am very pleased at this time to introduce my wife, Anne, my mother, Mrs. Marta Fried, and I am very pleased that three members from the Office of the Solicitor General, Mr. Clagg, Mr. Wallace, and Mr. Geller, are also here.

The CHAIRMAN. Thank you very much.

Senator METZENBAUM. I assume you ordered them to be here.

Mr. FRIED. Oh, I almost ordered them not to be here. There is a lot of work to be done, Senator.

The CHAIRMAN. Is there any opening statement anyone wants to make on him? If not, we will proceed with some questions. Do any of you have an opening statement?

Senator SIMON. I have no opening statement.

Senator SPECTER. Thank you, Mr. Chairman. I have no opening statement.

The CHAIRMAN. Mr. Fried, would you briefly state your legal background and experience that qualify you for the position of Solicitor General.

Mr. FRIED. Mr. Chairman, I think that of all the experience that I have had, that which qualifies me most, if I am qualified, is an experience I had 25 years ago, when it was my privilege to be law clerk to one of the finest Justices in the history of the Supreme Court, John Marshall Harlan, and I hope I carry his standards, and his values in my heart and mind, as I do this work.

In a more mundane way, for the 24 years following that experience I have been teaching law at Harvard Law School. I have taught eight different subjects. I try to change from time to time so that I do not get stale.

And I have consulted from time to time, mainly to the Government, but also have done some private consultation. But I would say it is principally the experience of studying, teaching law, and writing about the law, which has given me such qualifications as I have.

The CHAIRMAN. Mr. Fried, as you know, the Office of Solicitor General has a distinguished history. Traditionally, the Solicitor General has enjoyed a relationship with the Supreme Court characterized by a candid and independent legal judgment.

How do you intend to conduct yourself, if confirmed by the Senate, as Solicitor General?

Mr. FRIED. Nothing would be more important to me than to maintain that sense of confidence which I believe the Supreme Court has always had in the Office of the Attorney General. That the Supreme Court can believe that the work that comes from the Office represents the most objective, the most accurate, and the fairest presentation of the issues before it. To be sure, the Office of the Solicitor General is an advocate's office. Nevertheless, I think though we are advocates, though we are the Government's lawyer, we are also handmaidens to the Supreme Court, and the Supreme Court has always reposed a very special confidence in the quality of our work, in the accuracy of our work, and in the objectivity and restraint of our judgments, and I would hope very much to keep that up.

The CHAIRMAN. Mr. Fried, how is the Department's position in a given case before the Supreme Court determined, and how do you intend to resolve any differences of opinion on the legal positions that should be taken in the Supreme Court?

Mr. FRIED. Mr. Chairman, there is a process by which the Solicitor General's position is determined, and I think if I sketched that process out, it would remove some of the mystery about our Office.

We certainly do not sit there and figure out what we think is best by just talking about it at lunch. We are the Government's lawyers, and the way a matter comes to us is that an operating, a litigating division of the Department of Justice with a programmatic interest in a matter, or an agency of the Federal Government, will have won or lost a case in a court below, and will then request that our Office take them in that matter in the Supreme Court. We then consider that request. The usual form in which this takes place is either as a draft brief from the division or the agency, or as a memorandum from the division or agency. That request is then assigned to an assistant in the Office.

The assistants in the Office are an extraordinary group of men and women, professional career lawyers of the highest degree of competence.

That memorandum is then reviewed by one of the deputies who are even more remarkable than the assistants, and fewer in number, and that deputy, and the assistants together, make a recommendation to the Solicitor General who then proceeds to make a final disposition, whether the request of the agency or department to bring a case to the Supreme Court will indeed go forward.

If we determine it shall go forward, then we proceed to draft the papers, draft the brief, and argue the case.

The CHAIRMAN. Mr. Fried, during the past several months you have been serving as Acting Solicitor General. In that capacity you signed an amicus brief before the Supreme Court urging that the Court abandon its decision in *Roe* v. *Wade*. Would you please explain why you took this position.

Mr. **Fried**. Certainly, Senator. Before I give that explanation I should like to enter one caveat. That case is currently before the Court, and, indeed, will be argued next month. And that special relation to the Court which I just spoke of, that special deference which I owe the Court, I think includes my respect for it in not arguing in another forum, a case which will be argued before it.

The **Chairman**. I understand.

Mr. **Fried**. So I hope you will understand if I do not go into details, and try to get a "bootleg" argument, as it were, through the back door here, and I shall try not to do that.

But I think I can answer in a general way the process which we followed, and the general thinking that was involved, because I believe that is what you are interested in.

Once again, this amicus brief did not arise in a way other than any other amicus brief which we file. The Solicitor General's Office does not dream up what cases it will file amicus briefs in.

There, again, it acts on recommendation by relevant divisions, in this case, the Office of Legal Policy, and the Civil Division. The Assistant Attorney General for the Civil Division, Mr. Willard, did sign that brief along with me.

We then considered and analyzed those recommendations and came to our conclusion. I think I am not trespassing on the principle of not arguing in an other forum a case which must be and should be argued only to the Supreme Court, that though there have been very grave political and moral controversies regarding the subject of abortion, what is in question in our Thornberg brief does not deal with those controversies at all. It is not a brief which discusses the rights and wrongs of abortion.

That brief is concerned with questions of the proper form of adjudication, the proper forms of reasoning, the proper forms of constitutional interpretation.

The **Chairman**. The constitutional basis, in other words.

Mr. **Fried**. That is correct, Mr. Chairman, and that is a matter on which I believe that we had a contribution to make, and it seemed to me appropriate that we make it.

The **Chairman**. Mr. Fried, some critics of the administration have pointed to the—when I stood at the bar we called it amicus curiae; I believe you called it amicus, so, whichever it is—urging the abandonment of *Roe* v. *Wade* as an indication that the Office of the Solicitor General is being somewhat politicized. How do you respond to that concern?

Mr. **Fried**. Senator, I do not believe that our Office has been politicized, and I would not wish to serve as Solicitor General in order to further a process of politicization. I suppose that the President has nominated me because he has some sense of what my philosophy is, and that philsophy enters into my judgment of what the law is on a particular matter, and what arguments should be made. But certainly, partisan political considerations have never entered into our judgments, never should enter into our judgments, and I would never allow them to enter into our judgments.

The **Chairman**. Now, Mr. Fried, the Justice Department I believe filed two briefs in the *Thornberg* v. *Gingle* case, now pending before the Supreme Court, did they not?

Mr. **Fried**. Yes, Mr. Chairman.

The **Chairman**. The Legal Defense Fund has raised a question concerning what they believe to be serious inaccuracies in the brief concerning statements regarding the legislative history of the 1982 amendments to the Voting Rights Act.

Are you in a position to comment on their concerns at this time?

Mr. **Fried**. May I make this comment, Mr. Chairman. First, Mr. Short showed me the letter from Mr. Schnapper of the NAACP Legal Defense Fund, and, without offense to the many other kind people who have submitted letters to the committee on my behalf, I value that letter I think more than any other because Mr. Schnapper and I have not agreed on all matters and yet I found that letter warm and supportive, and I appreciate the support of people who have not always agreed with me more than of those who agree with me. On the subject of the *Gingle's* case itself, I should say first, that that was a case in which we filed a brief in response to a specific request by the Supreme Court.

We did not intrude ourselves into that case. We did not thrust ourselves into it. We were asked by the Supreme Court to file such a brief. In order to file that brief, we engaged in a detailed analysis of the legislative history. That legislative history is very complicated, sometimes confused, very intricate. I hope we represented it accurately. We worked very hard on it. It is a matter, of course, on which reasonable men and women could differ, and the NAACP Legal Defense Fund has filed its own brief giving its interpretation of that legislative history.

That is precisely the issue which the Supreme Court will have before it in December, I believe, when that case matter will be argued, and I hope that our office will have an opportunity to argue, and at that time we might address those concerns. I do think it would be inappropriate for me to join issue on that question here.

The **Chairman**. Thank you. Mr. Fried, will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. **Fried**. Certainly, Mr. Chairman.

The **Chairman**. The distinguished Senator from Delaware.

Senator **Biden**. Thank you, Mr. Chairman.

Professor Fried, welcome. I am sorry I did not hear your opening comment. Mr. Chairman, I would like to ask unanimous consent that an opening statement with regard to both Mr. Fried and Mr. Markman be entered in the record as if read.

The **Chairman**. Without objection, your statement on Mr. Markman can follow mine.

Senator **Biden**. Fine.

I think both of the nominees are qualified for the positions they seek, notwithstanding the fact, Mr. Fried, that I have some concerns.

Let me begin, and I am going to go back and review some ground that the chairman just went over, but let me start with a new point and ask you maybe to explain a couple things for me.

You were quoted in the report of the Manhattan Forum, at page 3, as saying the following: "Looking back at that time—meaning the mid-1960's—I think it is clear that judges were among those who did it to us. They did it to us partially through the creation of new rights, mainly, positive rights to a particular benefit or status. They also did it to us by departing from common sense and moving in the direction of elaborate rule systems." End of quote.

Now my first question is, Mr. Fried, who is the "us" you are referring to?

Mr. **Fried**. I am going to have to think myself back to that particular——

Senator **Biden**. Would you like me to——

Mr. **Fried**. Well, I have done so. I now recall that lunch and those remarks, which were not written remarks. I think "us" must have been the American people.

Senator **Biden**. And what you were saying was, somehow, the Court victimized us? I mean, what did they do to us?

Mr. **Fried**. Senator, I would not want to say "the Court." I said "judges." At that time I was referring to a point which I have written about on other occasions, may I say in perhaps more guarded and more scholarly, and less vulnerable language. I do think that an overly broad expansion of positive rights of people to one thing or another, coming from the judiciary, is a dangerous matter; it is far better that claims to particular things be created by the legislature.

Senator **Biden**. Would you feel that the American people had something done to them, had the legislative body, the U.S. Congress, created what you have characterized, I think accurately, as "positive rights" for Hispanics, and women, and the disabled? Would you have had any problem with that?

Mr. **Fried**. No, Senator. I have always been a very, very strong opponent of any kind of discrimination, and any kind of discrimination on the grounds of race, or nationality, or religion, or any of the matters—certainly handicap, which you refer to.

And I believe I am very clearly on record in other writings, some of them Senator Metzenbaum was kind enough to refer to earlier in these hearings, that such discrimination is detestable to me, and I think that what the Congress did in enshrining the principle of nondiscrimination in law, is one of the landmarks of our national history, and one of our great sources of pride.

Senator **Biden**. I am going to come back to what you mean by "positive rights." But let me skip, then, because in terms of the amicus briefs that have been filed in your capacity as acting, several of them have related to those kinds of enshrined rights under the Voting Rights Act, for example. In *Gingles,* you have a bipartisan group of Senators, including Senator Grassley, stating that what you have adopted as the Government position, does not reflect the position or the intention of those who enshrine those rights.

I mean, when you make a decision as Solicitor General—you make a judgment for the Government, and as a friend of the Supreme Court—do you not look at the determination of whether or not the right has been enshrined—to use your phrase—by the Congress? Shouldn't you and look at what the individuals who were here at the time, writing those laws meant? What they said in the brief that they filed is that the position they are taking is different than the one you were arguing on behalf of the Government?

How do you fit those things?

Mr. **Fried**. Senator Biden, the brief we filed, as I explained, was filed at the request of the Supreme Court. They asked for our views.

Senator **Biden**. I understand. It is your views I worry about, not the request.

Mr. **Fried**. And what we then proceeded to do was to analyze the legislative history as it then appeared. On legislative history, there is something at work a little bit like the parole evidence rule in contract, and we did our best with the written record as we saw it. The arguments we made were arguments based on what that written record revealed. There is no doubt that record was lengthy and complicated, and sometimes confused and contradictory. And there is no doubt there is room for reasonable judges, legislators, men and women to differ, but I believe that we gave our best and most objective view about what that record revealed. If there are a number of Senators who 3 years later, concluded they had meant something else, they have given that view to the Court as well, and the Court will decide.

Senator **Biden**. Well, let's talk about "reasonable judges" which you have spoken to this committee about before.

You have said before this committee, on May 30, 1984, and I quote: "The statutes, Titles 6, 9 and 504, are all open to private suits by private attorneys, what I call "civil rights bounty hunters", who are able to collect fees if they win, and sometimes able to collect fees even if they don't win. And these private suits will be litigated not before bureaucrats, who are subject to political controls, but before hundreds and thousands of Federal District Court Judges, many of whom lack common sense, which the heads of Agencies perhaps have. And if they do not have 4 years later, the successor will." End of quote.

Now that and other things that I have read you have said, it does not seem as though you have much regard for the common sense of the very Court that you now suggest we should pay attention to.

And on the "crisis in the courts", you are quoted as saying the *Miranda* decision, as well as decisions in search and seizures are "good examples of the judiciary's departure from common sense."

Now you understand my problem here, I hope?

Mr. **Fried**. I think so

Senator **Biden**. OK. And now you have just made the case to me, as to why, in fact, the first series of questions I asked would not have been a problem to you, if it was clear that the legislative body had wanted us to move that way.

But, then you say that the legislative history is confusing, and therefore, you ultimately have to make your best case, and rely on the common sense of the judges, which you appear to not think they have.

Mr. **Fried**. Well, we are talking about the Supreme Court of the United States.

Senator **Biden**. I assumed that you were including that, too.

Mr. **Fried**. And you are quoting from my testimony on the Civil Rights Act, Civil Rights bill of 1984. I was concerned then about suits brought in large numbers of district courts, and I think the judgment, the quality of judgment among district judges surely does vary. My present practice, and if confirmed, my future practice, will be before the Supreme Court of the United States, and I have the very highest regard for that Court.

Senator BIDEN. Well, weren't you referring to them when they—didn't they make the *Miranda* decision, and didn't they do the search and seizure and *Fourth Amendment* decisions? That did not occur out of the third circuit. That was the Supreme Court of the United States of America, and you said it was a departure from common sense.

The CHAIRMAN. If you will allow an interruption.

Senator BIDEN. Sure.

The CHAIRMAN. The *Miranda* decision was handed down under the Warren Court, was it not?

Senator BIDEN. Well, I understand that. It is still the Supreme Court, though, Mr. Chairman.

The CHAIRMAN. I understand, but there are different judges and they take different views.

Senator BIDEN. I guess maybe—let me put it this way.

Mr. FRIED. Even Senators

Senator BIDEN. That is true. Some of us are——

Mr. FRIED. And even on *Miranda.*

Senator BIDEN [continuing]. Are fallible and others are not. I am fallible.

Mr. FRIED. Perhaps I was—in that case I was tied—in my loyalty, which remains unabated, to the memory of my mentor, John Harlan, for whom I clerked, who dissented rather vigorously, and on similar grounds, in both of those decisions.

Senator BIDEN. Well, see, I think there is plenty of room for dissent, plenty of room for dissent on those two issues.

See, I worry about the Ed Meeses of the world. I worry about the men who say "suspects who are innocent of a crime should have the Miranda protection, but the thing is, you don't have any suspects who are innocent of a crime. You do not have many suspects who are innocent of a crime. That is contradictory. If a person is innocent of a crime, then he is not a suspect." What in the hell is he talking about?

And what worries me is, when I see man as brilliant as you talk about, in what I would characterize—which is what I do ofttimes, talk in glib terms, and use phrases like Miranda and search and seizure rules as a departure from common sense, I want to make sure you are rooted in Harlan and not in Meese.

Do you understand my concern?

Mr. FRIED. I thought that is very nicely put, Senator Biden, and I——

Senator HATCH. It is difficult to understand what his concern is but it was nicely put.

Mr. FRIED. I have been rooted in the thinking of Justice Harlan for a very long time. As for those remarks of Attorney General Meese, I believe just yesterday he took the occasion to clarify them.

They were remarks which were made in the course of a conversation. I have not—I am sure I am at fault in this—studied the Attorney General's remarks on that subject, but I do know that he took the occasion to clarify them, and indicated that to some extent, they were not as cautious as they might have been, but in the whole context, he gave a different, and I think a clearer expression to those views.

Senator BIDEN. Well, I mean, I would not be so unfair as to put you in the position of having to defend Mr. Meese's remarks, or anyone else's.

I have written to Mr. Meese and asked him whether or not he was misquoted. I have yet to receive a response, and maybe he will let me know, but they are absolutely the most outrageous statement made by any Attorney General in my lifetime, and I have only been here 13 years, but there have been a lot of Attorney Generals since I have been here, and he takes the cake.

I mean, that is absolutely outrageous, that statement, and I hope that his retraction was as brilliant as his initial statement, and as clear as his initial statement was.

By the way, if there ever is evidence of the need for the Miranda warnings, it is Ed Meese. The presence of him as Attorney General is the clearest requirement of why we need the Miranda warnings.

There are people out there who believe what he apparently believes, but he will come up and explain that to us.

But back to my concern, and which you have abated a great deal, is that we all say things, especially me, that in fact I wish I had not said after I have said them, and are in fact not taken in the context in which I meant them.

So to summarize, you do not believe at this point, that the Supreme Court lacks common sense. Is that correct?

Mr. FRIED. Oh, I do not believe that; no, sir.

Senator BIDEN. Now do you believe that the previous court, the Warren Court, lacked common sense?

Mr. FRIED. I must say I regret that way of putting it.

Senator BIDEN. I beg your pardon?

Mr. FRIED. I regret that way of putting it.

Senator BIDEN. Is that a Princetonian answer? Maybe you could tell me how you would put it now?

Mr. FRIED. Well, certainly, Senator. I do not want to seem to be evading the answer. The formulation was a journalistic one. I probably should have stuck to the law review style, where they do not allow you to talk that way, and you are better off for it.

I think the question of principle and of theory is a fair one. I think what one might wonder about *Mapp* and *Miranda,* is whether it was wise to go as far as the Supreme Court did, in laying down detailed, rather intricate rules on the subject of search and seizure, and confessions. The principles are very clear. The principle of privacy in the Fourth Amendment is very clear and must be rigorously defended. The principle of no coerced confessions is very clear and must be rigorously defended. I think where I had difficulty in those times, and where my mentor had difficulty and why he dissented, is when those principles then are turned into rather detailed and intricate sets of rules, which become, with the passage of years, more and more detailed and more and more intricate. Somebody once said that you need a pocket map to understand the search and seizure cases.

Now I think there is a problem, and that is the more cautious statement which I would like to substitute now for the more incautious version which you were good enough to read into the record.

Senator BIDEN. I do not suggest that you, or anyone else, are free from, or anyone here—and again, myself included—to use your phrase, "incautious statements." I have enough that you may, to use your phrase, need a pocket map to be able to deal with, and I admit that. But it is very important to me that you in fact clarify, as you just did, your view. Because in fact you are one of—you rank among the most brilliant of the nominees who have come before us, and I am not being solicitous. Your career points that up. You are truly a brilliant man. You meet the tests that I, for one, use to judge—the Constitution does not define what advise and consent is, in precise terms. So for me, the first and foremost requirement, is that the person nominated for the job clearly have the intellectual and educational background to understand and be able to deal with that body of law and tradition that he or she is required to oversee.

And that is why it is so important, for a man of your stature, to have, put in the more judicious terms, something that is dangling out there.

Because I think that although he may have clarified it, Mr. Meese and other of your predecessors, and Attorneys General, have a tendency, on occasion, to be less than judicious about something that we are deadly earnest about.

My last question, and I will submit the rest for the record. And that is that Rex Lee—and you have had, by the way, I think some formidable predecessors to the job. Erwin Griswold and Wade McCree, and Rex Lee, and others. They have taken the job, as I expect you to do, and know you will, very seriously, and, what is, in a sense, a bifurcated responsibility that you have, which is again like the advise and consent in the Constitution, not clearly defined in any place as a precise one paragraph definition that everyone would agree to. But they have, in the past, I think, been fastidious in maintaining the tradition of independence and autonomy of the Solicitor General from the political ends of any administration.

And Mr. Lee, Solicitor General in the first term of this administration, was quoted as saying that he was under "enormous pressure" to take positions on social issues such as abortion and school prayer.

And there seems to be some indication that in light of the briefs that have been filed—and this I would like you to explain—that you have either disagreed with your predecessor's view of the issues and/or succumbed to the pressure.

See, you are in an unusual spot. You are clearly with the most ideological administration that we have had in a long time on these issues, attempting to, and forthrightly stating, to turn around the direction the Court and the law has been going, and then you find yourself in a spot where your predecessor says, "I was under pressure to do these things."

And now you are being nominated for a slot, where you have already either done or signed on to do the things that Rex Lee said he was under pressure to do. And so for the record, I would like you to explain to me whether or not you disagree with Mr. Lee, your predecessor's interpretation on these social issues—abortion, school prayer, et cetera. Or whether or not you have succumbed to any pressure.

Mr. **Fried**. I will start with the easiest one first. I feel certain in my own mind that I have not succumbed to any pressure.

The next one is also easy but may take a few more words, which is a matter of great concern to this committee, I understand, and rightly so. The Office is, always has been, must remain independent. I would like to explain what that means.

Senator **Biden**. I would appreciate it.

Mr. **Fried**. The statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General. I think the original statute, 1870 statute, speaks of the Solicitor General as a helper to the Attorney General, learned in the law.

Now the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions—there always have been and there will continue to be—on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.

When that happens, I think it would be peevish and inappropriate, for the Solicitor General to be anything but cheerful in accepting that reversal.

At the same time I should say that if such reversals took place too frequently, the Solicitor General would have a right to wonder whether the Attorney General has that confidence in his judgment which he should have. And certainly, if the case should arise, and one would hope it would never arise, and, when you read the history, the anecdotal history, you find that it has perhaps arisen on one or two occasions—if the case should ever arise in which the Attorney General should direct the Solicitor General to take a position which is not simply one with which he does not agree, but which he feels is influenced by improper factors, or, cannot conscientiously be urged to the Court, then the Solicitor General should simply not do that. But that is a rare circumstance, indeed. There are interesting histories of the Office which detail the one or two occasions in which that has happened, but they have been very rare, indeed.

Senator **Biden**. I think that was a very succinct, and straightforward, and I think accurate appraisal of what in fact is the responsibility of the Solicitor General.

I would ask only two questions from that. Do you think that we, the Judiciary Committee, or the Congress as a whole, or the American people as a whole, have a right to know when the Solicitor General is moving forward after having been reversed, although cheerfully.

Do you think we have a right to know that?

Mr. **Fried**. When a case is still before the Court it would be very destructive of the position of the Department of Justice as a whole, as an advocate before the Court, and in some cases, as the lawyer for a particular agency, if the internal deliberations in the Department of Justice were made public, or indeed were spread before any other body. That would be as destructive to the interests of our clients, as if a court were apprised by a law firm, where one partner had said do this, and another partner had said do not do that. That would really be, I think, tantamount to a breach of professional ethics vis-a-vis the Court, and our client, in a case that is open and before the Court.

Senator **Biden**. I am not sure I disagree with you. I think I might, because I think the analogy to the law firm is not—and I realize it is a gross analogy—but it is not on all fours when it comes to the relationship of this body to your office.

Maybe we have been spoiled, but we have come to the point—I have been here 13 years now—that we rely upon the judgment of the Solicitor General, in addition to the Attorney General.

We look on it with great respect. It has impacted upon the deliberations of this body as to what we will and will not do. Maybe we should not.

Maybe constitutionally, it is something where we have overstepped our bounds, in the sense that there has been a lapse in our judgment in putting so much stock in the judgments of the Solicitor General.

But the notion that the judgment to be rendered by the Solicitor General, at the request of the Attorney General, is one that is of great value and requires the independent nonpolitical best judgment of the Solicitor General.

And then a reversal of that judgment by the Attorney General. I am not sure. Maybe you are right. I am reluctant to engage you on an interpretation of the Constitution. You have probably, as they say, forgotten more about it than I am likely to learn. But it seems to me that we are charting new ground here in a broad sense, over the last 3 or 4 years, in the way in which we conduct this unscripted dance that occurs.

The Constitution is a pretty flexible document and what I—this is not to solicit a response, you are welcome to, but I will lay out my concern to you. And I will stop with this, Mr. Chairman, and I really appreciate your giving me this much time.

My concern is that this administration, generally speaking, is changing the unwritten ground rules in the way in which we operate in this country, and that is that it is more like guerilla warfare.

In the past we have always assumed that what would happen—I think we have assumed that what would happen is that the electoral process would in fact have its will every 4 years.

And that meant that not only would the President and the Chief Executive Officers, so to speak, of the Agencies, be up on the block to go, but that the new administration would have available to it the full range of levers that were available to a President.

But what this President has made clear—and the New Right has made it clear it is their agenda—is that they are looking out there, placing bright second and third level people. So that when the next "war" is over, although the Chief may be gone, the cells will have been planted. That in fact it will be more difficult for the next President, whether he shares the point of view, or not, to change the game.

And that is legal. It is not wrong. I mean, in a moral sense, it is not unconstitutional for the President to come along and say:

I'm going to put—you know—the following 300 ideologues in civil service positions where they can in fact be the wrench in the works, if they try to turn back the revolution, the Reagan revolution.

But it is a violation of the unwritten rule. That is not how we have operated. And now, what worries me—not about you, sir, but about the Solicitor General's Office—is that the commity and the—that is the wrong word—the sort of automatic "good faith", the get-out-of-jail-free card, that has been given by every Congress to every Solicitor General, may be on the verge of being tarnished, not by you but by those who are putting you there.

And that is why I pursue, with such, I think specificity, some of the things that I ordinarily would not have asked you, because I know of you.

I mean, my former Governor, whom I have great respect for, calls me about you. Everybody I know, who speaks to me about you, talks about your intellectual capabilities and your integrity.

But I want you to know why I have been pursuing this route, and why I worry when you say things like, that you should "cheerfully" move on, after there has been a reversal of your judgment.

I am not so sure that is good, in the unwritten rules, to move on cheerfully, because what we are talking about here are issues of enormous proportion, enormous proportion, when we talk about the rights of minorities; when we talk about the rights of the criminally accused; when we talk about the issue of where religion fits in the matrix of this country.

I just make this closing statement, and I am finished, in order to point out to you that I am not directing it at you as a man.

You are, though, in a position where if in fact it does not go right, we are in "deep trouble." If in fact at some point, a man of your character and stature, if political pressure is in fact—and I am not suggesting it has been thus far—put upon you, that you not only demur in your initial judgment from where the Department might go, but that you maybe are willing to appear in the second editions of "Profiles In Courage", and say "No. I resign." I expect you have that in you, I expect that is what you are made of, I hope that time does not come, but if it does, I want you to know as one Senator, I expect you to be in the second edition of "Profiles In Courage." Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Fried, I think you have explained it in a very exemplary manner. I think you have explained the process, where you have assistants who work these matters up, you have a deputy, and then the Solicitor General reaches a decision, and, the Attorney General, of course, if he is going to be the Attorney General, has to have the final say-so.

But the Solicitor General can exert influence on him and he can explain his reasons for his decision, but somebody has to make a final decision, and, if your decision is final, then you are overruling the Attorney General of the United States who is the Cabinet Officer of the President.

I think you have explained it exactly right, I think you are on the right track, and I think you are the right man in the right place, and I think you will do a fine job.

Senator BIDEN. I am also counting on that, Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. I want to express my sympathy with what the distinguished Chairman of this committee has just said. I think you are one of the finest people I have ever seen nominated for any position in Government, and I have had a great deal of opportunity to examine you, not only on this committee but on the Labor Committee which I chair, and I think you will be an exceptional Solicitor General, and I know that you have the integrity to give your opinion and do so forcefully.

And I think Senator Biden has raised a number of his concerns, and rightfully so, and others will do likewise.

I might just mention, if my recollection is correct——

The CHAIRMAN. Senator Hatch, will you excuse me just a moment. I have to go to another meeting at 11:30. I would ask you to take over this hearing and finish it, and after you have finished it, the understanding and agreement was that 30 minutes later, the full committee would meet, and if you will have the staff members to call the members and have them here 30 minutes afterwards. I would not object to changing it, as you discussed with me, until a later time, but since that has been agreed on, I think we had better stick to that.

Senator METZENBAUM. Mr. Chairman, I do not have any objection to 30 minutes after, but I have a strong feeling you will not get a quorum at that point, and I would suggest that you work out an arrangement yourself, or with Senator Biden, that we vote right off the floor, before or after a rollcall this afternoon.

Senator HATCH. Could we poll the nominees? Would there be any problem with that?

The CHAIRMAN. Would there be any objection to us meeting—11:45 there is a rollcall. Well, could we meet, then—what is that room, 224, is it, by the Secretary's office?

Senator HATCH. Yes; let's meet in the Secretary's office at room 224.

The CHAIRMAN. Yes; 224.

Senator HATCH. Right off the floor.

The CHAIRMAN. At 224, right after the rollcall has been announced in the Senate. Would that suit you, Senator Heflin?

Senator HEFLIN. Yes, Mr. Chairman.

The CHAIRMAN. And Senator East, does that suit you all right?

Senator EAST. Yes, Mr. Chairman.

The CHAIRMAN. And if you will announce that to the rest of them, then we will just meet.

Senator HATCH [presiding]. I will do that. Let me just make one comment, and then I would like to relinquish my time to Senator Metzenbaum who also has a very tight schedule this morning and who would like to be able to meet that, and then we will finish with the other Senators. As I recall, Mr. Justice Robert Jackson, when he was Solicitor General of the United States, constantly took opposing positions to the then existing law.

Later, most of his positions became vindicated. So there is precedent for having done that, and I think good precedent for having done that.

The only people who sometimes disagree with that precedent are those who might disagree with the positions being taken at the time.

So I would hope that the Solicitor, whoever he may be, and whichever administration he may be in, will represent the country, and that administration, to the best of his ability, whether or not he agrees with the present law. Or disagrees with the present law.

So I commend you for being willing to take tough positions, and articulate them well, and of course to stand up for the positions that you have taken.

So I just wanted to call that to the attention of everybody.

OK. Now we have three witnesses after you, so I am going to turn, and relinquish my time to Senator Metzenbaum so he can make his appointment. Then I will turn to Senator East, and then Senator Heflin, and hopefully we can finish this before that vote, if we can. Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Fried, it is good to see you again, and I do not have many questions, but I do have some.

The Attorney General recently delivered a speech to the American Bar Association in which he criticized the constitutional principle that the Bill of Rights applies to the States as well as to the Federal Government.

The speech contained the statement that the "principle was intellectually shaky, and that nowhere else has the principle of Federalism been dealt so politically violent and constitutionally suspect a blow, as by the theory of incorporation."

Simply stated, he does not like the incorporation doctrine. I am sure you are aware of the consequences of abandoning the principle that the Bill of Rights applies to the States.

Individual rights regarding freedom of speech, separation of church and State, fourth amendment protection from unreasonable searches, and many other individual rights would no longer apply to State laws.

That would be a radical change from our current constitutional principles. As Solicitor General, do you believe that the Constitution should be interpreted to mean that the Bill of Rights do not apply to the States?

Mr. **Fried**. Senator, I have signed, since I have been a Deputy or the Acting Solicitor General, I am sure, dozens of briefs, in which the application of the Bill of Rights to the States has been taken as a premise and simply not questioned.

Indeed, in the very brief which I believe you and Senator Biden referred to, our brief in the abortion case, there was some discussion of the incorporation doctrine, and it was described as a fixed and rather familiar part of the legal landscape as it now is, and we took no issue with it.

In no brief that I have worked on have we attacked the doctrine of incorporation. I do remember very well, when I was a law clerk for Justice Harlan, and when Justice Frankfurter was writing, there were lots of criticisms of the doctrine of incorporation in the Court at that time, and they were not always in dissenting opinions.

And even today, Senator, the Court has not gone to what one might call a doctrine of total incorporation. We do not have the seventh amendment incorporated against the States, nor the second amendment. That is to say, incorporation has always been, on the part of the Court, a process of judgment as to which protections of the Bill of Rights appropriately apply to the situation of the States. That is a process of judgment which the Court is continuously engaged in, and in which our office, as advocates before the Court, would be involved.

But as for some sort of wholesale onslaught on the doctrine of incorporation, we have not engaged in it; we have no plan to do so.

I think those remarks of the Attorney General were really remarks about how we got here from there, rather than remarks about what he thinks we should do now, and maybe that is why they were dropped. I have no idea. I have not studied those remarks and I have not actually discussed them with the Attorney General. It is just speculation on my part.

Senator **Metzenbaum**. Well, when he says they are "intellectually shaky"——

Mr. **Fried**. Well, that was Justice Frankfurter's view as well.

Senator **Metzenbaum**. Well, I will not go further on that, but I guess I would ask you, and along the lines of Senator Biden's questions, if Mr. Meese directed you to attack the whole principle of incorporation in a case, or series of cases, what would you do?

You indicated previously, that you thought it would be peevish and inappropriate for a Solicitor General to disagree with his Attorney General. If he were asked to act, you indicated that, correctly, that you are an assistant to, or your job is to assist the Attorney General under the statute, and you indicated that the Solicitor General would have the right to wonder whether the Attorney General had confidence in him, if you disagreed with him oftentimes.

But the question is: What would you do if the Attorney General called you in and said:

> I want you to find an opportunity to attack the principle of incorporation head on in a pending Supreme Court case, and to do so either by amicus or finding a basis on which we can have a right to intervene?

Mr. **Fried**. Senator Metzenbaum, I hope you will allow me to answer that question in a general way, because to focus on that specific question involves a premise which I find myself very uncomfortable in even entertaining, and that is the premise that I would be asked to do such a thing.

But in general let me say—and I hope this will satisfy you—that like any other Solicitor General, if confirmed, and indeed, like any officer of the Court, there are certain things that I would not do, and those are things which seem to me to be improper, or, things which cannot be done with due regard for our constitutional traditions, for what a lawyer can reasonable and respectfully urge the Court to do. And if I were asked to do such a thing, I would not do it. I have no expectation whatever that I would be put in this position. I would not have accepted the nomination if I thought I would be put in that position.

And that is why I have a little difficulty in answering your question on exactly the premises you put, because I have been treated with the greatest respect and deference by the Attorney General, and I cannot imagine him dealing with me in that way.

But to ask the more general question, let me assure you that I have my own professional standards. I have my own conscience. I know that when this job is over, which will be, I guess 3 years from now or so, I plan to go back to teaching and writing, and I would like to go there with a clear conscience. And if I found myself saying something which a conscientious lawyer and scholar could not say, I would not have that clear conscience, and I would not do it, but I do not expect that I am going to be put to that test.

Senator METZENBAUM. I might recommend for your reading that which I consider to be one of the best statements I have seen prepared for this committee, which the distinguished Senator from Alabama had left with me, when he was not present to put in the record, and I have not done so as yet since he is here. But in reading that, before putting it into the record, I noted a quote from Francis Biddle who was Solicitor General from 1940 to 1941, and Senator Heflin has come across that quote and he used it. And I thought it was very apropos.

His guide is

> Only the ethic of his law profession, framed in the ambience of his experience and judgment, and he represents the most powerful client in the world. The Solicitor General has no master to serve except his country.

And I am indebted to Senator Heflin for having found that but I think it is the finest description of the obligation of an Attorney General, taking into account the statute of 1870, but I still believe it to be, and I think it comports with that which you have just enunciated as your own position.

Mr. FRIED. Thank you, Senator.

Senator METZENBAUM. I just have a couple more questions.

As Acting Solicitor, you recently filed a brief in the *Thornberg* v. *American College of Obstetricians* case, arguing that the *Roe* v. *Wade* decision should be overruled, and that there was no constitutional right for any freedom of choice for women in regard to abortion.

Can you give me any other example of the Solicitor General advocating that the Supreme Court reverse a decision recognizing a fundamental constitutional right for individuals?

Mr. FRIED. There are certainly many examples of the Solicitor General urging in an amicus brief that established Supreme Court precedent be reconsidered. I think of *Brown* v. *Board*. I think of *Baker* v. *Carr*. Now your question did of course say an established right of an individual, and, of course, that is the difficulty and intricacy of this case, because one individual's right is another individual's lack of right, and our position was simply that it would be appropriate—and I do not want to trespass in the direction of arguing my case here, rather than in the brief—but I believe the position could be accurately summarized by saying, that we thought that this issue should be returned to the rights and prerogatives of the elected representatives of the people.

So, as I say, one person's right, always, is another person's lack of right. It depends where you set that boundary.

Senator METZENBAUM. I have one last question and then I will submit some questions to you, which I hope will be answered before your matter comes up on the floor.

In his recent speech to the American Bar Association, the Attorney General advocated interpreting tbe Constitution solely on the basis of the intention of the framers. Justice Brennan, as you know, has recently said that idea is really "arrogance cloaked as humility, because it is ridiculous to argue that we can determine precisely the intention of the framers 200 years ago."

Where do you come out on this question? Where does the Solicitor General fall?

Mr. **Fried**. Senator Metzenbaum, this perhaps is the best illustration of why I do not regret our having filed the brief in the abortion case, because it was an occasion for us to address that very issue. And our brief referred to the intention of the framers as an important element, an important bit of material in constitutional interpretation. But we were quite clear and quite explicit that the intention of the framers cannot be the sole touchstone for constitutional interpretation, and we indicated what some of the other touchstones, besides that intention, might be.

So I think I am on the record in the clearest and most public way I could be on that point. The brief does speak about the traditions of the legal profession and about the course of precedents in the Supreme Court itself, as important materials for constitutional interpretation.

Senator **Metzenbaum**. I have some other questions. I am going to submit them in the interest of time. I would appreciate your responding promptly, so your matter can come to the floor promptly.

Mr. **Fried**. Certainly.

Senator **Metzenbaum**. I do, Mr. Chairman, ask unanimous consent that the statement of Senator Heflin be included in the record.

Senator **Hatch**. Without objection we will do that, and of course we will expect you to answer these questions as soon as you possibly can.

[The statement of Senator Heflin follows:]

Prepared Statement of Senator Howell Heflin

Mr. Chairman: Today the Senate Judiciary Committee will consider the nomination of Charles Fried for the position of Solicitor General of the United States. This committee is invested with the awesome responsibility under the Constitution to advise and consent to Presidential nominees to the executive department. To conscientiously fulfill our obligation under the Constitution, we must not only carefully review the credentials of the individuals presented to the committee, but also examine the responsibilities delegated to the nominee for the position which he or she will hold.

The position of Solicitor General is not as visible as that of the Attorney General to the general populous, but visibility is not the only measure of the impact and influence of an office on the American people. The position of Solicitor General was created by Congress in 1870. The qualifications were simply stated in the original statute: "An officer, learned in the law, to assist the Attorney General in the performance of his duties." Over the years, many individuals with impeccable legal credentials have occupied the Office of Solicitor General and often quietly, with little notoriety, these individuals have played a part in shaping the development of law in the land.

The Solicitor General is the attorney for the Federal Government and in that role, he determines which cases of Federal agencies and departments may be appealed to the circuit courts and the Supreme Court. The Solicitor General is the attorney for the executive and as a member of the President's party, may select cases which will serve as a vehicle for the furtherance of the administration's goals. Perhaps the most important responsibility of the Solicitor General is the access to the Supreme Court and the ability to bring issues before the Court as amicus curiae on important constitutional issues.

The 1985–1986 term of the supreme Court began on October 7. Many of the issues before the Court this term elicit strong emotions in all of us, and strike at the very heart of our individual convictions. The Court will consider the proper deliniation of the separation of church and state, the rights of handicapped infants, racial discrimination and the policies of affirmative action, the rights of defendants in criminal trials, and the appropriate role of Government in the question of reproductive rights.

The Solicitor General is the most frequent litigator in the Supreme Court and he or she has the ability to focus the Court's attention on the far-reaching public policy considerations of a case, rather than the specific facts.

Because of the unique nature of the Office of Solicitor General, he must balance his role as advocate for the United States, with a more institutional role of protector of the public interest and preserver of principles embodied in the Constitution.

The Solicitor General has many clients, and we can only hope that while he will be an avid attorney for his clients, he will be guided by a duty to an even greater good. Francis Biddle, Solicitor General from 1940 to 1941 stated: "(H)is guide is only the ethic of his law profession framed in the ambience of his experience and judgment. And he represents the most powerful client in the world. . . . The Solicitor General has no master to serve except his country."

No one today questions the legal capabilities of Mr. Fried, but the confirmation process realistically accords us the only opportunity to ascertain the direction the nominee will take as Solicitor General.

Mr. Fried, I congratulate you on your nomination, I commend your outstanding legal career, and I humbly caution you as I would caution any nominee to this position. Do not let individual freedom be the price of the attainment of justice, but rather the result.

Senator HATCH. Senator East, do you have any questions?

Senator EAST. I have no questions, Mr. Chairman. I would like to ask unanimous consent that a statement I have in support of Mr. Fried be made a part of the permanent record.

Senator HATCH. Thank you so much, and we will do that without objection.

[The statement of Senator East follows:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I am pleased to express my enthusiastic support for the President's nomination of Professor Charles Fried to the position of Solicitor General of the United States. Professor Fried has proven himself most ably in his role as the Acting Solicitor General and in his prior posts both in public service and in the teaching of law.

Professor Fried is not a native of this country. Born in Czechoslovakia, he immigrated and became a naturalized United States citizen at the age of 13. Graduating from Princeton University, he obtained further degrees from Oxford University and a law degree from Columbia. In 1960, Professor Fried clerked for the late Justice John Harlan of the United States Supreme Court and from there joined the faculty of Harvard Law School.

As the Carter Professor of Jurisprudence, he has served as a guest lecturer at the Harvard Medical School, and at the law schools of the University of Texas, Stanford University and Indiana University.

In 1984, Professor Fried joined the Justice Department as a Special Assistant to the Attorney General. Earlier this year he became Deputy Solicitor General and Counselor to the Solicitor General. Upon the resignation of the former Solicitor General, Rex Lee, in June of this year, Professor Fried entered upon the duties of that office as Acting Solicitor General.

Professor Fried has written extensively in the areas of moral philosophy, jurisprudence, medical ethics, civil rights, economics, federalism, and the legal profession. As one who, in early youth, experienced at first hand the horrors of Nazi tyranny, Professor Fried's writings display a unique and profound insight into the concept of freedom under law. His publications, which range from scholarly treatises to newspaper columns, display a depth of understanding that sets him apart from others in the legal profession. Indeed, Professor Fried has sought not only to master the technicalities of the law, but to understand its fundamental purposes as well.

This nomination comes to us with strong support from many in the legal profession. Along with the obvious support of Attorney General Edwin Meese, Mr. Fried enjoys the commendation of his fellow Harvard Law professor Laurence Tribe. Mr. Tribe states he has "the highest regard for Mr. Fried's acumen as a legal philosopher and for his accomplishments as a legal scholar."

Charles Fried has proven himelf to be extremely capable in every endeavor to which he has applied himself. The Office of the Solicitor General will be graced by his hard working and intelligent gentleman and lawyer.

Mr. Chairman, I urge my colleagues on the Judiciary Committee to act swiftly in favorbly recommending this nomination to the full Senate. Professor Fried is a man of proven talent and ability. As he has shown in the past few months, Charles Fried will fulfill the duties of Solicitor General with high distinction. I wish him abundant good fortune.

Senator HATCH. Mr. Fried, we are greatful to have had you here today. I think everybody here has to say that you have handled yourself very, very well, and if you do that well here, we are positive you will do very well before the Supreme Court of the United States of America where you are going to spend an awful lot of your time.

We are grateful to have your wife and your mother here. They are beautiful women and we are happy to welcome them to the committee as well. So, we will let you go. We are going to have just three more witnesses, and then we will finish.

Mr. FRIED. Thank you, Senator.

Senator HATCH. Now for all members of the committee, we have S. 224 set aside from 12:00 to 1:30 today. The vote is going to occur in 5 minutes, so I will have about 10 to 12 minutes to listen to our last three witnesses, probably 10 minutes, and I would like to conclude this hearing, and we will put all statements in the record, in full, without objection.

I hope that our staffs will get every Senator contacted right now, so that they can meet immediately following the vote on S. 224 and we will conduct this meeting and do what we all agreed to do last week.

With that, the last three witnesses. We will call on Miss Althea T. L. Simmons, the director of the NAACP, the Washington Bureau, and we will call on Mr. Anthony T. Podesta, who is president of People for the American Way, Washington, DC.

And Miss Susan M. Liss, director of the Judicial Selection project, in Washington, DC.

If we can swear all three of you in, we would appreciate it.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

[Chorus of ayes.]

Senator HATCH. Thank you. Now we want to welcome all three of you to the committee. We look forward to hearing what you have to say.

I think you understand that I want to conclude this so that I can get over to the vote and also be to the committee meeting, so we are going to limit each of you to about 2½ to 3 minutes, but we will put your complete statements in the record.

And I have to say I have read all three of them, so we appreciate it. We will start with you, Miss Simmons, first.

TESTIMONY OF A PANEL CONSISTING OF: ALTHEA T. L. SIMMONS, DIRECTOR, NAACP, WASHINGTON, DC BUREAU; ANTHONY T. PODESTA, PRESIDENT, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC; AND SUSAN M. LISS, DIRECTOR, JUDICIAL SELECTION PROJECT, WASHINGTON, DC

Miss SIMMONS. Thank you so much, Mr. Chairman. I shall be very, very brief. With reference to Mr. Markman, the NAACP is concerned specifically about one part of his functions which deals with judicial nominations.

We are not quite sure that the responses given with reference to how he plans to handle judicial nominations will get to our concerns. We are quite concerned that the National Bar Association, which is the professional association of black lawyers, be consulted.

Senator HATCH. I will personally encourage him to do that, and he had better be fair. He has to deal with me. So I suspect he will be.

Miss SIMMONS. Very good. Because for years and years and years, black lawyers were not accepted in the American Bar Association——

Senator HATCH. That is right.

Miss SIMMONS. And we have great respect for this organization, and we think that a good deal could be brought to the whole process if the NBA as well as the ABA is consulted. We have only seen the tip of the iceberg, where minorities and women are concerned with reference to the Federal judiciary, and we think that every attempt must be made to ensure that the percentages that were talked about here today are increased.

And we know that the Office Mr. Markman will head has a very large role to play in this. I shall leave the rest of it to my written testimony which will be placed in the record. We are concerned that no litmus test be used to screen out blacks and other minorities.

And thank you so much, Mr. Chairman, for saying that you would encourage Mr. Markman to follow up on NAACP's concerns because I know that you will.

Senator HATCH. I will.

Miss SIMMONS. Where Mr. Fried is concerned, we have quite a bit of concern. We agree that he is very, very brilliant, but, in reading some of his writings, I must admit that I am a little bit confused as to where he stands with reference to issues of concern to black Americans.

I shall refer only to the Harvard Law Review article in 1968 on "Moral Causation", I was quite perturbed by the statement, "If a principle is right, it always has been, always will be right although changing circumstances may require changing conclusions from the application of the same principle."

I want to know whether Mr. Fried, as Solicitor General, will he be moved by the historical moral appeal of black America in dealing with issues which affect it?

The NAACP is concerned as to whether Mr. Fried, in taking a look at history, will decide that the right thing for him to do is recognize the injustices perpetrated against blacks, and move to act to erode the effects of past discrimination.

This is a great Nation, a pluralistic Nation, consisting of persons of different races and ethnic groups, and this office is one which should represent all those interests objectively and impartially.

And I am not quite certain, after reading some 15 or 20 articles he has written whether the nominee has a clear perception of civil rights and whether he will be able to move objectively to level the barriers of racial injustice.

Senator **HATCH**. Well, Miss Simmons, your time is up but let me just say this to you. I know Charles Fried very, very well, and I can assure you that he believes in the Constitution and in the civil rights of all human beings, and in the equal protection of the laws, and will enforce those. He is a very fine man, who has very deep feelings in this area, and I will also work to convey your message, not only to Mr. Fried, but to everybody else with whom he works.

So I understand your concerns and we are happy to have you express them here today, and we appreciate your taking time to be with us.

I am sorry it has to be so short, but you and I know each other. We have been together a lot.

[The statement follows:]

TESTIMONY OF
ALTHEA T. L. SIMMONS

Mr. Chairman and members of the Committee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. The NAACP is a 76-year old national civil rights organization with more than 2,100 branches and youth units in the 50 states and the District of Columbia.

The NAACP appreciates this opportunity to present its opposition to the nomination of Charles Fried to be Solicitor General.

The NAACP has considered this nomination carefully and in the process has read some of Mr. Fried's writings. After careful deliberation, the NAACP opposes the nomination of Mr. Fried to be Solicitor General because he has demonstrated a total insensitivity to the minorities of this nation, and their struggle to advance equality and justice.

During a period of time when two presidents had recognized that the denial of fundamental Constitutional rights to blacks created a "moral crises" in this nation, Mr. Fried was developing his own theory on this question. He published it in 1968 in the Harvard Law Review, entitled "Moral Causation."

In this essay, Mr. Fried refers to civil disobedience in this country as being against just laws. He wrote:

> Civil disobedience as a protest against laws which are constitutionally valid or private practices sanctioned by such laws, presents the notion of moral causation...

What are the "constitutionally valid" laws that Blacks demonstrated against? This organization came into existence, and has been fighting for the last 76 years, because blacks were/are denied the rights guaranteed them by the Constitution. The civil disobedience struggle that blacks waged was for rights guaranteed by the Constitution which were administratively denied. He wrote:

> If by the mere force of numbers a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of views justify revolution.

Another great president, often described as the Abe Lincoln of the early 1960's--John F. Kennedy, also talked of morality and law. Kennedy, like Lincoln, was convinced that the denial by the majority of the full constitutional rights of the minority constituted a "moral crisis" for the nation. He made this clear in a nationwide T.V. address after the Birmingham civil rights campaign in 1963. He began:

> One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freeded from social and economic oppression. Yet this nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.
>
> We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world...that this is a land of the free except for the Negroes...? Now the time has come for this nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently choose to ignore them.

He concluded: "We face therefore, a moral crisis, as a country and as a people."

These two great Americans, as we understand it, disagree with Mr. Fried's concept of morality. They suggest that any law which de-humanizes, or relegates one to second class citizenship status is not only immoral, but threatens the morality of the entire nation.

But Mr. Fried would have us believe that morality is selective, and that a law is constitutionally valid, simply by being in the Constitution, that is, as long as it does not appear to be at the expense of the dominant race.

No where do I find in Mr. Fried's writings that the constitutional protection of slavery, or the counting of slaves as 3/5 of a man was invalid, or immoral. No where in Mr. Fried's writings did I read that the Post Reconstruction laws and court decisions which stripped blacks of their newly won rights and established an overt "apartheid" system was invalid or immoral.

I do not read scathing attacks on those constitutionally-valid programs, designed to remedy the effects of four hundred years of racial oppression. He is opposed to affirmative action, to the Legal Services Corporation, equal pay for women, and medicaid and medicare programs which provides equal access to the best available medical service and terms "equal access" a dangerous slogan.

Will Mr. Fried use the position of Solicitor General to innundate the Supreme Court with briefs seeking to get laws favorable to the minority ruled unconstitutional.

Mr. Fried describes himself "as a legal intellectual, as much a philosopher as a lawyer." He continues by adding "My principal orientation has been in the direction of working out the possibility for a regime of liberty. I believe in liberty and the individual, and those two principles have guided my intellectual work."

The NAACP believes it has a legitimate concern regarding the views and values held by one who will represent the government before the highest court in the land. The Solicitor General occupies a position of public trust and the actions of and theories advanced by the holder of the office become extremely important. Mr. Fried's views expressed in the December 17, 1984 Washington Times posit that busing to achieve racial integration and affirmative action is not susceptible to argument. Such an attitude distorts the historical fact of inequity and inequality.

The NAACP expressed its concern that Mr. Fried's struggle with moral causation, right and wrong and the like may divert him from the grim reality that we live in a color conscious society and one must take into account society's racist past and present together with its obligation to the future.

We are particularly perturbed by the statement in the aforementioned article:

> "If a principle is right, it always has been and always will be right although changing circumstances may require changing conclusions from the application of the same principle."

Will Mr. Fried, as Solicitor General, be moved by the historical, moral appeal of black America in dealing with issues which affect it. Mr. Fried asserts that:

> "An important, indeed a crucial technique for moving another to act is to make the desired performance the right thing for him to do, that is to put him under a moral obligation to act in the desired way."

Will Mr. Fried, in taking a look at history decide that the "right thing for him to do" is to recognize the injustices perpetuated against blacks and be moved to act to erode the effects of past discrimination?

Knowledge is the foundation of all ideas, noble or ignoble; and one does not have to be philosophical intellectual to realize that everything built on a flawed foundation will eventually come crumble.

This is a great nation, a pluralistic nation consisting of people of many races and different ethnic groups. The solicitor general's office is an office which should represent all of these interest objectively and impartially. The NAACP does not believe that Mr. Fried has demonstrated that he is capable of doing either. For this reason we oppose his nomination.

Thank you for this opportunity to be heard on this nomination.

Senator HATCH. Mr. Podesta, I have read your statement. I think it is an excellent statement. I do not totally agree with it because I think any Senator can ask any question he or she wants to. Some are better than others, I have to admit, and I tend to agree with you in your concerns, but let's turn the time to you.

TESTIMONY OF ANTHONY T. PODESTA

Mr. PODESTA. Thank you very much, Senator Hatch. I will restrict my oral comments to Mr. Markman who is before you for Assistant Attorney General for Legal Policy.

We had lengthy discussions with Mr. Markman during which time we expressed to him our concerns about ideological litmus tests for Federal judges.

I would like to share with the committee our conclusion, that although we disagree with Mr. Markman on many issues, we found that he maintained a strong commitment to an independent judiciary, to an openminded judiciary, and as well indicated that he had a keen understanding of the ethical boundaries of the process through which judges would be selected for the Federal bench.

In short, Mr. Markman sees the controversy over judicial selection, I believe, not as a problem of public relations, but as a problem of ethics.

And I think that he will, if he is confirmed by the Senate, help to provide greater public confidence in that process.

Senator HATCH. I think you are right.

Mr. PODESTA. At the same time, in his remarks, and the colloquy between him and the Senators this morning, he suggested that the role of the Office of Legal Policy, as it has been traditionally operated, would include the oversight of the judicial selection process, and I listened carefully, but felt that the issue of whether or not he would really be doing that in the future was left open by the committee, and we would urge the committee to be certain that Mr. Markman, and the Office of Legal Policy, confirmed by the Senate, is the place of primary responsibility in the Department of Justice to oversee the judicial selection process.

[The statement follows:]

PREPARED STATEMENT OF ANTHONY T. PODESTA

Mr. Chairman and members of the Judiciary Committee, my name is Anthony Podesta. I am testifying on behalf of the 200,000 members of People For The American Way, a national, non-partisan citizens' organization dedicated to the protection of the constitutional liberties of all Americans.

People For The American Way neither supports nor opposes the nomination of Charles Fried to be Solicitor General. There are broader issues before the Committee today which require discussion, specifically how the nominee will conduct himself in this powerful office in light of the radical legal views that the Justice Department is propounding. Our purpose in testifying is to urge the Committee to explore Mr. Fried's views on fundamental issues of safeguarding Constitutional rights in the courts.

The Solicitor General is not only the United States' advocate in the Supreme Court, but he also plays a crucial role in other matters. He determines which trial court losses the government will appeal; he reconciles conflicts among agencies. Most importantly, he has enormous influence with the Supreme Court with respect to both the cases that it hears, and the rulings it makes. An overwhelming proportion of his certiorari petitions are granted, in contrast with an almost minuscule proportion of other litigants' petitions. As a result, he plays some role in over half the cases argued annually. Moreover, the Solicitor General wins a very large proportion of the cases he enters, either as a party or an amicus.

The Solicitor General has such great influence with the Court that the has been called the "tenth member" of the Court. This, in turn, puts an enormous responsibility on him to serve interests broader than a mere litigator's, or even perform the traditional role of a government lawyer to seek justice more than victory. He must have what Archibald Cox has called "a sense of loyalty to the Court. Indeed...he has about as much duty to [the Court] as to the [client]."

Former Solicitor General Rex E. Lee has stressed that the Solicitor's independent relationship with the Court is such that the Solicitor's positions have carried "special weight with the Supreme Court precisely because they are regarded as representing not merely the political views of the Administration, but the broad interests of the nation...While the office is a hard advocate on behalf of the government, it is also a creature of the Court itself and is not expected to move too far too fast," said Mr. Lee. "One of the most important jobs I have," he added, "is protecting the tradition of [former solicitors] John W. Davis, Robert H. Jackson, Charles Fahy and Thurgood Marshall." (L.A. Times, July 25, 1983, p.10.)

The Administration's Radical Legal Views

Today, this responsibility and the implied independence of the Solicitor General are being tested as never before by forces within the Administration and its allies. Their goal is to undo a judicial tradition of federal court protection for constitutional and other rights dating to the birth of the Republic and reaffirmed throughout our history. Former Solicitor General Lee, who came under heavy fire from some forces, wrote that "the most important function of the Constitution is the protection of individual rights," and that the courts "are the most appropriate safeguards for these rights."

If today's efforts to withdraw the federal courts from their historic role of protecting the rights guaranteed by the Constitution are successful, our basic Constitutional structure will be severely altered. Limitations on the government imposed by the Bill of Rights will be eroded and the states will be free to establish religions, censor communications, impose cruel and unusual punishments and trample on the rights of the accused. Voting rights will be threatened. Civil rights laws and statutes for the protection of health, safety and other matters will be narrowly read, irrespective of Congressional intent.

There are four significant legal theories that the current Administration has advanced in briefs, litigation and in speeches by the Attorney General. This Committee should view as its responsibility, and, indeed, its obligation to determine where Mr. Fried stands on these issues.

A. The Incorporation Doctrine

The most important target for this assault is the incorporation doctrine of the Fourteenth Amendment which makes binding on state and local officials the guarantees of the Bill of Rights. Although the doctrine has been solidly established since the 1920s, Attorney General Edwin Meese III, in a speech before the American Bar Association in July 1985, repudiated the doctrine. He said that it is contrary to what he calls the "original intention" of the framers that "the Bill of Rights did not apply to the states..." After criticizing the Supreme Court for deciding cases on "policy" grounds rather than on the basis of "constitutional principles" -- an attack precipitated by the Court's refusal to abandon its almost 40 year commitment to governmental neutrality in religion in Wallace v. Jaffree -- his speech attacked the incorporation doctrine as "intellectually shaky," "constitutionally suspect," and "politically violent" toward federalism.

It is a dangerous notion that the federal courts have no jurisdiction over First Amendment matters because the Bill of Rights does not apply to the states. Wallace v. Jaffree reaffirmed a fundamental constitutional principle. The Bill of Rights applies to state and local government, as well as to the federal government. The State cannot remove the burdens imposed by the Constitution.

In Wallace v. Jaffree, Federal District Court Judge Brevard Hand held that the Constitution's Establishment Clause "does not prohibit the state from establishing a religion." According to this extreme view, "the states were free to establish one Christian religion over another in the exercise of the prerogative to control the establishment of religions." The Eleventh Circuit reversed Judge Hand and rejected the "historical arguments" that had been advanced by New Right judicial reformer, James McClellan of the Center for Judicial Studies, in his testimony before Judge Hand. As Supreme Court Justice Stevens wrote in the majority opinion commenting on the District Court's "remarkable conclusion" that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion: "...it is appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States."

Mr. Meese, Mr. McClellan and their allies appear to have forgotten the Civil War, the Fourteenth Amendment, and other post-war civil rights enactments. The Fourteenth Amendment is, after all, the textual source of the incorporation doctrine. As the conservative Justice Potter Stewart said for a unanimous Supreme Court in 1972, the Fourteenth Amendment was

> an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era -- and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.

This Committee must determine from Mr. Fried whether he agrees with Mr. Meese on this matter, and whether he plans to urge the Court to overturn or severely limit the incorporation doctrine.

B. Reliance on Other Branches for Protecting Rights

The ultimate goal of these efforts is to reduce judicial protection for individual rights to a minimum and to regulate such protection to the legislature and the executive branch. Bruce Fein, a former Administration Justice Department official explained, "the first place to get resolution or redress would be in your legislative offices or in your executive branch offices. The judiciary should be there only to police the outer perimeters which legislators and executive officials have in formulating policy." (Interview, National Public Radio, Oct. 2, 1984.)

Reliance on the popular branches of government for the protection of individual rights is a contradiction in terms. Justice Robert H. Jackson (a severe critic of what he called "libertarian judicial activists") observed years ago that the Bill of Rights was created to protect the individual and the minority against the popular will. The majority, after all, needs no judicial protection for by definition, it controls the legislature and the executive. As Alexander Hamilton wrote in The Federalist No. 78, the Constitution imposes "certain exceptions to the legislative authority," in order "to guard the rights of individuals from the effects of those ill humors" which can oppress the minority or "injur[e]...the private rights of particular classes of citizens by unjust and partial laws." The Bill of Rights manifests democracy's awareness of its own need for self-restraint. Obviously, a majority-controlled institution like a legislature is not likely to restrain that same majority, especially when the legislature's own "ill humors" produce the "unjust and partial laws." For that kind of check, an insulated institution is necessary, which is why the courts have the primary responsibility for providing this protection, and why federal judges were given life tenure.

The federal courts' authority, going back to Marbury v. Madison (1803) and earlier, has been reasserted time and again. Thomas

Jefferson, no admirer of judicial power, wrote to James Madison in support of a Bill of Rights:

> In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.

To take this check from the Judiciary and to rely solely on the legislature and executive for these protections does violence to a constitutional design that has generally served us well these 200 years. This is not conservative restraint. It is radical activism at its most extreme. It is not in accord with the "original intention," but contrary to it and profoundly anti-constitutional.

The Committee has the obligation to probe Mr. Fried's views on the reliance of other branches of government for the protection of individual rights.

C. Jurisprudence of Original Intent

Attorney General Meese has also called for exclusive reliance on the framers' intentions. Our Constitution, however, was not adopted to apply just to the world as the Framers knew it. We were then a tiny, largely rural society with a weak national government and predominantly local loyalties. We are certainly none of those today, and the inevitably limited vision of a handful of 18th Century statesmen, no matter how farsighted they were, should not straitjacket us. As Woodrow Wilson said, the Constitution was intended to be "a corner stone, not a completed building. It is a root, not a perfect vine." (Quoted in Cooper, The Warrior and the Priest 45 (1983).)

A half century ago, Chief Justice Charles Evans Hughes put it this way:

> It is no answer to say that this public need was apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget, that it is a Constitution we are expounding;" [McCulloch v. Maryland] "a Constitution intended for ages to come, and, consequently, to be adapted to the various crises of human affairs."
> Home Bldg. v. Blaisdell, 290 U.S. 398 (1934).

D. Judicial Restraint

All of these radical initiatives are put forth in the name of "judicial restraint." It is hard to take that claim seriously, for those who espouse these goals also promote activism. For example, where the protection of property or judicial curtailment of individual rights is concerned, these forces urge judicial activism. In a number of areas, the dichotomy between the call for judicial restraint on the one hand, and recommendations for specific activist solutions on the other hand are apparent.

People For The American Way does not take positions regarding the merits of these issues; however, the contradiction with regard to restraint vs. activism is transparent.

° In Economic Rights: Some have called for vigorous judicial review of any legislation infringing upon what the Wall Street Journal has called "economic civil rights," judicial invalidation of state rent control and land reform laws, as well as the Federal Election Act.

Similarly, they have castigated the Supreme Court for its recent decision deferring to Congress in applying the Fair Labor Standards Act to state and local governments. [Garcia v. San Antonio Metro Transit Authority 105 U.S. 1005 (1985)]

° In Criminal Matters, the Administration has successfully urged the Court to reach out in every way possible to curtail the rights of the accused. For example, there is an ancient doctrine that where a court can decide on a narrow or a broad ground, it should choose the narrow. Yet, this Administration has frequently asked the Court to make sweeping statements in criminal procedure cases, where narrow grounds were available.

° In Antitrust matters, the Administration has been zealous in its activist effort to overturn almost 100 years of antitrust law that it has drawn criticism even from business lawyers for its "almost religious zeal." [See Brett, Monsanto: Great Expectations Unfulfilled, 30 Antitrust Bull. 39, 55 (1985)]

° Regarding stare decisis, this Administration and its allies are also urging the Court to ignore what Mr. Fried has remarked is a major aspect of judicial restraint, stare decisis, respect for precedent. Attorney General Meese seems to be moving toward urging a whole-scale rejection of the 60 years of judicial precedent involved in the incorporation doctrine. This is not judicial restraint. It is activism with a vengeance.

In short, for the proponents of "judicial restraint," the virtues of activism and restraint depend on what is being promoted, not on some abstract neutral principles about the appropriate role of the courts.

The combination of the Administration's legal views and our reading of some of Mr. Fried's writings compels us to urge the Committee to take seriously its advise and consent responsibilities. Consider the following reported remarks by Mr. Fried made while serving as moderator of a recent discussion at the Manhattan Institute for Policy Research earlier this year:

> I think by now there is a large measure of agreement that many significant, yet misguided, policy trends developed in the law during the mid-1960s. There was the growth of the regulatory bureaucracy which often supplanted the functions of economic markets and intermediate social institutions. There was also an infatuation -- almost an obsession -- with what Robert Nozick would refer to as "end state" or "pattern" conceptions of justice, in which laws were interpreted to ensure very specific policy outcomes. Finally, there developed in the mid-1960s a growing institutional paralysis -- a kind of celebration of self-hatred for national values and institutions -- which was fed by the emergence of what many have called the "new class," a class in which lawyers and judges played a large role. Looking back at that time, I think it is clear that judges were among those who "did it to us" partially through the creation of new rights -- mainly positive rights to a particular benefit or status. They also "did it to us" by departing from common sense and moving in the direction of the elaborate rule-systems. The Miranda decision, as well as decisions in the search-and-seizure area, are good examples of the

> judiciary's departure from common sense. Most advanced industrial democracies do not have the kind of "internal-revenue-code" view of illegal police procedure which prevails in this country. Only we do, and that is the work of the judges.
>
> Now, since November of 1980, there has clearly been a reaction against these trends in the law. That has led to the appointment of new judges. Those new judges, however, confront a dilemma. What we expect from them is a return to sounder principles. The problem is that sound principles have two forms -- one relating to substantive law and the second relating to the role of the judiciary as an institution.
>
> This second set of principles calls for self-restraint on the part of judges, much less contentiousness, shorter opinions, and a greater respect for stare decisis. Therein lies the problem. If you are to respect other institutions, be less activist, and adhere to precedent, you're going to be stuck with many of the ill-conceived legal decisions, which occurred between 1960 and 1980. If you're less activist, you're going to be less creative about interpreting some really silly statutes which were passed during this period, which could do with a dose of negative activism. Judicial restraint may require judges to be faithful to a lot of things which, in the abstract, don't deserve fidelity. I am interested in hearing how our panelists would resolve this dilemma.
> [5 Manhattan Report on Economic Policy, No. 2, p.3 (1985)]

The nomination of a Solicitor General, often referred to as the "tenth justice" is too significant to be disposed of routinely and rushed to a vote.

Today we are witnessing a massive attack on the traditional function of the courts. It is clear that former Solicitor General Rex Lee was unwilling to participate in that attack, to the extent that some in the Administration and their allies would have liked. It is important for the Committee to determine whether or not Mr. Fried will adhere to the high traditions of independence demonstrated by his predecessors or whether he will become a party to the radical effort underway to curtail the historic mandate of the federal courts to defend the rights guaranteed by the Constitution.

Senator **Hatch**. Well, thank you, Mr. Podesta. I appreciate your abbreviating your remarks. We will certainly put your statement in the record.

Mr. **Podesta**. Thank you.

Senator **Hatch**. Miss Liss, we are happy to have you here. Welcome.

TESTIMONY OF SUSAN M. LISS

Ms. **Liss**. Mr. Chairman, we are appearing today because we wanted to raise these serious issues about judicial selection.

Senator **Hatch**. I have read your statement also and I found it to be an excellent statement.

Ms. **Liss**. Thank you. And we think that the issues have been very fully explored. We are glad that the committee asked so many serious questions of Mr. Markman on these issues. I really do not want to take the time to say anything else.

Senator **Hatch**. Well, thank you. We will put your full statement in the record.

[The statement follows:]

Judicial
Selection
Project

600 New Jersey Avenue, N.W. Washington, D.C. 20001
Telephone: 202/624-1247

SUSAN M. LISS
Director

NAN ARON
Chair

STEERING COMMITTEE

DAVID COHEN
Advocacy Institute

ARMAND DERFNER, ESQ.

RICHARD FAJARDO
Mexican-American Legal Defense
and Education Fund

JOAN M. GRAFF
Employment Law Center

GAIL HARMON, ESQ.

ELAINE R. JONES
NAACP Legal Defense
and Education Fund, Inc.

JANET KOHN
AFL-CIO

MARSHA LEVICK
NOW Legal Defense and
Education Fund

CLINT LYONS
National Legal Aid and
Defender Association

ANN MACRORY
Washington Lawyers' Committee
for Civil Rights Under Law

RALPH NEAS
Leadership Conference on Civil
Rights

MARILYN NEJELSKI
National Women's Political Caucus

LEN RUBENSTEIN
Mental Health Law Project

HERMAN SCHWARTZ
American University Law School

BARBARA STEIN
National Education Association

WILLIAM TAYLOR
Center for National Policy Review

CLAUDIA WITHERS
Women's Legal Defense Fund

TESTIMONY OF THE

JUDICIAL SELECTION PROJECT

ON THE NOMINATION OF

STEPHEN J. MARKMAN

FOR ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY

OCTOBER 9, 1985

A Project of the Alliance for Justice

Participating Alliance Members: Business and Professional People for the Public Interest; Center for Law and Social Policy; Center for Law in the Public Interest; Center for National Policy Review; Center for Public Representation; Center for Science in the Public Interest; Education Law Center; Employment Law Center; Equal Rights Advocates; Food Research and Action Center; Institute for Public Representation; Juvenile Law Center of Philadelphia; Mental Health Law Project; National Education Association; NOW Legal Defense and Education Fund; National Women's Law Center; Native American Rights Fund; New York Lawyers for the Public Interest; Public Advocates, Inc.; Sierra Club Legal Defense Fund; Women's Law Project; Women's Legal Defense Fund

I am Susan M. Liss, Director of the Judicial Selection Project. Thank you for the opportunity to appear before this Committee today.

The Judicial Selection Project is a coalition of lawyers, academics, and representatives of civil rights, labor and public interest groups that was formed nearly a year ago to monitor appointments to the federal courts. The project reviews nominees' backgrounds on issues such as access to the courts, their records of equity and fairness, commitment to equal justice, Pro bono activities, and membership in clubs that discriminate.

We believe that maintaining an independent judiciary is essential in our democratic system. However, we are deeply concerned about that independence in light of recent developments which demonstrate that judicial appointments today continue to be based on ideological fitness rather than merit.

We neither oppose nor support Mr. Markman's nomination. Rather, we are here today to discuss the administration's process of judicial selection.

It is our understanding that Mr. Markman's primary responsiblity as head of the Office of Legal Policy will be to oversee the administration's selection of federal judges. His confirmation hearing, therefore, provides this committee with the opportunity to explore with Mr. Markman the administration's position on a number of issues concerning judicial selection, and we urge you to do so.

First, we believe that the committee should explore with Mr. Markman what criteria the administration is using in selecting judicial candidates. Despite continuing denials by administration officials that litmus tests are not being used, we have learned that candidates under consideration are being asked questions identical to those included in the now infamous "Rodriquez questionnaire" during screening interviews by Justice Department and White House staff.

If it is true, it should be of great concern to every member of this committee. The questions on the Rodriquez questionnaire sought to elicit the nominees' views on a range of issues which might very well come before a judge.

Seeking assurances, before nomination, about the way a judge will vote destroys the impartiality that a judge must have in order to make fair decisions.

We urge this Committee to elicit a clear answer from Mr. Markman as to whether, either directly or indirectly, the administration: (a) is using ideological-litmus tests or (b) is seeking assurances about how a potential nominee will rule on specific issues.

Second, we urge the Committee to explore with Mr. Markman ways that the administration could increase the number of women and minorities being considered for judicial appointment. Our view of the appointments to date reveals that in filling 199 vacancies over nearly five years, only two blacks have been seated in District Courts and one black on a Court of Appeals. The administration's record on appointing women is not as bleak, but is nothing to be proud of -- seventeen out of the same 199 vacancies.

Administration officials claim that because they give great deference to Senatorial recommendations for the District Court nominations, they have little control over the number of minorities and women appointed to those courts. However, responsibility for the paucity of women and minority appointments must rest with the administration. Without a firm commitment and a strategy to implement it, appointments will continue to be business as usual.

The administration also maintains that it is having a difficult time identifying qualified women and minorities. If the administration established a dialogue with the major bar associations representing women and minority lawyers, those groups would identify candidates acceptable to the administration. Mr. Markman's appointment provides an opportunity to commence such a dialogue. We urge him to do so.

The unique role of the courts has been maintained over two centuries only because of public confidence in the fairness of our justice system. Thus, it is essential that the people selected to be federal judges respect the basic tenets of our legal system: respect for individual rights and a commitment to equal justice for all.

Trust in the courts can only be maintained if citizens feel confident that those selected to become federal judges will be able to judge others holding differing views with fairness. Decisions must be rendered not based on personal ideology, but dispassionately and according to the law.

As we have pointed out today, the administration's current standards for selecting judges do not reflect a commitment either to fundamental fairness or to an independent judiciary. Mr. Markman will have the opportunity to shift the direction of the administration's judicial selection process, and we urge him to do so.

Senator HATCH. I want to thank all three of you. I assure you that these are two of the best nominees I think any administration has ever suggested. You may differ with them philosophically, but they are good people. They are honest people. They are ethical and moral people, and they are committed to civil rights, among other things.

I know that we have had our problems with ideological litmus tests, and you do in any administration. I remember when President Carter was President.

We had a Tenth Circuit Court of Appeals judgeship nomination and they set up a judicial selection commission, which I believe in, for the most part, and I think they do basically a good job.

I encouraged a number of Democrats in Utah, who were just outstanding constitutional scholars, people committed to civil rights, people that you would, I think, pretty well be proud of. You may differ with a few of their positions.

One of them was one of the top law professors in the country at the time, or had been at the time, one of the top legal scholars, one of the top constitutional scholars, widely read and widely impressive.

And the first question they asked him when he was in was, "Are you pro choice?" Then they asked him if he believed in the Equal Rights Amendment. And unfortunately for him, he was wrong on both counts, from their perspective. And he was automatically left out, along with a wide variety of other, very highly qualified Democrats, who really represented the majority of people in that particular area.

Now, I think sometimes the media, and others, get caught up in just what happens during a particular administration, but I did not see any comments about that at the time. But it was really amazing to me. I do not blame anybody for asking questions about ideology because the response is as important as whether or not you agree with the person, and I have pointed out a few with Judge Rodriguez.

He disagrees with me about capital punishment, but he answered that he would implement the law as it existed. That was important to me, much more important than whether or not he agreed or disagreed with me on any particular issue.

Because you see, there is no way—you could take 8 hours with every judicial nominee, and you could have 10 people there ask them every conceivable question they could in that 8 hour period, and you still would not even scratch the surface of the potential conflicts that those people would have to deal with in the next year on the bench.

You and I both know that. So, I appreciate your concerns, and I believe both of these nominees will appreciate those concerns, and both of them will, I think, do a good job about those concerns.

So, we appreciate your taking time to be here, and we want to just thank you for it, and with that, we will recess this committee until right after this vote, and hopefully all staff will get their Senators notified, have them meet in room 224, and we will resolve the problems that we all agreed to resolve last week.

With that, we will recess until that time.

[Whereupon, at 1:30 p.m., the committee was recessed, subject to the call of the Chair.]

BIOGRAPHIES

STEPHEN J. MARKMAN

NOMINEE, ASSISTANT ATTORNEY GENERAL

Birth: June 4, 1949, Detroit, Michigan.

Legal Residence: Virginia.

Marital Status: Married to Mary Kathleen Sites Markman.

Education: 1967-1971—Duke University, B.A. degree. 1971-1974—University of Cincinnati, College of Law, J.D. degree.

Experience: 1975—Legislative Assistant, Representative Edward Hutchinson. 1975-1978—Legislative Assistant, Representative Tom Hagedorn. 1978-present—Chief Counsel/Staff Director, Subcommittee on the Constitution, Senate Committee on the Judiciary.

CHARLES FRIED

NOMINEE, SOLICITOR GENERAL

Birth: April 15, 1935, Prague, Czechoslovakia.

Naturalized: 1948.

Legal Residence: Massachusetts.

Marital Status: Married to Ann Summerscale, 2 children.

Education: 1956—Princeton University, A.B. degree. 1958—Oxford University, B.A. degree. 1960—M.A. degree. 1960—Columbia University, Law School, J.D. degree.

Bar: 1966—Massachusetts.

Experience: 1960-1961—Law Clerk to Hon. John Harlan, United States Supreme Court. 1961—1981 (on leave of absence)—Harvard Law School, Assistant Professor (1961-65), Professor of Law (1965-1981). 1984-1985—Special Assistant to the Attorney General. 1985-present—Deputy Solicitor General and Counselor to the Solicitor General. 6/1985-present—Acting Solicitor General of the United States.

CONFIRMATION HEARING ON CHARLES J. COOPER

WEDNESDAY, OCTOBER 23, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch, Grassley, Specter, McConnell, Biden, Kennedy, Heflin, and Simon.

Staff present: Dennis Shedd, chief counsel and staff director; Duke Short, chief investigator; Cindy Lebow, minority staff director; Arthur Briskman, subcommittee minority chief counsel; and Karen Kremer, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We have met today to consider the nomination of Charles J. Cooper of Virginia to be an Assistant Attorney General, Office of Legal Counsel. I believe he is from Alabama. Senator Heflin and Senator Denton are down to speak on his behalf. I have a letter here from Senator Denton that he is sick today, but I will read it in a few minutes, rather than hold you up. Of course you can stay for the whole hearing. We will be glad to have you.

Senator Heflin. I plan to be here.

The Chairman. You do. All right. Well, you can go first, if you want.

Senator Heflin. Would you like me to begin?

The Chairman. You are the senior Senator.

Senator Heflin. Mr. Chairman, it is always a privilege for me to introduce to this committee Alabamians nominated by the President of the United States to serve the American people.

It is a recognized and customary part of the constitutional responsibility of advice and consent entrusted to the U.S. Senate, and I take every aspect of this responsibility very seriously.

Today, Mr. Chairman, I present to the committee Charles Justin Cooper, the President's nominee to be Assistant Attorney General. Although not a native Alabamian, Mr. Cooper was raised in Huntsville, and he is an outstanding graduate of the University of Alabama system, finishing his undergraduate work at the University of Alabama in 1974, and receiving his law degree there in 1977.

Mr. Cooper's list of honors at the Alabama Law School is very impressive. He graduated first in his class and served as editor-in-chief of the Alabama Law Review.

After receiving his juris doctorate, Mr. Cooper served as a law clerk to Judge Paul Roney of the fifth circuit, now of the 11th circuit, and then as clerk to Supreme Court Justice William Rehnquist.

Mr. Cooper served as a special assistant to the Attorney General, Civil Rights Division, for 1 year, and has served as Deputy Assistant Attorney General, his present position, since 1982.

Mr. Chairman, Mr. Cooper has amassed an impressive scholastic record, and has served effectively in the Department of Justice.

Mr. Cooper's nomination has generated some interest in the State of Alabama, and I have received several letters and mailgrams in support of his nomination.

Two of these communications are particularly noteworthy and I would like to bring them to the attention of the committee at this time. I would like to read the first letter from Rev. James D. Bailey, pastor of the Latham United Methodist Church of Huntsville, AL.

> Dear Senator: I am writing in the interest of the hearing for Charles J. Cooper. Although I do not know him personally, his mother is my administrative assistant, and having become acquainted with his parents, I feel that if he reflects the attitude and spirit of them, then he should be a worthy candidate for the appointment for which he is being considered. I do not know his political persuasion but his mother continues to be a faithful Democrat. Sincerely, James D. Bailey.

[Laughter.]

Senator HEFLIN. Now I thought that Reverend Bailey's declaration might raise a question, but in case there is any doubt, I would like to read a mailgram which we received from the nominee's mother, which read: "Vote for Cooper. He's super. Signed, his Mom." [Laughter.]

Senator HEFLIN. This should lay to rest any question of dissension in the Cooper household.

I am delighted to present Mr. Cooper to the committee.

The CHAIRMAN. Thank you very much.

Senator Denton has developed a sudden illness which forces him not to be able to attend today's hearing to endorse Mr. Cooper. Senator Denton has asked that I read his prepared introduction. The Senator desires that I emphasize that his absence is due to illness and in no way should be viewed as lessening his strong endorsement of Mr. Cooper's nomination. And this is his statement.

> Mr. Chairman, I am always pleased to appear before the various committees of the Senate to introduce distinguished Alabamians. I may be biased but I am of the opinion that Alabamians represent some of the most outstanding nominees made by the President. Today I have the honor of introducing to the committee Mr. Charles Justin Cooper, the President's nominee to be Assistant Attorney General for the Office of Legal Counsel.
>
> Mr. Cooper is uniquely qualified by his background and experience, and will serve with great distinction in the position to which he has been nominated.
>
> In order to acquaint everyone with Mr. Cooper's abilities and background, I will start by claiming him as a true Alabamian. Although Mr. Cooper was born in Dayton, Ohio, we Alabamians proudly call him ours.
>
> He attended the public schools of Huntsville, Alabama, and he graduated from Huntsville High School in 1970, where both his scholastic and athletic abilities were outstanding.

Mr. Cooper then went to the University of Alabama where he received a B.S. degree in Finance in 1974. In 1977 he graduated from the Alabama School of Law. Mr. Cooper was first in his law school graduating class and also editor-in-chief of the Alabama Law Review. Few law students scale both of those very tall peaks of academic excellence. As one might expect, Mr. Cooper also received numerous academic awards while at the Law School, too many to mention here.

After law school, Mr. Cooper was a law clerk to the Honorable Paul H. Roney, Judge, United States Court of Appeals for the Fifth Circuit in Florida.

From there, he became law clerk to the Honorable William Rehnquist, Associate Justice of the United States Supreme Court.

Following his clerkships, Mr. Cooper was a practicing attorney for Long and Aldrich in Atlanta, Georgia handling general corporation litigation.

In 1981, Mr. Cooper began his distinguished career with the Department of Justice as a Special Assistant to the Assistant Attorney General in the Civil Rights Division.

After one year he was promoted to Deputy Assistant Attorney General in the Civil Rights Division where he has been for the last three years.

His areas of responsibility as Deputy Assistant Attorney General have included trial litigation in such areas as public education and institutionalized persons.

Mr. Cooper has served with distinction in his Division. He has not only supervised the Division's appellate litigation but also argued several cases himself.

Perhaps the most notable case he was directly involved with, even arguing the case himself, was United States versus University Hospital of the State University at Stony Brook, or as it is even better known, the Baby Jane Doe case.

His personal attention and direct involvement with the case helped to focus much-needed attention to the all but neglected area of civil rights, the right of handicapped new borns to be free of discrimination.

Mr. Cooper has built quite a reputation for himself. I believe he has one of the finest legal minds in America today.

His devotion to the law, and to the rule of law is also without question. He is an outstanding man, and one of the most distinguished lawyers I have ever had the privilege to introduce to this Committee.

I am personally pleased for the country, and proud for our State, that President Reagan has chosen such a fine individual to hold the position of Assistant Attorney General for the Office of Legal Counsel.

I urge the members of this Committee to act upon this nomination as expeditiously as possible.

Mr. Chairman, if I may, I would like to introduce to the Committee a number of additional fine Alabamians.

The CHAIRMAN. Chuck's wife. Is she here? Would you stand up, please. Thank you. Jill Cole Cooper, and Chuck's parents, Mr. and Mrs. Robert Cooper.

Mr. COOPER. Mr. Chairman, my parents, unfortunately, were unable to get their flight out of Huntsville. It was canceled. They planned to make other arrangements and be here as early this morning as they can.

The CHAIRMAN. All right, sir.

Now we have statements here endorsing you from Senator Laxalt, a member of this committee, from Nevada, of course, and Senator East, a member of this committee, from North Carolina. I ask that those go in the record.

[The statements of Senators East and Laxalt follow:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I believe that President Reagan has made an excellent choice in nominating Charles Cooper to be Assistant Attorney General for the Office of Legal Counsel. If only for the high quality of the service that he has performed in the Department of Justice for the last 5 years, Mr. Cooper would more than deserve Senate confirmation. His qualifications, however, do not begin with the commencement of his government service in 1981. Rather, as his academic record and professional experience demonstrate, Mr. Cooper possesses legal telents of the highest caliber. As a law student, he was first in his class at the University of Alabama and was awarded multiple honors—including the Order of the Coif. As a practitioner, he has been privileged to clerk for both Supreme Court Justice William Rehnquist and Fifth Circuit Judge Paul Roney. His first-hand, inside experience of the workings of the judicial branch has provided him with a unique background for his service in the Nation's chief law enforcement agency.

As a senior official in the Civil Rights Division of the Department of Justice, Charles Cooper has demonstrated that he not only possesses an excellent grasp of the intricacies of the law, but also a deep appreciation for its higher social purpose. He has employed these qualities to build a solid record of achievement during his tenure with the Reagan administration. As one dedicated to implementing the President's policies, Charles Cooper has striven to make a reality of the long unfulfilled vision of the elder Justice Harlen that "Our Constitution is color-blind . . . in respect to civil rights, all citizens are equal before the law." As the Deputy Assistant Attorney General for the Civil Rights Division, Mr. Cooper has been instrumental in crafting the record number of prosecutions brought by the Administration against those who would abridge the civil rights of others in violation of Federal criminal law. He also has employed civil litigation as a vehicle for eliminating all forms of racial discrimination which continue to divide our nation.

Mr. Chairman, it is my sincere hope that the Judiciary Committee will act swiftly to send Mr. Cooper's nomination to the floor. Charles Cooper has amply demonstrated that he truly is the "lawyer's lawyer" which the position of Assistant Attorney General for the Office of Legal Policy requires. He is a man of great integrity and vision; one who has served valiantly in defense of principle. I urge my colleagues to support his nomination.

PREPARED STATEMENT OF SENATOR PAUL LAXALT

Mr. Chairman, Chuck Cooper's strong qualifications to head the Office of Legal Counsel are self-evident, and I shall not take the committee's time by detailing again his stellar accomplishments. He is well equipped to follow in the distinguished tradition established by the most brilliant of his predecessors at O.L.C. (whose number include the Supreme Court Justice for whom Mr. Cooper clerked, William Rehnquist). While enviably young (he is roughly the same age that Judge Scalia was when he served at O.L.C.), Mr. Cooper has nonetheless achieved a good mix of scholarly and practical expertise, coupled with 6 years already devoted to the public service.

For the past several years, of course, it as been Mr. Cooper's duty as a Deputy Assistant Attorney General for the Civil Rights Division to work in areas involving some of the most controversial issues of our day. Today's hearing will doubtless touch upon some of these hotly debated topics, such as the Administration's basic opposition to race or sex-conscious preferential treatment. While some may see indications to the contrary, I do not believe that a willingness to involve oneself in public service relating to complex and contested issues should inevitably become a liability to advancement, or at least to Senate confirmation. From what I know of Mr. Cooper's performance at the Department of Justice, he has shown himself fully able to render the sophisticated legal judgments that will be required of him in his new post. I welcome his nomination, and anticipate that this hearing will quickly demonstrate his fitness for the position to which President Reagan has nominated him.

The CHAIRMAN. We have a letter here from William French Smith, former Attorney General, endorsing you for this position. We will ask that that go in the record.

[The letter follows:]

WILLIAM FRENCH SMITH
333 SOUTH GRAND AVENUE
LOS ANGELES 90071

October 14, 1985

The Honorable
Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr.Chairman:

I write in support of the President's nomination of Charles J. Cooper to be Assistant Attorney General for the Office of Legal Counsel. I can think of no one more deserving of this office.

During my tenure as Attorney General, I worked directly with Chuck Cooper on scores of legal issues. I found him to be one of the most impressive young lawyers I have ever known. He has a firm grasp of the law, from the broadest principles to the most minute details. He would prove to be an outstanding Assistant Attorney General.

Chuck's academic training has been superb. He graduated first in his class in law school. In addition to serving as Editor-in-Chief of the Alabama Law Review, he garnered a good many academic awards and honors. His clerkships for Judge Paul Roney of the Eleventh Circuit Court of Appeals and Justice William Rehnquist, as well as his experience in private law practice make him especially well qualified for the important post to which he has been nominated.

Mr. Cooper proved himself to be a loyal assistant and a tireless worker. He takes his responsibilities very seriously and is truly a dedicated and honorable public servant. Charles Cooper is a man of integrity and high professional standards.

I recommend him to you with great enthusiasm and without qualification or reservation.

Sincerely,

William French Smith

The **Chairman**. And we have a number of other letters here in support of this nomination, and here is one from James F. Blumstein, professor of law at Vanderbilt University, and various other letters here which I just ask to be put in the record. Copies will go in the record.

[The letters follow:]

VANDERBILT UNIVERSITY
NASHVILLE, TENNESSEE 37240
TELEPHONE (615) 322-7311
School of Law · Direct phone 322 2615

October 8, 1985

Senator Strom Thurmond
Chairman, Judiciary Committee
United States Senate
Washington, D.C. 20510

Re: Charles J. Cooper

Dear Senator Thurmond:

I am writing in support of the nomination of Charles J. Cooper for the position of Assistant Attorney General, Office of Legal Counsel. Chuck is currently serving as Deputy Assistant Attorney General in the Justice Department's Civil Rights Division.

Chuck Cooper is an attorney of considerable experience and ability; he knows his way around the Justice Department and has been able to develop a relationship of trust and respect with those with whom he is and will be working. Chuck is also a person of enormous energy and commitment, a conscientious lawyer and a perceptive analyst.

Chuck's background and professional credentials would be the envy of many a young attorney. His professional career is clearly on a very fast track, and he has a record of accomplishment and achievement in the positions he has filled. His outstanding record at the University of Alabama School of Law speaks for itself. His subsequent clerkships at the Court of Appeals and for Justice Rehnquist at the Supreme Court reflect the height of achievement for a law school graduate.

Chuck's professional credentials, his record of performance and achievement, his experience, his energy and conscientiousness, and the confidence placed in him by his colleagues at the Department of Justice surely qualify him for the position of Assistant Attorney General.

Sincerely,

J F Blumstein
James F. Blumstein
Professor of Law

JFB:eb

LAW OFFICES OF
PAUL, HASTINGS, JANOFSKY & WALKER
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
TWELFTH FLOOR
1050 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036
TELEPHONE (202) 223-9000
CABLE ADDRESS: PAULHAST WSH
TWX: 710-822-9062

LOS ANGELES OFFICE
TWENTY-SECOND FLOOR
555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071
TELEPHONE (213) 489-4000

ORANGE COUNTY OFFICE
SEVENTEENTH FLOOR
695 TOWN CENTER DRIVE
COSTA MESA, CALIFORNIA 92626
TELEPHONE (714) 641-1100

WEST LOS ANGELES OFFICE
FIFTH FLOOR
1299 OCEAN AVENUE
SANTA MONICA, CALIFORNIA 90401
TELEPHONE (213) 451-1200

OF COUNSEL
LEE G. PAUL
ROBERT P. HASTINGS
LEONARD S. JANOFSKY
CHARLES M. WALKER

ATLANTA OFFICE
ELEVENTH FLOOR
230 PEACHTREE STREET, N. W.
ATLANTA, GEORGIA 30303
TELEPHONE (404) 588-9900

CONNECTICUT OFFICE
SECOND FLOOR
THREE LANDMARK SQUARE
STAMFORD, CONNECTICUT 06901
TELEPHONE (203) 357-0100

1985 OCT 15 AM 10 06

October 8, 1985

OUR FILE NO:

The Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing in support of the President's nomination of Charles J. Cooper as Assistant Attorney General, Office of Legal Counsel.

Mr. Cooper has exceptional credentials, having served as law clerk to Justice Rehnquist and enjoys a reputation as an outstanding lawyer. In my opinion, he would certainly be a credit to the Justice Department in the new position to which he has been nominated by the President.

Respectfully submitted,

Dennis H. Vaughn

Dennis H. Vaughn
of PAUL, HASTINGS, JANOFSKY & WALKER

DHV:sgf

American Enterprise Institute for Public Policy Research
1150 Seventeenth Street, N.W., Washington, D.C. 20036
(202) 862-5800
Telex: 671-1239

October 3, 1985

The Honorable Strom Thurmond
Senate Committee on the Judiciary
224 Dirksen Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The President has nominated Charles Cooper to be Assistant Attorney General in charge of the Office of Legal Counsel and I want strongly to support his nomination. I have known Mr. Cooper for four years now -- have read some of the briefs he has written, watched him in action at several conferences, and have talked seriously with him about constitutional matters on a number of occasions. He is a first-class lawyer and a first-class young man. Just this morning I was privileged to have breakfast with the Attorney General and a few of his top aides, and it was quite clear that Charles Cooper enjoys, and deserves to enjoy, the full respect of the Attorney General. He will, of course, require this respect to function efficiently in the Office of Legal Counsel.

Charles Cooper knows the Supreme Court, having served there as a law clerk, he knows the Department of Justice and its business, and he knows well the Attorney General whom he would be expected to serve. It is a privilege to support his appointment and I do so, as I said at the beginning, strongly and without reservation on any score.

Sincerely yours,

Walter Berns

WALTER BERNS
John M. Olin Distinguished Scholar
in Constitutional and Legal Studies

MAYER, BROWN & PLATT
231 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60604

WASHINGTON
LONDON
NEW YORK
DENVER
HOUSTON

312-782-0600
TELEX 253760
CABLE LEMAY

(312)750-3315
WRITER'S DIRECT DIAL NUMBER

1985 OCT -3 PM 12:40

October 2, 1985

Senator Paul Simon
United States Senate
462 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Simon:

I recently learned that Chuck Cooper has been nominated to serve in the Department of Justice as Assistant Attorney General in charge of the Office of Legal Counsel. I understand that his nomination will shortly come before you for consideration. I therefore thought that I might be able to provide some information about Chuck that would be useful in your evaluation.

I first met Chuck in 1981 when he was serving as Special Assistant to the Assistant Attorney General in the Civil Rights Division. I then served as Deputy Solicitor General, and my office was directly adjacent to Chuck's office. We had occasion to work together on a number of government cases and I got to know Chuck and his work quite well. On the basis of my experience with Chuck, I would like to offer my wholehearted support for his nomination.

I should say a word about Chuck's background. He graduated first in his class in law school, and was Editor-in-Chief of his law review. In law school, Chuck earned a series of awards and commendations for the highest grades and best legal writing, and for special service to the law school.

Following law school graduation Chuck clerked in the Fifth Circuit for Judge Roney and then clerked in the Supreme Court for Justice Rehnquist. He subsequently engaged in private practice in Atlanta before coming to work for the Department of Justice.

In the Department of Justice, Chuck has handled a wide variety of trial and appellate litigation. As an ardent follower of Supreme Court cases, I have had occasion to read all of Chuck's briefs, and they are of the highest quality. In addition, I have personally observed the work habits of my former next door neighbor, and can report that the taxpayers receive a real bargain from Chuck Cooper. He is an indefatigable worker. Of equally great importance, Chuck is a lawyer with the highest standards of integrity and professionalism, and a real commitment to public service.

If confirmed for the Office of Legal Counsel, it would be Chuck's duty to advise the Executive Branch and various offices and agencies of the federal government on a host of legal issues. The Assistant Attorney General in charge of this office is truly a "lawyer's lawyer." In my opinion, Chuck would do an exceptional job in this office because of his keen intellect and wide experience in the Supreme Court and the courts of appeals, and his four-year tour of duty in the Department of Justice.

Chuck is a member of the Republican party and a loyal supporter of the programs of the President. It seems especially fitting to me that the President and Attorney General would have the benefit of such a conscientious lawyer in the Office of Legal Counsel, which assists the Executive Branch on a daily basis in analyzing complex legal issues.

It would be a pleasure to discuss Chuck's nomination with you or any member of your staff if I can provide any further information.

Sincerely,

Stephen M. Shapiro

SMS:ps
cc: Senator Strom Thurmond

JUSTIN DART JR.
907 6 ST SOUTHWEST APT 516-C
WASHINGTON DC 20024 30AM

Western Union Mailgram

4-0185498273 09/30/85 ICS IPMBNGZ CSP WHSB
5124482444 MGMB TDBN AUSTIN TX 99 09-30 1212P EST

SENATOR J STROM THURMOND
CHAIRMAN SENATE JUDICIARY COMMITTEE
DIRKSEN SENATE OFFICE BLDG
WASHINGTON DC 20510

I STRONGLY SUPPORT THE PRESIDENT'S NOMINATION OF CHARLES J COOPER TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL. MR COOPER IS A SUPERBLY COMPETENT AUTHORITY IN HIS FIELD AND A PERSON OF UNQUESTIONED INTEGRITY. IN ADDITION, IT IS ESSENTIAL TO THE EFFICIENT FUNCTION OF OUR CONSTITUTIONAL SYSTEM AND TO THE WELFARE OF OUR NATION THAT THE PRESIDENT BE ABLE TO APPOINT QUALIFIED EXECUTIVES OF HIS CHOICE. THANK YOU AGAIN FOR YOUR CONSISTANT SUPPORT FOR AMERICANS WITH DISABILITIES. SINCERELY,
JUSTIN DART JR.

12:13 EST

MGMCOMP

TO REPLY BY MAILGRAM MESSAGE, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS

LAW OFFICES OF
PAUL, HASTINGS, JANOFSKY & WALKER
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ELEVENTH FLOOR
230 PEACHTREE STREET, N. W.
ATLANTA, GEORGIA 30303
TELEPHONE (404) 588-9900

LOS ANGELES OFFICE
TWENTY-SECOND FLOOR
555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071
TELEPHONE (213) 489-4000

ORANGE COUNTY OFFICE
SEVENTEENTH FLOOR
695 TOWN CENTER DRIVE
COSTA MESA, CALIFORNIA 92626
TELEPHONE (714) 641-1100

WEST LOS ANGELES OFFICE
FIFTH FLOOR
1299 OCEAN AVENUE
SANTA MONICA, CALIFORNIA 90401
TELEPHONE (213) 451-1200

OF COUNSEL
LEE G. PAUL
ROBERT P. HASTINGS
LEONARD S. JANOFSKY
CHARLES M. WALKER

WASHINGTON, D.C. OFFICE
TWELFTH FLOOR
1050 CONNECTICUT AVENUE, N. W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 223-9000

CONNECTICUT OFFICE
SECOND FLOOR
THREE LANDMARK SQUARE
STAMFORD, CONNECTICUT 06901
TELEPHONE (203) 357-0100

October 14, 1985

OUR FILE NO.

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
SD-224, Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to support the President's nomination of Charles J. Cooper, Esq. to the post of Assistant Attorney General for the Office of Legal Counsel at the U.S. Department of Justice. I have known Chuck for a number of years dating back to the time he was in private practice here in Atlanta. I have also had extensive contact with him in his present capacity within the Civil Rights Division, since my practice is devoted almost exclusively to employment and civil rights law.

My first-hand experience with Chuck is that he is a very energetic individual, whose long, hard hours on the job exemplify his dedication to public service. Chuck is also one of the most intelligent and thoughtful lawyers I have had occasion to know. He is a candidate of high integrity and possesses truly superior analytical skills. I enthusiastically recommend his nomination to you and other members of the Judiciary Committee without qualification. He will be a great asset to the federal goverment's administration of Justice.

If I can answer any additional questions, I am at the Committee's disposal.

Very truly yours,

Lawrence Ashe

R. Lawrence Ashe, Jr.

RLA:tmf

LAW OFFICES
MITCHELL, LOGGINS, CAMPBELL & ELSBERRY
THE EQUITABLE BUILDING, SUITE 950
100 PEACHTREE STREET
ATLANTA, GEORGIA 30303
(404) 658-1400

WALTER W. MITCHELL
SEWELL K. LOGGINS
DOUGLAS N. CAMPBELL
MICHAEL V. ELSBERRY
BARRY S. MARKS
BRIAN J. MORRISSEY
LAURA E. STEVENSON
STEPHEN B. SCHROCK
JOHN J. WILES

October 15, 1985

The Honorable Strom Thurmond, Chairman
The Committee on the Judiciary
United States Senate
226 Senate-Dirksen Building
Washington, D.C. 20510

Re: Nomination of Charles J. Cooper, Esq.
as Assistant Attorney General for the
Office of Legal Counsel

Dear Senator Thurmond:

I have been acquainted with Charles J. "Chuck" Cooper for over ten years, and am most pleased to see that he has been nominated as Assistant Attorney General for the Office of Legal Counsel. Chuck is an extremely intelligent, articulate and energetic public servant, and he is most qualified, both by education and experience, for that position. As I am sure you know his background in detail, I will not recount it for you.

I wish to emphasize, however, that Chuck's strength and depth as a person extend beyond his professional endeavors to his personal life. We who count ourselves among his friends are always pleased to have an opportunity to visit with Chuck and to share his good humor and insight into life. He, Jill and their children are strong evidence of the vitality and worth of the American family.

Chuck's sound judgment has been demonstrated time and again, and that judgment will undoubtedly serve him and our country well if he is approved for the position. He certainly is well qualified for it, and I commend him highly for your consideration.

With kindest regards, I am,

Very truly yours,

Michael Elsberry

Michael V. Elsberry

MVE/es

The **Chairman**. Is there anybody else that has—no other member of the committee is here. If you will stand up and be sworn.

Do you swear the testimony you will give in this hearing will be the truth; the whole truth, and nothing but the truth, so help you God?

Mr. **Cooper**. Yes, sir.

The **Chairman**. Have a seat. Without objection, I will place a brief résumé of Mr. Cooper in the record at this point.

[The résumé of Mr. Cooper follows:]

BIOGRAPHY

Charles J. Cooper

NOMINEE, ASSISTANT ATTORNEY GENERAL

Birth: March 8, 1952, Dayton, OH.

Legal Residence: Virginia.

Marital Status: Married to Jill Cole Cooper, 1 child.

Education: 1974—University of Alabama, B.S. degree. 1977—University of Alabama School of Law, J.D. degree.

Bar: 1977—Alabama. 1979—Georgia.

Experience: 1977-1978—Law Clerk to Hon. Paul H. Roney, U.S. Court of Appeals, Fifth Circuit. 1978—Law Clerk to Hon. William H. Rehnquist, U.S. Supreme Court. 1979-1981—Long & Aldridge, Associate. 1981-1982—U.S. Department of Justice, Civil Rights Division, Special Assistant to the Assistant Attorney General. 1982-present—U.S. Department of Justice, Civil Rights Division, Deputy Assistant Attorney General.

TESTIMONY OF CHARLES JUSTIN COOPER, OF ALABAMA, NOMINATED TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

The **Chairman**. Now, Mr. Cooper, would you summarize for the committee your background and legal experience.

Mr. **Cooper**. Yes, Mr. Chairman. As has earlier been indicated by——

The **Chairman**. Speak louder so we can hear you.

Mr. **Cooper**. Yes, sir. As the Senators from Alabama have indicated, I took my legal education at the University of Alabama School of Law.

Upon my graduation, I served as a law clerk to Judge Paul Roney of the then fifth circuit. It now is the eleventh circuit after the split. After a year as law clerk to Judge Roney I entered upon service of Justice William H. Rehnquist of the Supreme Court as his law clerk, one of his law clerks.

After those experiences, Mr. Chairman, I returned to the South, to Atlanta, GA, to enter into the private practice of law with a law firm called Long & Aldrich, and in that practice, I focused my attentions on litigation principally, a host of different kinds of commercial and business litigation.

My private practice experience spanned approximately 2 years, when I sought to become a part of the Justice Department, and particularly the Civil Rights Division of the Justice Department, and was fortunate enough to be asked to serve as special assistant to Mr. Reynolds, who, of course, is the Assistant Attorney General for the Civil Rights Division. I spent 1 year as a special assistant and was promoted, thereafter, to become one of three deputies to the Assistant Attorney General.

During my time in the Civil Rights Division I have supervised a number of matters both at the trial and appellate level.

The CHAIRMAN. Would you describe the responsibilities of the Office of Legal Counsel at the Department of Justice.

Mr. COOPER. I will be happy to, Mr. Chairman. The Office of Legal Counsel is the component of the Department that principally assists the Attorney General in his role as legal adviser to the President and to the executive branch agencies.

In that role, the Office prepares for the Attorney General's consideration legal opinions on issues that arise, and on which the Justice Department's view is sought.

The Office of Legal Counsel also prepares, on its own account, formal and informal legal opinions. In addition to that role, the Office will comment on the form and legality of any proposed Executive orders.

It coordinates the Department's activities with respect to treaties, international organizations, and will generally perform certain tasks and special projects as assigned by the Attorney General, the Deputy Attorney General, and the Associate Attorney General.

The CHAIRMAN. Mr. Cooper, one of the responsibilities of the Office of Legal Counsel is to provide legal advice for the Attorney General. In effect you will serve as the Attorney General's lawyer.

If an occasion should arise when your best legal advice conflicted with a policy which you knew the Attorney General wished to pursue, what actions would you take to attempt to resolve the conflict?

Mr. COOPER. Well, Senator, it would be the responsibility of the Assistant Attorney General for the Office of Legal Counsel to research and analyze, in a painstaking and careful way, the legal ramifications of any policy, and the Office of Legal Counsel—if I am honored by this committee's confirmation—the Office of Legal Counsel would execute that responsibility in the most objective, painstaking way possible and would advise the Attorney General of those legal ramifications.

If it appeared that a policy initiative conflicted with the best legal judgment of the Office of Legal Counsel, it would be the responsibility of the Office of Legal Counsel to make the Attorney General aware of that, and to advise him of the legal aspects of any such policy.

The CHAIRMAN. Now, would you hesitate to do that, if, in your opinion, there was a case?

Mr. COOPER. Senator, I would not hesitate a moment. In fact, the Attorney General has every right to expect, and should expect, that the Office of Legal Counsel would perform its solemn obligation to do so.

The CHAIRMAN. Then of course he would make a decision, and you would be bound by the decision, naturally?

Mr. COOPER. Well, sir, certainly, the Office of Legal Counsel advises the Attorney General. The ultimate responsibility for providing the President and executive branch agencies with legal judgment and opinion is the Attorney General's, and it would be based, and informed, by the views of the Office of Legal Counsel, I am sure; but it is his ultimate responsibility.

The CHAIRMAN. Considerable controversy has been generated by the actions of the Justice Department in a so-called reverse discrimination case in Birmingham, AL.

Would you briefly summarize this case and tell the committee the role you played as Deputy Assistant Attorney General for the Civil Rights Division.

Mr. COOPER. Mr. Chairman, to understand that case, I think one must understand the interplay of two cases, actually. A case entitled "United States versus Jefferson County" was brought several years ago by the United States and other private plaintiffs against Jefferson County and the city of Birmingham. That case was concluded by a settlement agreement, a consent decree, which was then ordered into effect, entered by a court.

It was entered over the objection of nonminority employees of the city of Birmingham who sought to intervene. They then appealed the denial of their intervention, and I should say that the United States resisted their intervention.

They appealed the denial of their intervention to the eleventh circuit and the eleventh circuit decided that they should not be allowed to intervene, but that one of the reasons denying intervention was appropriate, was that they could always bring private, separate lawsuits.

And the Birmingham reverse discrimination case, cases, actually, is what are those separate lawsuits, denominated and consolidated into one, called the Birmingham reverse discrimination cases.

Now our involvement in those cases, the separate lawsuits brought by nonminority employees, began initially when a Federal judge to whom a couple, at least two, of the cases had been assigned, invited the United States, after consulting with the parties, to intervene into the matters and to provide its judgment and participation to the Federal court. We responded, of course, favorably, to that request by a Federal judge and intervened in the matter, and since that period of time, our principal effort in the case has been simply to determine the facts that have been alleged.

The nonminority employees have alleged that they were the victims of racially discriminatory promotion policies and it has been our effort to determine whether there is a factual basis to support those allegations.

Now my role has been principally, since the time of our accepting the invitation by Judge Acker, my principal role has been to supervise that litigation and career attorneys and political appointees who are involved in prosecuting that case.

The CHAIRMAN. All right. In his prepared testimony submitted for today's hearing, Mayor Richard Arrington of Birmingham, AL, states that with regard to the Birmingham employment discrimination case, your appearance in the case drastically altered the substance and tone of the Justice Department's position and that you actually have misrepresented facts and allegations in that case.

Could you please respond to these charges by Mayor Arrington for this committee.

Mr. COOPER. Certainly, Mr. Chairman. The principal disagreement that is at issue in that case is over the implementation of the consent decree.

The CHAIRMAN. Over what?

Mr. COOPER. The implementation of the consent decree that was issued in *United States* v. *Jefferson County,* its application.

There is a disagreement with respect to what conduct it requires of the city of Birmingham. Now the key provision of the consent decree in this matter is paragraph 2. Paragraph 2 generally requires, or provides, that nothing in the consent decree should promote the employment of a demonstrably qualified individual over another individual on the basis of race. That is its essential terminology.

As I say, that is the principal provision at issue in the case, and it is the provision whose interpretation the parties are in conflict over.

When we were invited by the Federal court to get into the case, we made known that we had no intention whatever of challenging the validity of the consent decrees.

In fact it was our view that the challenge made to the validity of the consent decrees by the nonminority employees should be dismissed, and we so advised the court, and have maintained that ever since.

We have certainly believed that the interpretation of the consent decrees is not properly understood, the way the city of Birmingham has advanced it. I should point out, that in terms of my own involvement, the interpretive significance of that particular provision was made known in the Eleventh Circuit Court of Appeals by the Department of Justice, prior to the time that I ever became involved in the case.

In a filing in that court of appeals case, the Department of Justice argued that if the nonminority employees are correct in their factual allegations—that is, that they have been subjected to, been victimized by racially preferential promotion practices, then those facts would not be required—that conduct would not be required by the terms of the consent decree, and indeed, such facts as that would violate the consent decree.

Now that position was taken prior to the time that I ever got involved in the case, and it has been my role in the case, since then, simply to advance the Government's position as it has been articulated by the Assistant Attorney General in as professional and as straightforward, and, as able a way as I possibly can, and it is simply not correct to suggest that I have misrepresented anything to any court, or in any way engaged in a practice of misleading a Federal court. That is in error.

The CHAIRMAN. Mr. Cooper, considerable controversy was also raised over the actions of the Justice Department in the *Bob Jones University* case. Would you tell the committee what your responsibilities were in this case.

Mr. COOPER. Senator Chairman—excuse me. Mr. Chairman, that case first came to my attention scarcely 3 months after I had joined the Department as Mr. Reynolds special assistant, and while the precise account of events, that long ago, is dim in mind, to the best of my recollection, matters proceeded along these lines.

Mr. Reynolds came by my office one morning and indicated to me that he would like for me to attend a meeting with him, a meeting in the Deputy Attorney General's Office, on a case that a number of people within the Department of Justice had—including Mr. Reynolds—had grave difficulties with in terms of the position that the Department, the Solicitor General's Office was proposing to advance in the Supreme Court, and that was the position that had been advanced in the court of appeals and had succeeded.

I attended that meeting with Mr. Reynolds. I can recall, vividly, that I did not contribute very much to it because I had no background or knowledge of the case or the law that pertained to the Tax Code. That was not my area of expertise.

But the meeting did certainly indicate that there were a number of people within the Justice Department who were very concerned about the issue.

The central issue in that case was whether section 501(c)(3) of the Tax Code invested the Internal Revenue Service with the authority to divine what is national public policy, and then to accord tax exemptions based upon those determinations, by virtue of the appearance in that provision of the Tax Code of the word "a charity."

Over the next 3 weeks or so, the Department's principal effort was to try to narrow the position that was being proposed in the Solicitor General's Office, in order to preserve the judgments won in the courts of appeals, that had denied Bob Jones University a tax-exempt status.

After 3 weeks or so of endeavoring earnestly to come up with a theory that would be sufficiently narrow not to include a whole lot of other organizations, the Justice Department decided that—and so did the Treasury Department—decided that we simply could not, conscientiously, advance that position, but rather, that our position was incorrect in the case.

And it was on December 31—and I remember this well because the results of that meeting had me working through the New Year's weekend—but on December 31, the Deputy Attorney General had a meeting at which it was determined, at least tentatively, that we would reserve the position that had been advanced in the court of appeals, and Mr. Reynolds was asked to develop the legal arguments in a comprehensive memorandum that would support that view. Mr. Reynolds then turned to me, and a special assistant to the Attorney General, to develop a memorandum, which we did, and submit it to him.

Subsequently, as you know, the Government, the Treasury Department and the Justice Department, decided to reverse that earlier position. It was our first and initial judgment that that action would moot the cases in the Supreme Court.

In fact subsequent judicial activity, breathe new life, so to speak, into the cases, and the cases were ultimately argued and presented to the Supreme Court for resolution.

I should add that I was among those who drafted the briefs to the Supreme Court.

The **Chairman**. Mr. Cooper, have you played any significant role in the recent efforts within the administration to review Executive Order 11246 relating to affirmative action by Federal contractors, and if so, would you describe your involvement.

Mr. **Cooper**. Senator, that is a matter that is—that I understand and am aware is proceeding in both the Justice Department and the Department of Labor, but that is not a matter that I have been "in the loop" on, as we say in Washington. I have not been involved in that matter.

The **Chairman**. Mr. Cooper, will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. **Cooper**. Certainly, Mr. Chairman. I will be——

The **Chairman**. That is a question we ask all nominees.

Mr. **Cooper**. Well, Mr. Chairman, as all nominees, I would certainly be happy and pleased to respond to any requests by this committee, and I would look forward to cooperating with it in every respect and detail, should I be confirmed.

The **Chairman**. The distinguished Senator from Delaware.

Senator **Biden**. Thank you, Mr. Chairman. I have just been informed that my good friend, the Senator from Colorado, has an amendment that he just brought to the floor eliminating Amtrak, all of Amtrak, and I have not only a philosophic disposition to support Amtrak, I have an absolute necessity since I commute on it every single day.

And I am sure, others, including the President, would not want me to have to move and live in Washington, and so I am going to be leaving.

I know this will break Mr. Cooper's heart for me to leave, and, at 11 o'clock, I am supposed to vote in the Foreign Relations Committee, on which I am the second ranking member, on the Jordan arms sale.

But I expect if my colleagues have enough questions, I will be back to finish out what I am about to start, a series of questions I have. In the event that I do not get back in time, I would like to ask unanimous consent that the questions I do not get to ask will be submitted to Mr. Cooper for the record.

The **Chairman**. Without objection, the questions may be submitted to be answered for the record.

[The questions of Senator Biden follow:]

SENATOR BIDEN

Questions Concerning Birmingham Employment Litigation,
United States et. al. v. Jefferson County, et. al.,
CA No. 75-P-0666-S; 74-Z-17-S; and 74-Z-12-S

1. When and how did Mr. Raymond Fitzpatrick first contact you concerning issues relating to the above captioned cases? What was the substance of that first contact? What writings, notes, memoranda, or letters reflect that first contact?

2. Attached as Exhibit A is a list of correspondence prepared by the Justice Department, between Mr. Fitzpatrick and yourself or other employees of the Justice Department concerning the above captioned cases. From January 19, 1983 to January 11, 1984, Mr. Fitzpatrick wrote numerous letters to you or your supervisor. Which letters did you personally respond to? How did you respond in each instance whether in writing, by telephone, or otherwise? What was the substance of your response in each instance? With whom did you discuss your response in each instance?

3. What other employees of the Justice Department responded to Mr. Fitzpatrick's letters? What was the substance of their response?

4. Did Mr. Fitzpatrick, you or any employee of the Justice Department ever propose or suggest modifications of the Consent Decree in the above captioned case? What modifications were proposed or suggested? Were such modifications shared with counsel to the other parties? When?

5. Apparently, Mr. Fitzpatrick came to Washington, D.C. to discuss the above captioned cases with employees of the Justice Department? Who participated in those meetings? What was discussed? Was counsel to the other parties informed that such meetings had occurred? When?

6. Paragraph 4 of the Consent Decree in the above captioned cases established a mechanism to resolve disputes concerning the defendant interpretation of its rights and obligations under the Decree. Has the United States invoked Paragraph 4 of the Decree to challenge any action of the defendant? When? What action did the United States challenge?

7. When did you assume primary responsibility for these and the Wilks and Zannis cases from Richard Ritter? Why was this action taken?

8. Please attach copies of all notes, memorandum, and/or correspondence which set forth any reasons why you, instead of Mr. Ritter, are working on these cases?

9. When did you first learn of Mr. Ritter's views concerning the intention of the persons who drafted Section 2 of the Consent Decree? From whom did you learn of Mr. Ritter's views? What were Mr. Ritter's views at that time?

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

November 1, 1985

Honorable Strom Thurmond
Chairman, Senate Committee
on the Judiciary
Room 224, Dirksen Senate Office Building
Washington, D. C. 20210

Dear Mr. Chairman:

Enclosed are five copies of the responses to questions by Senator Biden supplementing the responses provided on October 30, 1985. As with the first set of responses, those responses relating to privileged communications are being provided under separate cover for inspection in Duke Short's office by Ms. LeBow and Members of the Committee. Provision of these responses does not constitute a waiver of any applicable legal or evidentiary privileges.

Sincerely,

Michael Carvin
Special Assistant to the
Assistant Attorney General
Civil Rights Division

Enclosure

RESPONSES TO REMAINING QUESTIONS FROM SENATOR BIDEN CONCERNING THE BIRMINGHAM LITIGATION

10. When did you first discuss with Mr. Ritter your views or the view of your supervisors concerning the obligations and rights of the City of Birmingham under Section 2 of the Consent Decree? What were Mr. Ritter's views? What were your views?

Answer

The answer to this question requires disclosure of privileged communications among attorneys of the Department of Justice.

In response to similar questions asked of Mr. Ritter during his deposition (a transcript of which has been made a part of the record of my confirmation proceedings), the United States has asserted that information concerning communications among Justice Department lawyers is privileged and outside the permissible scope of the deposition, as defined by the court. Mr. Ritter was instructed by counsel not to answer such questions in his deposition. Because disclosure of such information in response to this question might jeopardize the United States' claim of privilege, we are constrained not to provide these answers publicly.

Pursuant to the agreement between the Department and the Committee regarding other privileged materials pertinent to this matter, however, we are providing under separate cover a written response to this question to be available for inspection by Ms. LeBow and Members of the Committee.

11. Did you have any subsequent conversations with Mr. Ritter concerning the interpretation of Section 2 of the Consent Decree? Describe the substance of each such discussion.

Answer

See answers to Questions 9 and 10.

12. Did you review the May, 1982, brief that the U. S. filed in the 11th Circuit in U.S. v. Jefferson County or discuss its content with Mr. Ritter (in any form, draft, or otherwise), before it was filed?

Answer

At the request of Mr. Reynolds and in my capacity as his Special Assistant, I reviewed the May 1982 brief. I did not discuss its content in any way with Mr. Ritter before it was filed.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN CONCERNING
BRATTON v. CITY OF DETROIT, 704 F.2d 878 (6th Cir. 1983)

Introduction

These questions concern routine conversations and events that took place over two years ago in one of the many cases in which I have been involved. My recollection of these matters, therefore, is general and spotty. Of course, these responses are based on my best recollection.

1. "Did you have a conversation on or about March 31, 1983 and/or April 5, 1983 with Mr. Preston Oade, Jr., concerning his intention to file a petition for rehearing in the above-captioned case? What was the substance of your conversation(s)?"

Answer

I contacted Mr. Oade shortly after March 29, 1983, to request copies of the briefs filed by the parties in the Bratton case. Earlier that day, I had requested the Clerk of the Court of Appeals to send me a copy of the panel's decision. I indicated to Mr. Oade that the Department of Justice might have an interest in becoming involved in the case in some manner if his clients intended to pursue the case further. I explained to him that, based on a description contained in a news story about the court of appeals' decision, his clients seemed to have similar claims to those police officers on whose side the Department had successfully intervened and sought rehearing in the Williams v. New Orleans Police Department case just a few months earlier. I am confident that I briefly described the Williams case and the government's position in it.

As is typically the case with inquiries of this kind, I requested that Mr. Oade keep the Department's inquiry confidential because it was preliminary only and the Department had not even reviewed the court's opinion. Since this case had apparently been controversial and the Department was not then in a position to determine its course of action, I explained to Mr. Oade that the Department did not want to generate expectations which might not be met concerning the Department's possible involvement in the case and that we did not want to create or exacerbate any controversy needlessly. My recollection is that Mr. Oade advised me that he was confident that his clients would seek review of the panel's decision, but he had not decided whether to seek en banc rehearing or to file a certiorari petition with the Supreme Court. He indicated that the Department's interest in the case was welcome and that he would send copies of the briefs of all parties, which he did.

I had another conversation with Mr. Oade shortly thereafter, probably on or about April 5, 1983. I informed him that the Department would not be able to make any decision concerning its participation in this case within the time allotted by the Federal Rules of Appellate Procedure for filing rehearing petitions, principally because the Attorney General was absent from the country.

I inquired about the possibility of seeking an extension of time from the court for filing a rehearing petition. He indicated to me that he was still not certain of his future course of conduct in the case and that he would probably need an extension of time in any event to decide how he intended to proceed. He mentioned that he had not yet been able to verify some employment data statistics cited in the court's opinion, which he believed were inaccurate. He indicated his belief that he could obtain an extension of time without difficulty because he and defendant's counsel had always cooperated on such matters in the past. I requested that he advise me promptly if the court extended the time limit, so that the Department would know the time frame within which its consideration of the matter had to be completed.

2. "Did you state to Mr. Oade that the United States probably would not complete its review of the panel decision, decide whether to intervene and petition for rehearing, and prepare the appropriate motion papers by April 12, 1983? When?"

Answer

See answer to Number 1.

3. "Did you ask Mr. Oade not to disclose the substance of your conversations with him? When?"

Answer

See answer to Number 1.

4. "Did you ask or otherwise encourage Mr. Oade to file a motion for an order enlarging the period of time in which to file a petition for rehearing? When?"

Answer

I do not recall asking Mr. Oade to file a motion for an extension of time in which to file a petition for rehearing. See answer to Number 1.

5. "As a result of your conversations with Mr. Oade, did you believe that Mr. Oade had planned to file a motion for an order enlarging the period of time in which to file a petition for rehearing which would not state as a ground for the fact that the United States was reviewing the case and probably could not prepare papers in support of intervention and rehearing within 14 days of the entry of judgment?"

Answer

As previously noted, I had told Mr. Oade in a telephone conversation on or about April 5, 1985, that without an extension of time, the Department would not be able to make a decision concerning its participation in the case in the appellate court. I believed, however, that Mr. Oade would seek additional time in which to file a petition for rehearing because he himself needed additional time in which to decide his course of conduct. When he advised me that he needed additional time and that it would be a routine matter to obtain such additional time, I gave the matter no more thought. I did not advise Mr. Oade on how to obtain an extension of time or what he should say to the court or anyone else in seeking such an extension.

6. "What did Mr. Oade tell you concerning his conversations or contact with defendant's counsel on these matters?"

Answer

As previously noted, Mr. Oade told me that he and defendant's counsel had previously cooperated with each other on routine matters such as extensions of time. With respect to his conversation with defendant's counsel regarding this specific extension of time, Mr. Oade advised me that a description of this conversation contained in court filings by defendant's counsel was inaccurate and that Mr. Oade intended to file an affidavit with the court describing that conversation, as well as his conversations with me on this matter, to set the record straight. Copies of this affidavit were provided to the Committee on October 30, 1985.

7. "Did the 6th Circuit grant the motion of the United States: (1) for leave to intervene?; (2) to file a petition for rehearing?; and (3) to file a brief as amicus curiae?"

Answer

The Court of Appeals for the Sixth Circuit, by a two-one vote, denied the United States' motion for leave to intervene and to file a suggestion of rehearing en banc. The court stated that the United States was free to request the right to file an amicus brief if the court granted a rehearing of the case. The court shortly thereafter denied the plaintiff-appellants' motion for rehearing. The United States had requested the right to submit an amicus brief in support of plaintiff-appellants' petition for rehearing en banc, but the court stated that the request was received after a majority of the full court had already chosen not to rehear the case en banc, thus rendering the United States' request moot.

8. "Attach copies of all notes, correspondence, or memorandum other than briefs and supporting memorandum filed with the Sixth Circuit, relating to your conversations with Mr. Oade, and the decision of the United States to intervene and seek a rehearing in this case."

Answer

Other than the affidavit by Mr. Oade discussed in the response to Question 7, there are no notes, correspondence, or memoranda relating to my conversations with Mr. Oade. All other documents responsive to this request have been previously supplied to the Committee.

Senator BIDEN. And I would further ask unanimous consent that my opening statement be entered in the record.

The CHAIRMAN. Without objection, that will be done.

[The statement follows:]

PREPARED STATEMENT BY SENATOR JOSEPH R. BIDEN, JR.

Mr. CHAIRMAN. I am of the opinion that the nominee before us today is exceedingly competent and intelligent. But before I agree to support him for the very important position for which he has been nominated, I would like to satisfy myself on the following points.

As the official responsible for recommending to the President and Attorney General resolutions of legal issues and disputes concerning executive agencies, the Assistant Attorney General for Legal Counsel must be sensitive to the legitimate role of Congress and the judiciary as coequal branches of our Federal Government. In addition, the Office of Legal Counsel often analyzes constitutional and other legal issues of proposed legislation. Those analyses are often forwarded to Congress as "official" legal opinions of the President and, as a consequence, are considered by myself and my colleagues as we deliberate on proposed legislation. Assistant Attorneys General for the Office in Legal Counsel, from Judge Malcolm Wilkey to Nicholas Katzenbach to Robert Craver, just to name a few, have faithfully interpreted statutes and their legislative history and have considered carefully constitutional history and doctrine in fulfilling their responsibility as counsel to the Attorney General and ultimately, to the President.

It is my hope and expectation that Mr. Cooper will satisfy that he too will do the same.

Senator BIDEN. Now Mr. Cooper, my colleagues and I have, I suspect, although I have not spoken to any of them, a number of questions in areas you might very well anticipate, some of which the chairman has already touched on, some of the more controversial cases that the Justice Department has engaged in in the last several years and your role there.

Let me say at the outset, that although I find myself very philosophically incompatible with where you appear to be, that, on its own, is not sufficient for me, in my view, to deny voting for a nominee of the President of the United States.

But I am a little concerned. I do not expect I am going to be able to change your attitude on significant issues of civil rights and civil liberties, and others today, nor should you be required to have to change your attitude in order to be confirmed by me, or any of my colleagues, in my view.

But I am interesting in knowing how you square some of your statements and some of your actions, and, if you will, let me begin by asking you how you reconcile your view that the *Swann* case compels the conclusion that the proposed legislation, which Reynolds had suggested—let me back up.

There was a memo from the Office of Legal Counsel regarding the constitutionality of S. 1005, antibusing legislation, and you stated, and I quote:

> I agree that the decision in the *North Carolina State Board of Education* v. *Swann* holds that it is unconstitutional to prohibit any Federal court, including the Supreme Court from ordering mandatory reassignment and transportation, which is necessary to remedy equal protection violations, and eliminate from public schools all vestiges of de jure discrimination.
>
> While I disagree with the validity of this point, the reasoning of Swann seems to compel the conclusion that the bill would be held unconstitutional. Notwithstanding *North Carolina* v. *Swann,* I am confident that a principled analysis could be devised in support of the proposition that S. 1005 and similar antibusing bills are constitutionally sound.

Now, how do you reconcile your view that *Swann* compels the conclusion that the proposed legislation would have been held unconstitutional, and your advice that an argument could be devised in support of legislation that you admit is clearly unconstitutional?

The reason I ask the question is, Congress often receives legal opinions written by the office for which you have been nominated, and because those opinions are the opinions of the President of the United States, we consider such opinions as we deliberate on certain pieces of legislation. What confidence can Congress have in your opinion on the constitutionality of proposed legislation, if you have what appears to be a proclivity to devise an analysis in support of legislation which is otherwise constitutionally flawed?

Mr. COOPER. Well, Senator, at the outset, I want to state emphatically, that if I am confirmed to the position of Assistant Attorney General in the Office of Legal Counsel, you can have every confidence that the opinions that emanate from that Office will be based on the most painstaking, most objective review of all the legislative and case law materials that weigh on an issue, and that——

Senator BIDEN. Let me put it another way: If Senator Helms reintroduces that legislation and we ask you an opinion, will you write an opinion saying clearly, it would be declared unconstitutional?

Mr. COOPER. Senator, if, after the kind of painstaking review——

Senator BIDEN. You have already done that review.

Mr. COOPER. Senator, in truth, this memorandum does not reflect anything like that kind of review.

Senator BIDEN. You did not review S. 105, 1005, painstakingly?

Mr. COOPER. No, sir; the truth of the matter is I did not. The papers came into my office. I sent them on to Mr. Reynolds with this cover note, which essentially is my impressions that I developed after having simply read the opinion, or the draft opinion that had been prepared in the Office of Legal Counsel. It does not reflect anything like the analysis and review that I am sure took place in the Office of Legal Counsel when they developed that memorandum, and that I would insist take place, were I a participant in those deliberations.

Senator BIDEN. Without pressing that point too much further at this point—I will when I come back—tell me, then, why would you say, even though you now say it was a cursory review, it was clearly—you were emphatic about it. You said the conclusion that the bill would be held unconstitutional, it seems to compel the conclusion that it would be held unconstitutional.

Then you go on to say: "Notwithstanding that, I think I can work something up for you all."

Mr. COOPER. Senator, my review of the proposed bill comment suggested to me that OLC seems to have——

Senator BIDEN. Who is OLC? Office of Legal Counsel?

Mr. COOPER. Yes, sir.

Senator BIDEN. I am not good on acronyms. That is why I asked you that.

Mr. COOPER. I am sorry. We live by them, I am afraid, in the Department of Justice.

Senator BIDEN. My staff dies by them. [Laughter.]

Mr. COOPER. The Office of Legal Counsel. As I say, I reviewed that document, their analysis of this particular case struck me as being on target. I had not devoted, as this memo, I think reflects—I had not devoted the kind of painstaking analysis to probe its conclusions, to determine whether or not entirely principled, entirely legitimate responses could be made to that analysis, and that really is the process, I think, of developing a position within the Department of Justice.

It is to probe and to analyze, and to——

Senator BIDEN. I do not mean to cut you off. I understand all of that. Do you understand what bothers me most about what is happening in the Justice Department? And this seems to me to be an example. It is that there is, on the one hand, the notion that says, "Yeah, it's pretty clear that's what the law says."

On the other hand, the followup notion, or response, not just by you, but by many who have come before this committee: "But don't worry. We can figure something out to get around the Constitution."

I mean you point out, and you say—and I will go to other cases, so I will not just move on this. You say, "*Swann* seems to compel." In fairness, you said "seems to compel; seems to compel the conclusion that—and then you went on. And then you say: "But notwithstanding, I am confident that a principled analysis could be devised."

See, that is what guys like me think of you all. We think you sit there—and I may be wrong. I admit, I come from an ideological perspective different than yours.

I get the feeling that you all are down there with your glasses on and your green eyeshades, late at night, sitting there saying, "Now how can we screw up the Constitution?" How can we—and I mean this sincerely. How can we turn back the clock? How can we do something?

And it seems to me if my senior partner in a law firm I worked for said to me, "What's the situation here in this case?", and I said, "It seems clear that the case is on all fours, but if you have to make an argument we might be able to do something. I don't know." That is the kind of response I would think I should give and should be expected to be given from someone.

But you turn around and say, "But don't worry. I'm confident we can come up with an argument that's different."

It is your mindset that bothers me, and I am not sure—I must admit to you—I am not sure that my strong disagreement with your views, what appear to be your views on civil rights, I am not sure that is not coloring my view of your actions. My friend, Senator Hatch, and others, will point out as they always do—it is routine—that in fact any opposition to any nominee is totally based on ideological grounds.

I admit ahead of time, I would sure like to be able to vote against you because I have such strong disagreements with you on your ideological disposition on these issues, but I really believe I am being genuine when I say that what disturbs me, more than that, is this predeliction to what appears, or recurs all the time in Justice—not with you—but that, "We can devise a way."

Now let me move on to another issue, and I just want to be as straight with you as I possibly can.

There was an issue raised in Mr. Reynolds' hearing about whether or not a confidential arrest record was provided to private counsel in Birmingham. And what happened was, at the confirmation hearing, a question was asked of Mary Mann, M-a-n-n, a senior Justice Department attorney assigned to Birmingham, about her having obtained from the FBI in Beauford County—is that the correct pronunciation, Senator?

The **Chairman**. We call it "Bewford" in South Carolina.

Senator **Biden**. "Bewford." I beg your pardon.

The **Chairman**. But in North Carolina, they call it "Beau."

Senator **Biden**. Well, my son's name is Beau, B-e-a-u, and I will call it Beauford for the moment. But all kidding aside, in Beauford County, SC, confidential arrest records of a black employee promoted under the consent decree, and provided that information to the counsel for the white plaintiffs in a reverse discrimination case.

Mann further testified, and quote:

> That the only person that I might have discussed it with would have been another Justice Department lawyer who was working with me on the case and any discussion would have been to the effect that we need to determine whether or not this case—the black police officer—black cop was telling the truth, and we need to clear this up. End of quote.

And that was from page 273 of her testimony.

Now, obviously, you were a senior Justice Department attorney actively involved in the case. As we understand it Miss Mann reported to you, Mr. Cooper, and Mann was relatively new in the Department.

My questions are, were you the Justice Department attorney with whom Mary Mann discussed the need to obtain information about the prior criminal record of the black police officer?

Mr. COOPER. I was not, Senator. I did not have a clue about these activities until they were disclosed at Mr. Reynolds' hearings.

Senator BIDEN. If you were not, as you say you were not, and I believe you if you say that, do you know who she discussed that with?

Mr. COOPER. The truth of the matter is, I do not know who she had in mind as possibly having discussed this matter with. I know the lawyers with whom she is working on the case, certainly, but I do not know who, among them, she might have discussed this issue with.

Senator BIDEN. Were you aware that Mary Mann obtained confidential records and turned that information over to private counsel for the plaintiffs?

Mr. COOPER. No, sir. I was not.

Senator BIDEN. When did you first become aware that Mary Mann, in consultation with other Justice Department attorneys, according to her, had obtained such confidential records and provided that information?

Mr. COOPER. The same time you did, Senator.

Senator BIDEN. Did you take any steps subsequent to that hearing, or the Reynolds hearing, to discuss that conduct with her?

Mr. COOPER. Yes, sir. In fact the moment that these facts were revealed, we immediately asked the Civil Division who—I believe that we asked the Civil Division, but we asked another component of the Justice Department, to advise us on whether or not there had been any unlawful activity connected with this entire episode. It is my understanding that their determination—I am advised that they have advised us no, there was nothing unlawful, that our normal requirements and the FBI's typical—typically insists upon some written request for investigation and information of that kind, which was not provided, but that was the only irregularity in the matter.

And I have to hasten to add that I am reporting to you only what I understand. I have not personally investigated the lawfulness of this matter.

Senator BIDEN. Well, as I said, I have many more questions—not many, Mr. Chairman, about a half a dozen, and I hope to be able to come back to ask them.

So let me conclude by asking you this question, Mr. Cooper. Do you believe it is essentially that the Justice Department play a significant role in attempting to turn around the position that the courts have taken over the past decade with regard to civil rights and civil liberties?

Affirmative Action, consent decrees with regard to that issue? And also with regard to issues such as Miranda warnings and the like? Do you think it is important that the Justice Department play a role in reversing some of those previous decisions?

Mr. COOPER. Senator, I believe that it is important for the Justice Department to exercise an independent inquiry into what the law is, to determine what—if one is dealing with a statute, to determine what the intent of the lawmaker was.

From all the materials that bear on that issue, legislative history, the words of the statute, of course, and case law interpretations of those statutes, and, I think it is very important that the Justice

Department exercise that independent and objective review, and that it share the fruits of that review with courts, and, on occasion that will entail that——

Senator BIDEN. Let me ask it another way, then. Do you think it is important that the Justice Department go back, and at its own initiative, review all the major civil rights and civil liberties decisions of the past decade, to determine whether or not they have been made objectively, and whether or not they comport with what was the legislative intent of the Congress at the time?

Mr. COOPER. Senator, I am aware of no such process that has ever been employed in the Justice Department.

Senator BIDEN. I am not asking that. I said do you think it is important that Justice do that?

Mr. COOPER. Well, no, sir, I do not. I do not think that is what the Justice Department's proper role is. I think what the Justice Department's proper role is is to determine the law at such time as its enforcement activities require it to litigate, to go into court, to——

Senator BIDEN. How about the *Bob Jones* case? What was the requirement for you to go into court and take that position?

Mr. COOPER. The requirement, Senator Biden, was one of conscience alone. It was one of determining——

Senator BIDEN. But for the record, could you all have just stayed out of that, and not reviewed it? I mean, did anybody come to you, other than the Justice Department itself, and say, you know, we've really got to go in and relook at this whole question of how they've been ruling in courts for the past 10 years with regard to tax exemption?

I mean, was there a legal requirement for you to move forward in that case?

Mr. COOPER. Senator, there was. We were a party to the case. That is, the Treasury Department, the Internal Revenue Service, was a party to the case.

Our views, at some point or another——

Senator BIDEN. Was Treasury arguing a different position?

Mr. COOPER. Excuse me?

Senator BIDEN. Was Treasury arguing a different position than the court?

Mr. COOPER. No. Prior to the time that the position was reversed, yes, sir, it was and so was the Department of Justice, but at the time the decision was made to review the accuracy of the position we had previously advanced, and at the time the decision was taken, conscientiously, to say that we have fallen into error, and we think that the court has, too, and our responsibility is to advise the Supreme Court of these facts, the Treasury Department was fully in accord with that view.

Senator BIDEN. Well, I hope—and I will cease, Mr. Chairman. I hope that you feel—you, the Justice Department, feel as much due diligence to determine whether you have fallen into error on everything from the *General Dynamics* case to the *Hutton* case. I hope you feel the necessity that you seem to demonstrate that compels you all to look at the civil rights cases.

I would respectfully request that you go back and look at your positions on antitrust legislation and look at your positions on white collar crime issues, and make similar thorough investigations.

I will be back. I thank the nominee, and I will say, for the nominee's benefit, to the extent that it is any benefit, I do not know how I am going to vote on this nominee at this moment, but I will read with interest the response my colleagues get to the various questions they will ask.

I thank the Chair.

The CHAIRMAN. Thank you.

Mr. COOPER. Thank you, Senator Biden.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman. I think with regard to Senator Biden's earlier questions, really, has not the Supreme Court reversed itself even in the area of civil rights from time to time? Therefore, it seems to me that it is good legal conduct to advise department heads and others of competing principles in these areas. You cannot just ignore that there are sincere competing principles in this very difficult area of civil rights.

Moreover, in the area of busing, that Senator Biden mentioned, does not section 5 of the 14th amendment give Congress extensive authority to set remedies for civil rights violations?

Mr. COOPER. Senator, certainly section 5 invests the Congress with the authority to pass all necessary legislation to implement and to carry out the commands of the 14th amendment.

Senator HATCH. That is right. Well, would not that investment alone, section 5 of the 14th amendment, have suggested "principled alternative," argument on behalf of the constitutionality of that particular bill? Whether you or I agree with the bill or not, it still would present a principled argument in favor of the constitutionality of that bill.

Mr. COOPER. Senator Hatch, it is my understanding that a number of eminent legal scholars have lined up on either side of that question, and——

Senator HATCH. Well, that is my point. So for somebody to say here that you are unprincipled because you acknowledge that there may be two sides to this complex constitutional issue ignores that the constitutional law is frought with legitimate differences of opinion.

There may be Senators who differ with you ideologically. I may differ ideologically with you in some areas. In fact I am sure I do. However, I think all we are asking of you at Justice is to give the best effort possible. If you are wrong, admit you are wrong; if you are right, stand by your principles, and if you do not know, stand by what you consider to be your principles.

That may differ for any one of us on any given occasion here in the Judiciary Committee. Thus, I am also concerned about those types of issues.

The *Bob Jones* case, for instance, considered several intertwined legal issues. As I understand, one issue was whether, as a matter of public policy, institutions that discriminate on the basis of race should be granted a tax exemption.

Another distinct issue was whether the IRS had the authority, in the absence of congressional enactment, to unilaterally deny a tax exemption. There were sincere people on both sides of that issue, people who are as committed to civil rights as any Senator on this dais, or on this committee today.

I would now like to have your position clarified on each of those issues. For instance, on the first issue, do you think institutions that discriminate ought to be granted tax exemptions?

Mr. COOPER. No, sir, Senator, emphatically I do not, and those two issues were issues that I and the other people who worked on this case in the Justice Department were in accord.

Senator HATCH. On the second issue, do you think the IRS had the authority to deny a tax exemption without a congressional enactment, and what is the basis for your argument on that issue?

Mr. COOPER. Senator, I have never been involved in a project, I can say, where the legal arguments that might support a court of appeals ruling were given every benefit of the doubt, as was true in the *Bob Jones* case, and this was inspired by what I understood to be the unanimous belief—and it was certainly my belief—that as a matter of policy, these institutions, racially discriminatory private schools, ought not have a tax exemption, ought not to have that assistance of the Federal taxpayers. Our view, as I say, after the most painstaking research and analysis, was that Congress simply had not yet accorded the Internal Revenue Service with the authority to deny those schools tax-exempt status.

Senator HATCH. I know a lot of good legal scholars who would have agreed with you on that issue.

Mr. COOPER. Well, there have been—I am advised there have been several——

Senator HATCH. Who are equally committed to civil rights.

Mr. COOPER. That is right, Senator Hatch. In fact, I am advised there have been several law review articles in the aftermath of that case which have indicated some discomfort with the Court's statutory analysis.

The CHAIRMAN. We will have to temporarily suspend this hearing in order to vote. We will return shortly.

[A vote recess was taken.].

Senator HATCH [presiding]. Mr. Cooper, we were discussing the competing arguments on *Bob Jones.* For instance, I am aware that Professor Tribe—a personal friend for whom I have the greatest respect—said during the Department's brief in that case:

> I have the highest regard for the quality of the brief in the *Bob Jones* Case. I thought it was a powerful and, in most respects, entirely compelling legal document.

As I understand it, you did help to prepare that document. Is that true?

Mr. COOPER. Yes, Senator, I did participate in the drafting of it.

Senator HATCH. Before the Supreme Court's ruling in the *Bob Jones* case, four judges had ruled on these issues. Two of them had ruled that the university was entitled to keep its exemption under 501(c)(3) of the Tax Code.

Now, how did this split affect your deliberations on the case, itself?

Mr. COOPER. Well, Senator, it is at least my recollection that both judges did issue lengthy opinions analyzing the statutory interpretation questions that were at issue in the case, and those opinions of course were plugged into the analysis.

In fact, the reasoning that both of those judges employed was found persuasive in the Department of Justice.

Senator HATCH. Back to the two separate issues involved that I've raised in the *Bob Jones* litigation. If the Government's position was that it disapproved of discrimination but felt that the IRS lacked authority to deny the exemption—which was the opinion of many able scholars who believe in civil rights as well as objected to by other able, good scholars who believe in civil rights—was there any effort to recommend legislation to Congress which would have granted the IRS the necessary authority?

Mr. COOPER. Yes, Senator Hatch. The administration proposed legislation I think some 4 days ago—4 days had elapsed from the time that the decision was announced to reverse our legal position in the case to the time that legislation was drafted, prepared and proposed to the Congress.

Senator HATCH. This case is also clouded by the fact that many astute legal minds were also concerned about the first amendment and religious freedom. This case also asked just how far do you go in allowing the public policy asserted by the IRS to override the religious freedom rights asserted by the school in this case?

That also clouded the issue in the eyes of some very sincere people who also were strong supporters of civil rights.

Mr. COOPER. That's true, Senator. There was a serious first amendment question presented by the taxpayers in that case.

Senator HATCH. In other words, this is not the simple little administration gaffe, as it has sometimes been portrayed. There were legitimate questions on both sides of these issues where competent lawyers who are well intentioned believers in civil rights, could have legitimately taken either side of that particular question and still feel strongly about civil rights.

The fact is that there was a recommendation that the IRS be given that authority in these instances.

Mr. COOPER. Yes, sir.

Senator HATCH. Is that right?

Mr. COOPER. Yes, sir.

Senator HATCH. Let me talk about section 504 regulations. The Department of Justice circulated to Federal agencies model regulations concerning their obligations under section 504 providing protections for the handicapped. This is an area in which I am also extremely interested.

Those regulations, as I understand them contain significant protections for the handicapped. For instance, these regulations forbid agencies from denying contracts or licenses on the basis of handicaps, require agencies to make their services and facilities accessible to handicapped individuals, and they expanded the agency use of braille for those who were blind.

Telecommunications devices for deaf individuals and other important reforms were also established for the benefit of the handicapped.

Could you explain some of those initiatives in favor of the handicapped and your part in their development?

Mr. COOPER. Well, Senator, the regulations that have been developed by the Department are as you describe them. They do provide those very real protections for the disabled under section 504.

Other initiatives that we have taken in this area include, of course, the litigation initiative in an attempt to make clear that section 504's protection of the handicapped from discrimination, based on their handicap, applies to infants as well as to older human beings.

Our efforts in this area have been numerous. The Special Litigation Section of the Department is one that I have supervised and we have launched a number of investigations under the Civil Rights of Institutionalized Persons Act to provide very real and as immediate as possible relief to residents of institutions to ensure that all of their constitutional protections are observed and honored.

Senator HATCH. Thank you, Mr. Cooper.

I have other questions, but I will turn at this time to Senator Heflin who has patiently waited.

Senator, I must leave the hearing for a short period of time, and I'd appreciate it if you would take over. If I do not return after your comments, please ask the next available Senator to take over and question Mr. Cooper.

Senator Heflin.

Senator HEFLIN [presiding]. Mr. Cooper, I approach these confirmation hearings with the theory that the President is entitled to have his nominees confirmed unless the nominee is unqualified or unfit, or it would be to the detriment of the best interests of the United States for him to be confirmed.

You're from Alabama and that gives you a leg up with me, generally, but does not conclusively say that you are fit for the job or that your service would be in the best interests of the United States. Therefore, I wish to approach the advice and consent obligation with an open mind.

You have been working with Mr. William Bradford Reynolds and there are those that, because of that association, would inflict you with every disease that he has and every ill that, perhaps, he may have. That, I don't think, is necessarily true.

Several people voted against Mr. Reynolds' nomination on the basis, primarily, of his actions before this committee. Of course, your actions before the committee are your individual undertaking and you're not necessarily tainted with anything that he might have done before this committee.

But just to make my position clear, I do approach these matters with the belief that the President is entitled to have his nominees confirmed unless the person is not qualified or he's unfit or his service is not in the best interests of the United States.

What is in the best interest of the United States, of course, is a subjective evaluation. You may have ideological differences on a number of issues, but ideological differences are somewhat determined by Presidential elections.

So I try to approach these things with an open mind.

But, I am concerned about your participation in a number of matters. One particular matter is the *Birmingham* case relative to discrimination.

As I understand it, you were not involved in the negotiations or the drafting of the consent decree that was approved, nor were you involved in the fairness hearing that was conducted to determine the parameters of that decree in view of an objection to the decree brought by a group of white policemen and a group of white firemen.

The policemen, as I understand it, did not appear at that fairness hearing. The firemen were represented.

They largely raised the issue of reverse discrimination: that under the provisions of the consent decree whites could possibly be discriminated against as you were seeking to obtain the goal of hiring of blacks in personnel positions in the fire department, police department, engineering department, and others departments in the city of Birmingham.

As I understand it, you were not a part of that. You were not a part of the consent decree. You didn't enter that case or participate in that case at that stage.

Is that correct?

Mr. COOPER. Senator, it is. Those events transpired, actually, before I joined the department, I believe.

Senator HEFLIN. Did you go back at the time that you first became involved in it, and review the consent decree and review the proceedings under the fairness hearing pertaining to these matters?

Mr. COOPER. Yes, sir; I have done that, yes, sir.

Senator HEFLIN. Did you do it at the time that you first became involved, or is it something that you did later?

Mr. COOPER. Well, Senator, I did it certainly not long after I became involved.

Senator HEFLIN. Well, during the fairness hearings, questions were asked by the Court of Mr. Alexander, who was one of the city's attorneys, largely to the effect that if you had whites and blacks that were minimally qualified, and you had a black that was more qualified according to the procedure of the board, nevertheless would the city take blacks to meet the goal.

Mr. Alexander replied that that was his understanding of the decree and that they would hire the blacks.

Now, as I recall in reading that fairness hearing, there was no one that really objected and made any opposing statement relative to the matter.

This question arose when Mr. Reynolds was here and the action led a great number of us to believe that the Department of Justice took inconsistent positions. However, Mr. Reynolds, in regards to this, did point out—as you have pointed out in your testimony to Senator Thurmond—that this decree did contain the language that: "Nothing herein shall be interpreted as requiring the city to hire, transfer, or promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure."

I suppose, in my evaluation of this particular case and involving Mr. Reynolds that in my own mind, that did give him a peg to hang a legal hat on. Regardless of whether his legal hat was good or valid, it's difficult to classify it as being unconscionable conduct.

We now have available the Ritter deposition which was not available during the Reynolds hearings, which causes me some concern. Mr. Ritter was the attorney who represented the Department of

Justice at the consent decree proceedings, at the fairness hearing, and participated in it at that time.

In regard to his deposition, he has, in my judgment, indicated that there was an understanding that if the city hired a less qualified black in preference to a person who was demonstrably better qualified, a white, nevertheless that was the intent of the decree and that this decree language was largely to provide some flexibility in the event that some disgruntled person came up and used it in a different manner.

Now, that's subject to some interpretation; but it's clear, it seems to me, from the Ritter deposition that was taken that in order to obtain the goals of bringing about an affirmative action the decree was not a tie-breaker, as you have advocated or said that it is, but that it was designed for an affirmative action to be used in the employment of blacks.

I lay that as a background.

When you entered the case, did you have discussions with Mr. Ritter regarding this decree, what it meant, and the position that you were taking?

Mr. **Cooper**. Senator, first when I entered the case there had been a lot of water over the dam. As I indicated earlier in response to Senator Thurmond, the significance, the importance to the Department, the position of the Department with respect to the significance of paragraph 2 had been advanced in the eleventh circuit.

I was not involved in the case at the time that the position was crafted and was decided upon by Mr. Reynolds; but that position, as made known to the eleventh circuit, was that under paragraph 2 the city would not be required to promote a demonstrably less qualified individual over a demonstrably better qualified individual.

Indeed, if the facts as offered by the nonminority would-be intervenors happened to become true, then that would violate the decree. The decree would actually, in and of itself, preclude the city from engaged in racially preferential promotions.

Now there had also been a number of TRO hearings, hearings for a temporary restraining order, that were brought on for hearing by certain nonminority employees who were challenging particular promotions.

In the course of those TRO hearings, there were certain statements made by the court with respect to disposing of those matters that suggested agreement with the proposition that, indeed—as paragraph 2 says—there is nothing that would require the city to engage in a racially preferential promotion that would adversely affect a demonstrably better qualified individual on the basis of race.

Upon reviewing these matters, the position had been set by the Government and it was assigned to me to supervise, and I have advanced the position of the United States as ably and as honorably and as professionally as I am able to do.

Senator **Heflin**. Was there discussion that the entire Department of Justice should take a new approach on this in spite of Mr. Ritter's statement and position? And I assume that he took the position in the conversations with the Department of Justice.

Was it a change of philosophy or was it that you relied on the eleventh circuit or some of these other hearings that were held?

I'm faced with a situation in going back over the history of his deposition that this may have been anticipated, that you would have reverse discrimination suits brought and that you were going to be faced with them, and part of the objection at the fairness hearing was directed toward that. Questions were raised.

Nevertheless, in my judgment, paragraph 2 shouldn't have been in the decree if you were attempting to accomplish what obviously, from the fairness hearing and the decision of the court, the position of the Department of Justice, the position of the city and everyone else at that time was the language in this paragraph.

This language in paragraph 2, in my judgment, should have been phrased differently or written differently.

It may provide a legal right for you to take that position, but it does so in spite of all of these other circumstances, and the totality of the circumstance here would indicate that there was a clear understanding what the intent of what the consent decree was.

I'm just bothered about this and your position. Now, I realize you didn't have anything to do with the drafting of the decree or with the fairness hearing. But it does appear to be a reversal by the Department of Justice—the same Department of Justice, same administration—that drafted this decree that represented the Department of Justice in the fairness hearing.

It seems that there is a change of policy and a using of this case in regards to it.

Mr. Cooper. Senator, two points I would make.

First of all, at the time the decree was crafted it was generally assumed, I'm sure, that any challenges by nonminority employees would be rejected by the court as collateral attack on the decree. So any independent lawsuit that any disgruntled nonminority employee brought is—in almost every circuit in the country except the eleventh circuit—dismissed as a collateral attack on the decree.

It was against that legal backdrop, I feel confident—though again, I must say, I had nothing to do with this matter at the time—that whatever understanding was reached, was reached.

In the *Jefferson County* case in the eleventh circuit the court agreed with the position of the United States that, in fact, these nonmi-nority employees were not entitled to intervene in out case; but, in so doing, it said that they were entitled to bring these collateral attacks and they were entitled to have their rights decided as they've been alleged.

The court in the eleventh circuit said that the consent decree would become an issue only if the city set it up in defense by saying that the actions that it took were mandated by that decree.

So it has been against that *Jefferson County* ruling that the matter has proceeded ever since. The key issue, in our view, is whether or not that consent decree mandates, requires, the conduct that the nonminority employees complain against.

There's another point. That is that subsequent to the negotiation and entry of the consent decree decisions that are binding in the eleventh circuit have been issued by the Supreme Court and the court of appeals to the general effect that two parties cannot, by consent, through a consent decree, agree to remedial efforts that adversely impact upon the legitimate and legal enforceable rights of third parties who did not consent to the terms of that decree.

Now, as the United States explained in the initial filing, I believe, before the District Court in Birmingham on these consolidated matters, we believe that the interpretation that we have offered is an interpretation that will preserve the validity of the decree.

If the decree is understood and interpreted in our view the way that the city of Birmingham has advanced, then we fear that the decree will be inconsistent with these Federal laws; and we took that position before *Stotts* came down.

Our view of the Stotts decision is well known and we think that a decree of this kind, if indeed it——

Senator Heflin. Well, actually, the United States had intervened on behalf of the reverse discrimination plaintiffs several months in advance of the *Stotts* decision.

Mr. Cooper. Yes, sir.

Senator Heflin. So the action that was taken in *Stotts* couldn't have any influence on the action of the Department of Justice.

Mr. Cooper. That's absolutely right, and it did not. It did not.

But when *Stotts* was subsequently decided——

Senator Heflin. Of course, one of the complaints of the city of Birmingham is that you had an obligation under the decree to defend the decree; and, clearly, in the language of it it's there.

Also in the language in paragraph 4 of the decree which says, in effect, that in the event the plaintiffs seek to enforce any provision of this they shall give notice of their intention to the city attorney, the plaintiffs being U.S. Department of Justice there.

"Such notice shall state, with reasonable particularity, the nature of the alleged violation and the relief sought. The parties shall have a period of 30 days within which to resolve the matter informally, and if the parties fail to resolve the matter plaintiffs may, upon the expiration of the 30-day period, apply to the court for an appropriate enforcement order," which I gather was in order to avoid expense on the part of people in having full blown court proceedings by trying to resolve any of these matters informally and to give notice.

Did the Department of Justice attempt, prior to its intervention on behalf of the reverse discrimination plaintiffs, to resolve these matters, informally with the city of Birmingham or other defendants?

Senator McConnell. Senator, before Mr. Cooper answers, I have to go on to another meeting.

I just wanted to indicate to the witness my enthusiastic support for his nomination. I have followed your career for some time.

Also, Senator Specter has some questions which he would like to submit to you for you to answer for the record.

Prepared Statement of Senator Mitch McConnell

Mr. Chairman, it is a pleasure to be here today to hear testimony from Mr. Charles Cooper in connection with his nomination by President Reagan to be Assistant Attorney General for the Office of Legal Counsel. Mr. Cooper has an outstanding legal background, and has demonstrated his competence and integrity while serving as deputy to William Bradford Reynolds in the Civil Rights Division in the Department of Justice for some time now. I'm confident that his testimony today, as well as that of any other witnesses, will confirm that he is well qualified to serve as Assistant Attorney General.

Inevitably, I am sure, we will hear testimony and rhetoric from those who wish to make this nomination hearing yet another referendum on the policies pursued by President Reagan and the administration in so far as the recognition and expansion of positive rights in the field of personal rights and liberties are concerned. We saw this in the nomination of Mr. Reynolds to be Associate Attorney General, and because of Mr. Cooper's position as deputy under Mr. Reynolds, I have no doubt that we will hear much of the same sort of testimony. Yet I think it is important to state at the outset that the referendum those who would pursue such a course seek has already been held, and from their perspective, lost. Policies employed by the Civil Rights Division and by the Reagan administration are well known, and were well known before the November 1984 election. Yet the citizens of this country overwhelmingly endorsed the President. While there are those who would disagree or deny the fact, we can take comfort that that endorsement was approval of the policies pursued by the administration as well.

Nevertheless, this hearing will likely focus not on Mr. Cooper's competence and experience but on his role in implementing these popular policies. This is simply another manifestation of the continuing effort by a variety of groups who seek to prevent this administration from effecting the kind of needed and sensible change in the direction of Federal judiciary and the Justice Department that has been too long in coming. Some say that any effort to return the judiciary and the Government to an approach that respects the constitution and the limits it places on the Government's influence in the lives of the American people is "turning back the clock". I believe, however, that just as the Department had the obligation in 1954 to reevaluate longstanding decisions and approaches, the Department today has the obligation to reevaluate the law and its approach to the law where there is good reason to believe that its current approach is constitutionally flawed.

I make these comments simply in passing, because as I said I do not believe this hearing should degenerate into such a referendum. Nevertheless, that is exactly what happened with the nomination of William Bradford Reynolds, and I am not at all confident that the same will not happen here. I think it is unfortunate, and I would hope that this committee and its members would keep sight of the fact that we are here to evaluate the competence of this nominee to serve in the position for which he has been nominated.

Mr. Chairman, I look forward to supporting the nomination of Mr. Cooper, and look forward to his testimony.

RESPONSES TO SENATOR SPECTER'S QUESTIONS

1. What is your view on whether Executive Order 11246, relating to equal employment opportunity obligations of federal contractors, should be altered? If so, in what way?

Answer

In my view, Executive Order 11246 is -- and must remain -- an important tool to protect against discrimination in the employment practices of federal contractors and to require such contractors to take nondiscriminatory affirmative action designed to open employment opportunities to minorities and women. A review of the Executive Order program is now underway in the Administration to determine whether its implementation conforms to these original purposes. As I testified at my hearing in response to a question from Chairman Thurmond, this review "is not a matter that I have been 'in the loop' on," so I cannot speak from personal knowledge on the scope of the review or its results. I can state, however, my firmly held conviction that no person should be discriminated against or disadvantaged on the basis of his or her race or gender. Accordingly, should the pending interdepartmental review reveal the necessity to revise the Executive Order to reaffirm its nondiscrimination requirement, or to ensure that the affirmative action required under the Executive Order does not operate to discriminate against anyone on the basis of race or gender, I would support such revisions.

2. What is your view on the constitutional validity of the "Incorporation Doctrine," by which various of the amendments to the U.S. Constitution have been made applicable to the states? Do you believe that any particular federal constitutional guarantees should be "de-incorporated"?

Answer

The term "Incorporation Doctrine" is a shorthand reference to describe collectively a number of cases in which the Supreme Court has determined that certain restrictions imposed on the federal government by the Bill of Rights apply equally to the state governments by virtue of their "incorporation" in the Fourteenth Amendment through the Due Process Clause and the Privileges or Immunities Clause. It is my understanding that the Supreme Court has never held that the entire Bill of Rights was incorporated in the Fourteenth Amendment, and certain provisions of the Bill of Rights -- *e.g.*, the Second and Seventh

Amendments -- remain unincorporated. Since its initial articulation by the Supreme Court in 1925, the doctrine has been the subject of lively debate in the scholarly literature, with constitutional scholars of widely differing philosophical outlooks lining up on both sides of the issue. For example, luminaries such as Charles Fairman, Alexander Bickel, and Raoul Berger have written that the doctrine is based upon a dubious reading of the intent of the framers and ratifiers of the Fourteenth Amendment. I agree with Solicitor General Charles Fried, who noted to the Committee in connection with his confirmation, that while the incorporation doctrine was also once questioned by eminent jurists such as Justices Harlan and Frankfurter, it is now a familiar part of the constitutional landscape. Because I have not had occasion to examine the wealth of legislative materials, case law, and scholarly literature that pertain to the issue of incorporation, I do not have an informed legal opinion about the constitutional validity of the doctrine as a whole or the various cases that comprise it. I can say, however, that I revere all of the freedoms and protections of the Bill of Rights, and I believe that the states should abide by each of them.

3. In what situations do you believe it is appropriate for the United States Department of Justice to urge upon the Supreme Court that the Court reverse its own previous holding on a particular issue?

Answer

I believe that one of the proudest moments in the history of the Department of Justice occurred when it filed an amicus brief urging the Supreme Court to discard the separate-but-equal doctrine of Plessy v. Ferguson and rule that de jure racial segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment. There is, however, no generally applicable rule-of-thumb for determining whether the United States should urge the Supreme Court to reexamine its ruling in a prior case. Among the many factors in making such a determination are whether the facts and posture of the case present clearly the issue governed by precedent; whether correct resolution of other issues raised in the case would avoid the necessity of disturbing precedent; whether the United States is a party; whether the Supreme Court has considered the issue recently; whether the issue implicates the constitutional prerogatives of the Executive; and whether there are other means of ameliorating or reversing the prior precedent, such as legislation. On this latter point, I believe there is much wisdom in Justice Brandeis' famous observation:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 395, 407-408 (1932) (Brandeis, J., dissenting).

4. What obligation, if any, do you believe the Department of Justice has to follow decisions of Courts of Appeals when the issue in question arises in a Circuit which has not yet addressed it?

Answer

A decision of a circuit court of appeals is not binding precedent in a different circuit, though the latter court of appeals may find the decision persuasive on the issue and follow it. Were it otherwise, the initial court of appeals to consider a particular issue would essentially serve as the final arbiter of the issue among the courts of appeals, and the conflict between the circuits that is often necessary to bring certain categories of cases to the Supreme Court might never arise. For these same reasons, litigants, including the Department of Justice, are obliged to accept the binding authority of a court of appeals' ruling only in the circuit in which it was decided; in circuits which have not yet addressed the issue, the Department of Justice is free -- indeed, is required by the obligations of conscience -- to provide its independent legal judgment to the court. I hasten to add that I believe that a court of appeals' rejection of the Justice Department's position on an issue should occasion a sober and careful reexamination of the position within the Department. But if such a reexamination yields the firm conviction that the court of appeals' has erred, I believe that the Justice Department must be free to so argue in other courts of appeals and in the Supreme Court.

5. In your view, would it ever be appropriate -- for example, where extradition is impossible -- for U.S. agents to forcibly arrest a suspected terrorist on foreign territory and return the terrorist to the U.S. for prosecution in U.S. courts?

Answer

The question of the appropriateness of the forcible return to the United States of suspected terrorists by means other than extradition presents very difficult, complex, and intricately related questions of constitutional law, statutory law, and international law. This is not an area in which I have had any substantial experience. Consequently, I feel that it would be inappropriate for me to offer an off-the-cuff generalization about the legality of such matters in view of the fact that any such statement coming from the United States Department of Justice might affect the calculus both of persons considering engaging in terrorist activity and of other countries considering in what manner to cooperate with the United States in our on-going battle against outbreaks of this most heinous form of international lawlessness. If called upon to advise on a question such as this, I would devote to it diligent and thorough research and consideration and would, of course, rely extensively on the expertise in this area of other attorneys in the Office of Legal Counsel, and elsewhere in the Justice Department.

Senator McCONNELL. Sorry, Senator Heflin.

Mr. COOPER. Thank you, Senator McConnell.

Senator, with respect to notice, I think it's important to keep in mind how we got into these matters and the basis upon which we got into them.

At the invitation of Judge Acker, after he had consulted with all the parties, we accepted his invitation to intervene in the case. At that point, the Department of Justice made clear that we had no intention of attacking the validity of the decree.

In fact, we have urged that a motion to dismiss the nonminority employees' attack on the validity of the decree be dismissed as a matter of law. We do not think the decrees are invalid. We have not attacked them as such.

What the disagreement centers around is really what they mean and we have advanced an understanding of the decrees that we think preserves their validity.

But on the notice point the notice requirement says that if we seek to enforce the requirements of the decree. The judge invited us to participate in the case. We advised him we would be happy to do so, that we could not position on the factual allegation of the matters pending before the court until we had done a thorough investigation through discovery into the facts as they exist.

We have spent several months now in extensive discovery and there has just been every opportunity for everybody in the case to understand precisely what our thinking has been from the beginning.

I do not think that, in any way, this was a violation of the notice requirement. We have not come into this case in an effort to enforce the positive prohibitions of the decree.

We've come in to develop the facts and to make a determination whether or not these facts violate some Federal protection, and further whether or not the decree extends, of its own terms, any kind of defense to the city of Birmingham for the conduct that has been alleged.

Senator HEFLIN. I have not yet reviewed it—and I understand that there are certain restrictions on it—but there was certain correspondence that was carried on by the Department of Justice and the attorney for the reverse discrimination plaintiffs prior to the institution of the lawsuit.

First they filed it with judge Acker and it was consolidated with the judge in the pending case.

Was there correspondence between the Department of Justice and the plaintiffs in the case that was filed in Judge Acker's court prior thereto, and was this improper?

Mr. COOPER. Was there correspondence? I'm sorry.

The CHAIRMAN. Well, not just correspondence but conduct in which it——

I have not read the letter. I have a file that was given me a few minutes ago.

Mr. COOPER. Yes, sir.

Senator HEFLIN. I haven't seen them so I don't know what the content is. Rather than hold people up to do it, I'll look at them later.

However, it would appear that there was activity on behalf of the plaintiffs and the Department of Justice prior to the institution of the suit in which maybe there was encouragement of facts, or the information given which would have tended to have encouraged those people to have brought the suit which, in itself, would have some appearance of being a violation of the spirit of the decree where you are obligated to defend against collateral attack.

Mr. COOPER. Senator, there was——

Senator HEFLIN. If you would, give us some answer pertaining to this activity.

Mr. COOPER. Yes, sir. There was certainly correspondence, the overwhelming bulk of the correspondence being letters from principally the lawyer for the nonminority employees urging the United States to change its position, urging the United States to support their intervention into the lawsuit and to permit them to get into the lawsuit through intervention.

That is my recollection, anyway, of the principal focus of the private attorney's activity. That is not at all unusual. We are oftentimes urged to get into a case ourselves or to yield on a position that we have taken.

As I have indicated earlier, we resisted the intervention of the private lawyer and the nonminority employees, and we did successfully in the eleventh circuit. We never did change our position on that question.

Certainly if there was any encouragement to the nonminority employees to file independent lawsuits, it was not forthcoming from me or from anyone else that I'm aware of in the Department. I don't recall there having been conversations on that question, although it is certainly possible that the lawyer for the minority employees indicated to us his intention to do that.

But my recollection is—and I certainly could stand to be corrected on this—that there had been independent lawsuits filed by the nonminority in Federal court prior to the time that any correspondence of contacts of any kind took place; but it was not the Department of Justice's position that these independent lawsuits should be brought.

Senator HEFLIN. Since this was brought prior to the decision in *Stotts*, the policy decision made in the Civil Rights Division of the Department of Justice—that we are going to look at all the pending cases that we are in and if there is an affirmative action program that smacks of any quotas or that brings about anything other than tie-breaking approaches we are going to oppose this type of litigation in the future decided in an effect to undermine those decrees—was there a policy decision made on this or was it on a case-by-case basis?

Mr. COOPER. Are you referring prior to the *Stotts* decision?

Senator HEFLIN. Yes, prior to *Stotts*.

Mr. COOPER. Well, no, sir. It was the policy and had been at least since the time that I joined the Department of Justice that the Department would not seek in new litigation quota relief; and that was quite clear and that had been set forth, as I recall, as early as May if not earlier by a speech by former Attorney General William French Smith.

I think it was plainly the policy that we would not go in and try to undo decrees that had already been negotiated and that were in place. In fact, we did not do that.

There are a host of decrees that contain relief that we think is inconsistent with the policy that was announced, but it was not until after *Stotts* when the Justice Department perceived that the Supreme Court had concurred in our view on the remedial authority of courts under title VII and we then undertook a review of existing consent decrees to undertake an effort, cooperatively with the other parties to those decrees, to bring them in line with what we understood *Stotts* to require.

There was no such effort prior to *Stotts*.

Senator HEFLIN. As I understand it—I'm not exactly clear on this, maybe you can clarify it—there was, in effect, wasn't there, an effort to hold the Department of Justice, in contempt relative to its alleged change of position concerning the decree?

Mr. COOPER. There was, indeed, yes, sir.

Senator HEFLIN. Would you tell us what occurred pertaining to the contempt proceeding?

Mr. COOPER. Yes, sir.

I have to admit that some of the points that were made in that motion to hold the United States in contempt are fuzzy in my mind; but, in broad outline, the city—and I believe the intervening minority employees—believe that our participation in the case at Judge Acker's invitation as nominal plaintiffs——

I mean, when we accepted the invitation, we informed Judge Acker we would come in nominally as plaintiffs, but without any prejudgments on the facts and we would investigate them, and at such time as we had determined the validity of the charges that were made we would line up with whichever side we happened to agree with on the facts.

But it was their view that coming in on those terms, as I recall it, was inconsistent with the Department's duty to defend the decrees. At about that same time, we moved to modify our motion to dismiss those independent lawsuits—we had initially filed a motion to dismiss the independent lawsuits—prior to the time——

This gets very involved and I apologize for it, but it was prior to the time that the *Jefferson County* case in the eleventh circuit had held that collateral attacks can go forward in the eleventh circuit. It's the only circuit, to my knowledge, to have so ruled thus far.

But, prior to that time, we had said, these are collateral attacks. They should be dismissed.

We, then, moved to amend our motion to dismiss to say Jefferson County forecloses the argument that these are collateral attacks. Judge Pointer agreed with us entirely, he granted our motions to amend, and he denied the motions to dismiss on that basis that had been filed by the other side of this case.

Senator HEFLIN. I wouldn't say he agreed with you entirely on this thing, now. From this copy which basically holds his decision—this is a portion of it:

> In its brief supporting the plaintiffs on these pending summary judgment motions, the United States has advanced arguments that appear to be contrary to its obligations . . . .

He continues;

> . . . appear to be contrary to its obligations under the decree and inconsistent with the positions it pressed so vigorously in the early litigation.
>
> It seems to be contending that the promotion of the minority with lower test scores would never be required by the decree and would constitute a prima facie case of being permissible reverse discrimination; and, indeed, that the City would have a duty to seek such information before considering appointment of a minority candidate.
>
> Such a position could hardly be cognizant with its obligations to uphold the decree, which clearly contemplate that a portion of new appointments would go to minority candidates lower on the eligibility register.
>
> Its apparent change in position is particularly questionable in view of the fact that it has been contended and documented with extensive evidence in the early litigation that the tests have discriminatory impact against minority candidates and are not sufficiently job-related to be valid ranking devices in the 42 USC, Section 2000E-2(h).
>
> Although permitting the United States to align itself with the plaintiffs, the Court will insist that the United States act in accord with its obligations under the decree. It did, nevertheless, state that to the extent that the United States, in good faith, believes that the actions of the City are discriminatory against the plaintiffs and are neither required not permitted by the consent decree, it may support the plaintiffs' position in this litigation without violating the terms of the consent decree and, accordingly, may be allowed to align itself as a party plaintiff.

Now, that's Judge Pointer, your trial judge. Of course, that's subject to an appeal.

He basically, I gather in this, did not hold you in contempt of court, did say that if you in good faith believe, you would be allowed to align yourself as a party-plaintiff.

But he then goes forward, it appears to me, to almost support the position of the city of Birmingham that you acted inconsistent by here.

Am I giving a fair reading of that?

Mr. COOPER. Well, it's certainly an accurate reading, as I recall it, of the Judge's opinion. I don't think that opinion came down in response, in any way, to the motion to hold the United States in contempt.

I think it came down some time considerably thereafter and in response to the motion to hold the United States in contempt I believe the Judge simply—he just denied it more or less out of hand because I was at the hearing where he did that.

It was the same hearing, I do believe, Senator Heflin—and to the best of my recollection—when he also denied the motions to dismiss these collateral attacks that had been filed by the city and by the intervening minority employees.

I think that the opinion that you have just quoted springs essentially from a misunderstanding, frankly and with all due respect to Judge Pointer, of what the United States was maintaining with respect to the significance of the test score.

We have from the beginning been prepared to proceed in the matter without reliance, in any way, on the test scores, ready to throw the test scores out the window, and try the factual issues on the basis of non-test evidence of qualification.

It was our position that the test scores may have some relevance in this inquiry, but it has never been our view that people who simply ranked lower were automatically shown and established to be less qualified.

Senator **Hatch** [presiding]. Senator, I believe we have to go and vote.

Senator **Heflin**. Well, now you may be right as to when. I am not absolutely certain whether that was to the contempt proceedings or the hearings on the motion for summary judges.

Senator **Hatch**. Do you intend to continue when we get back?

Senator **Heflin**. Yes.

Senator **Hatch**. We will recess until voting is concluded.

Mr. **Cooper**. Very well, Senator.

Senator **Hatch**. And Senator, if you return before me, please continue your comments and questions.

Senator **Heflin**. All right.

[A vote recess was taken.]

Senator **Biden** [presiding]. The hearing will come to order. Before we move on to Senator Simon and his questioning, I understand, Mr. Cooper, some distinguished visitors have come into the room.

Would you be willing to introduce them to the committee, and to all of us.

Mr. **Cooper**. It would please me very much, Senator Biden, to introduce my parents, Bob and Kay Cooper who have just arrived from Huntsville after some difficulties with flight arrangements, but they are here.

Senator **Biden**. Well, welcome, Mr. and Mrs. Cooper. I am sorry you had difficulty with your flight, but in a way, I am glad you were not here when I was taking issue with your son. I am always intimidated by mothers; fathers, I can handle, mothers, I have real problems with. And it did not dawn on me until later, that the lovely woman sitting behind you to your right was probably your wife, and I am in real trouble with her, too.

So, I am glad you were not here, Mom, but I will yield and let Senator Simon tread on that area now. Thank you.

Senator SIMON. I thank you, Mr. Chairman. Mr. Cooper, I do not think there is any question in the minds of any of us about your ability.

There is a sensitivity to the Justice Department that is there much more than, say, the Department of Transportation, or other things, because we are dealing with something very fundamental in our society. And so we want to make sure the law is not twisted, that it is fairly, equitably applied. In 1982, Attorney General Smith wrote a letter to Senator Thurmond stating that legislation stripping the Supreme Court, or the lower Federal courts of certain basic functions was unconstitutional.

Are you familiar with that letter, first of all? Do you find yourself in agreement with it? Is there any intention on your part, or on the part of the Justice Department, that you are aware of, to reverse that?

Mr. COOPER. Senator, I am aware of the existence of the letter and the thrust of it. I am not—I was not involved in the process that came about in order to provide that letter, and to develop the analysis that is contained in it.

I have to confess that this is not an issue, the basic question of Congress' authority under article 3, to remove jurisdiction over certain issues from the Federal courts, including the Supreme Court, is not an issue that I have devoted a great deal, or even a small amount, frankly, of study and reflection upon.

As I say, I am familiar with Attorney General William French Smith's letter. I have no reason to disagree with it. Certainly I am aware of no effort or proposal that may be pending within the Justice Department to depart from it.

Senator SIMON. I voted against the Attorney General's nomination, but not because I do not respect him. Way back when, someone on President-elect Kennedy's staff called me and said that the President-elect was thinking about appointing his brother to be Attorney General, I said I thought it was a mistake.

The Attorney General should not be too close to the President of the United States. We want an independent judgment that serves the law and not a political purpose.

You are going to be in a position where, as legal counsel, you can either buttress that independence, or not buttress that independence.

Do you feel that you can serve the law and advise the Attorney General, firmly, and strongly? That if decisions are going contrary to the intent of the law, you could declare them unwise?

Mr. COOPER. Absolutely, Senator, and I have had no relationship with Mr. Meese prior to the time that he was confirmed as the Attorney General, and the relationship that I have had with him has been one that--has been the working relationship that we have enjoyed since the time he came to the Department of Justice. And I can state, emphatically, that it would be my view, my abiding view, that the Office of Legal Counsel should provide the most objective legal judgment to the Attorney General that it is possible to provide, regardless of what I may, or others may think the "hoped for" opinion, or conclusion may be.

Senator SIMON. If you were the legal counsel and the Attorney General said suspects are guilty, reversing the American tradition of innocent until proven guilty—would you not hesitate to say, "General, you have made a mistake?"

Mr. Cooper. Senator, I would provide the Attorney General with my candid, frank counsel, and if he made a statement that was understood to carry a message that I believed he clearly did not intend, or that I believed was inconsistent with prevaililng legal requirements, I would advise him very quickly.

With respect to the statement that I think you are referring to, he has hastened to make clear that that statement was misunderstood, and he did not mean to suggest that suspects are not presumed to be innocent until they are proven guilty. Rather, he said that of course as a bedrock understanding of our American criminal justice system, as I certainly believe.

Senator Simon. I notice that in your attached list of responsibilities, you say that you were requested on occasion to interview individuals concerning judicial nominations.

What kind of questions did you ask the nominees?

Mr. Cooper. Senator, perhaps it would help to say what kind of questions I do not ask, because I do want to state, clearly, that I, in interviewing a judicial nominee, I have never probed that nominee's policy or ideological preferences.

Senator Simon. That is what I am getting to, obviously.

Now you have worked with Mr. Reynolds in the Civil Rights Division. Let me just read you part of a staff memo here. "Mr. Cooper has spent a great deal of time at the Department of Justice on cases arising from CRIPA." The Civil Rights Institutional Persons Act. "Mr. Cooper has substantially restricted the civil rights of institutionalized persons, both prisoners and the handicapped."

Is that a fair judgment? I am concerned, and again, I mean this with all due respect to Mr. Reynolds, but I am very much concerned about a Justice Department that runs contrary to the whole spirit of what Congress has intended in that division.

Have you been following orders, have you been doing what you have been told here, or has your independent judgment been one that, this administration is right in its thrust, in the whole civil rights area?

Mr. Cooper. Well, sir, I do not think I am familiar with the quotation that you have just made, or its source, but I am frank to say that Mr. Reynolds and I have approached a broad range of policy issues from a similar philosophical outlook.

I subscribe to the civil rights policies that we have advanced under, now, two attorneys general. With respect to CRIPA, the Civil Rights of Institutionalized Persons Act, it is certainly true that I have been for a substantial portion of my time as one of Mr. Reynolds' three deputies, I have supervised the section that enforces CRIPA.

Our guiding principle in enforcing CRIPA is the Constitution. The statute itself does not contain the substantive protections. It merely provides us with the ability to go in to court and to enforce constitutional protections.

The statute is, in many ways, restrictive on our ability to go into court, in that it requires that an egregious and flagrant condition of confinement be found, before we can then sue—we can then bring litigation to correct it, and it also has a number of administrative procedural requirements that we must first abide by, before we can file a complaint. But all of our, all the positions that we have taken in that area have been based on, I can say emphatically, on our level best to determine what the prevailing constitutional—the correct and prevailing constitutional determination is on those questions.

I have to hasten to add that I think my work in supervising that section has provided me, personally, with more self-satisfaction, with a greater sense of rewards, psychic rewards, knowing the kind of, really, the unspeakable conditions that some of these institutions are, are in, and expose their residents to, that we can bring relief, and bring it about as quickly as possible.

Sometimes, that, unfortunately, is not as quickly as we would like, but that is a very rewarding——

Senator SIMON. But during your tenure in that Division you received the resignations of virtually all the professional staff lawyers. And if I may quote. Tim Cook was an attorney with that Division, and he resigned, and explained his reasons in a 33-page memorandum to Attorney General Smith.

One paragraph says this, and I am quoting from the paragraph: "Most significantly, you bave not initiated a single suit to vindicate the rights of handicapped people as a result of any of these investigations, even though many have been pending now for years, and it specifically talks about one that you refer to that you have worked on." The investigation of Rosewood Center, a mental retardation institute in Maryland, has been pending for 3 years.

How do you respond to concerns that people have who have seen the law not enforced, but apparently, significantly weakened under this administration, and during your involvement there?

Mr. COOPER. Senator, I believe I am correct when I state that the—that certainly, there has been a substantial turnover in that section.

I believe the most substantial part of that turnover occurred prior to the time I began to supervise it, but, in any event—

Senator SIMON. When did you take over or start to supervise there?

Mr. COOPER. Our records reflect—and I am advised, although I certainly do not remember the exact date—I am advised it was on October 5, 1983.

Prior to that time it had been under the supervision of other deputies to Mr. Reynolds. But——

Senator SIMON. So you moved in fact about the time that Tim Cook resigned. Is that correct?

Mr. COOPER. My recollection is it was pretty coincident with that period of time; yes, sir.

Senator SIMON. OK.

Mr. COOPER. I am sorry. Now——

Senator SIMON. No, no, I understand. I would not expect you to recall the exact date.

One final point, Mr. Chairman. I would be interested in your response, and I do not need it right now, but I would be interested in having it in writing for the record.

I have read the statement of the mayor of Birmingham, which is, frankly, a very powerful statement.

On page 11 of that statement, if you would want to, in writing, respond to what pages 11 and 12 say, what the mayor of Birmingham has to say there, starting with the second paragraph on that page, I would appreciate that.

Mr. COOPER. I would be happy to do that, Senator.

Senator SIMON. OK; thank you, Mr. Chairman.

Senator HATCH [presiding]. Well, thank you, Senator.

We clearly have a few more minutes before the 7½ minute bells ring, but I think we have a number of questions that will require more time.

So what I suggest—and the witness also needs some time to relax, we ought to take a 20-minute recess. Senator Kennedy wants to come in now? All right, then. Let me do the following: Senator Kennedy can question next. We will all eventually run over and vote; I think it would be the same as giving at least a half an hour for lunch. I will also protect the time of Senator Biden and Senator Heflin, so that as soon as they return we will enter into their questions.

Senator Kennedy is here, so I will go to vote and we will let Senator Kennedy open up with his questions at this particular time.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. Cooper, I want to join the others and welcome you here this morning, and congratulate you on the nomination.

Mr. COOPER. Thank you.

Senator KENNEDY. You have served as the Deputy Assistant Attorney General for Civil Rights, and my dissatisfaction with the administration's record on this is well known, and I am interested to the extent that you have participated in these decisions by the Civil Rights Division on some rather basic and fundamental questions.

I would like to direct your attention to the case of *Basemore* v. *Friday* involving race discrimination wages, race, and segregated 4-H clubs supported by the Federal funds through the Department of Agriculture and the State Extension Service. As I understand you overruled your line attorneys who urged you to argue that the segregated 4-H clubs are illegal. Is that correct?

Mr. COOPER. Well, Senator, actually, we advanced in the trial court that proposition, and it was rejected in the trial court, and so the question that I participated in the resolution of, was whether we should appeal that determination.

Mr. Reynolds did indeed decide, in a decision in which I concurred, that we ought not to appeal that determination because it was——

Senator KENNEDY. Well, did you make a recommendation to Mr. Reynolds?

Mr. COOPER. Yes, sir. I did. Yes, sir. I did.

Senator KENNEDY. And what was your recommendation?

Mr. COOPER. My recommendation was that we ought not appeal that determination.

Senator KENNEDY. And Mr. Reynolds followed your recommendation?

Mr. COOPER. He concurred with my analysis and my judgment on it.

Senator KENNEDY. And what was the position of the line attorneys? Do you remember? Was that for appealing?

Mr. COOPER. Excuse me?

Senator KENNEDY. Was that for appealing?

Mr. COOPER. Certainly there were some line attorneys who felt that we should appeal it. I cannot tell you that that was a unanimous recommendation. I, frankly, just do not recall. But there were line attorneys who believed we should appeal; yes.

Senator KENNEDY. Well, do you know what the position was of the chief of the enforcement section?

Mr. COOPER. Mr. Rose.

Senator KENNEDY. Yes.

Mr. COOPER. Yes, sir. He did want us to appeal the determination.

Senator KENNEDY. And he wrote a rather extensive note on that, as I have here, and I would ask that it be included in the record at the conclusion of my questioning.

He wrote a rather extensive note on that, if you will remember.

Mr. COOPER. Senator, I am sorry to interrupt. This is a case that is in, now pending on our petition for certiorari and another petition for certiorari in the Supreme Court. It is open, and, obviously, my ability to discuss some particulars may be somewhat constrained here, but I do think that probably the understanding that the Department has reached with the committee would require us perhaps to think very closely before we put anything in the record of that case.

Mr. SHORT. Senator, some of the documents were received as privileged documents. I am not sure which ones were.

Senator KENNEDY. I see. All right. Well, if it is privileged, I would ask that that be respected, and, if not, then I would ask it be included. I will leave it up to the staff.

Mr. COOPER. Thank you, Senator.

Senator KENNEDY. But to get back to the question about the enforcement section the chief recommended, that there be an appeal, do you know how many times you overruled the recommendation of the enforcement sction?

Mr. COOPER. Senator——

Senator KENNEDY. About how many? Is it 5 percent of the time or 50 percent of the time, or——

Mr. COOPER. Senator, I would be uncomfortable in placing any percentage on it, frankly. I know that——

Senator KENNEDY. Well, frequently, sometimes, often? How about that?

Mr. COOPER. Well, I do not think it would be fair to say frequently, no, sir. I think that in the normal course the appeal recommendations up from the sections are carefully and soundly analyzed, and they are followed.

There are occasions when, on analysis, that we come to different conclusions.

Senator KENNEDY. Well, the question is how often did you overrule the recommendations that were made by the line attorneys? And your answer is?

Mr. COOPER. Well, my frank and best answer is that I would just not know how to quantify that. I do not think it would be—I do not think it would be fair to say it happens frequently, however. It has certainly happened on occasion.

Senator KENNEDY. You want that to be your answer for this record? You want that to be your answer now, just the way you said it? We cannot get any more direct answer to that rather basic question?

How many reviews would you have of these kinds of cases come before you in the Civil Rights Division?

Mr. COOPER. There have been many, many cases that we have——

Senator KENNEDY. Well, how many? Can't you give a straight answer? Are you talking hundreds? Are you talking tens?

Mr. COOPER. Oh, there have been scores of cases, certainly. I did provide to the committee as comprehensive a list——

Senator KENNEDY. I am asking you approximately how many times did you have to take these various recommendations, in terms of—in your responsibility? How many times did you examine these various recommendations, whether you ought to pursue the case, or not pursue them?

Mr. COOPER. Scores of times. Scores of times. I do not know how I can be more——

Senator KENNEDY. Well, in a week how many? Would you have five in a week, or——

Mr. COOPER. Oh; no, sir. No, sir. There are not five appeal recommendations in a week. We do not have that many cases. But there might be appeal recommendations and other recommendations that relate to appellate activity——

Senator KENNEDY. And how many? What is the approximate number? I am troubled by the fact I cannot get a response, but I guess that is the way the record will be, it will have to remain, since you do not seem willing to give me an answer.

Now, in this particular case, you made a note on this that says, and I quote—I do not know whether you want to see it. I will be glad to show it to you. "Reference clubs: Nothing need be said. This is Plessey, not Green." Do you remember that?

Mr. COOPER. Yes, sir; I do.

Senator KENNEDY. What did you mean by that comment?

Mr. COOPER. I meant to convey my concurrence with a proposition that Mr. Reynolds had actually developed, and it will take a moment to fully——

Senator KENNEDY. We are talking now *Plessy* v. *Ferguson*, right?

Mr. COOPER. That is right; yes, sir. Yes, sir.

And *Green* v. *New Kent County*. Those are the two cases that are referenced in that cryptic note. The 4-H Clubs are entirely voluntary associations.

Senator KENNEDY. Well, before we get into that, do you think that the *Plessy* v. *Ferguson* has any possible—is good law?

Mr. COOPER. Oh, absolutely not, Senator; absolutely not. It is, next to *Dred Scott*, the largest blight to be found in the U.S. reports, and my public statements—

Senator KENNEDY. Well, was this in any way—if you read this reference—"This is *Plessy*, not *Green*"—were you considering citing the *Plessy* v. *Ferguson* as authority to uphold race segregated Government-supported clubs?

Mr. COOPER. No, sir; of course not. The reference meant simply that——

Senator KENNEDY. Well, when would you cite *Plessy,* I mean as any authority? What would be the times that you would cite *Plessy* v. *Ferguson* as authority?

Mr. COOPER. I do not believe we have ever cited it. I have certainly never cited it. I have——

Senator KENNEDY. Well, let me get back to your other answer, "This is *Plessy,* not *Green.*" What did you mean by that, as its application in this case?

Mr. COOPER. As I say, the 4-H Clubs are entirely voluntary associations. The decision to become a member of a 4-H club is much like the decision to attend a public park, and therefore, is fundamentally different from the decisions that are made in the public elementary and secondary education context.

In the *Green* case, the Supreme Court indicated that in that context, where attendance at school is compulsory, and where assignments to schools are traditional, and the norm, that a freedom of choice kind of response to de jure segregation is simply inadequate.

In that case they suggested that neighborhood schools be created and that assignments be based on a neighborhood school basis.

The circumstance is much different if you are talking about public parks, and in many places in the South, there were public parks that were segregated, and it seems clear that the way that public officials exercise and discharge their affirmative duty to dismantle a dual system, let's say, of public parks, is to halt, unequivocally, and completely, all racial exclusion from those parks, and let people decide where they go.

The *Plessy* reference comes in because Mr. Reynolds was—he was taken by this illustration. If Mr. Plessy had won his case in the Supreme Court back in the late 1800's, as we all wished that he had, then what would have been the appropriate relief for prior segregated railroad passenger cars?

It would not have been to make Mr. Plessy go to a particular car and sit there. It would have been to allow Mr. Plessy to sit wherever he chooses, and that is the reference that is pertinent here.

In other words, it was Mr. Reynolds' view, and that was a view in which I concurred, that the affirmative duty to desegregate is complete in contexts such as that, once the individual who was previously excluded is allowed a free, unfettered, nondiscriminatory ability to choose where he will sit on a railroad passenger car, where he will go in a public park, and, in this context, where he will attend, and what 4-H Clubs he or she will join.

That view of the matter was upheld by the court of appeals when they—I should say that the appeal of the 4-H Club issue was taken-we did not take it, but there were other parties in the case who did—and the court of appeals rejected the proposition that Green requires more than just letting people join what 4-H Club they will join.

And we have now filed a petition for certiorari, as I mentioned earlier, in the Supreme Court, on other issues in this case, but we have taken the position—and it is explicated in that brief—that indeed, the *Green* v. *New Kent County* analysis simply is not applicable to this context, because of the voluntary associational aspects of the 4-H Clubs.

Senator KENNEDY. Well, are you saying that public parks can be segregated because of *Plessy*?

Mr. COOPER. Oh, absolutely not, sir. No, sir. In fact, because of Brown, which overruled *Plessy*, they cannot be segregated, and, you know, I cannot say with sufficient emphasis, that I believe *Plessy* was a shameful decision and that I have taken every opportunity presented to me to denounce it and I denounce it here today.

Senator KENNEDY. Well, I will get a chance to examine this, your response, more completely in the transcript. Have you ever written anything discussing *Plessy*?

Mr. COOPER. Yes, sir; certainly. I think the record——

Senator KENNEDY. I mean, has that been submitted?

Mr. SHORT. I would have to check, Senator.

Mr. COOPER. Do you mean published writings? I do not think that I have any published writings but I have delivered a lot of public remarks that have referred to *Plessy* in the most disparaging of terms.

Senator KENNEDY. Would you have any trouble in submitting anything that you have written about *Plessy*?

Mr. COOPER. I would be happy to do that; yes, sir.

Senator KENNEDY. And as I gather from your statement here, never in any of your writings have you ever suggested, or advocated that any aspect of *Plessy* could have any continued validity?

Mr. COOPER. That is certainly my, my recollection. I do think, however, that in the context of de jure—excuse me—of de facto segregation—that is, the kind of segregation that is not unconstitutional because it is in no way attributable to the activities of State officials, that in that limited context, the 14th amendment would prohibit the State from according to, let us say, a black, a—excuse me—a predominantly minority school, let's say, or public park, less in the way of funding and support than a public park that is, let's say, frequented by predominantly nonminority people, and we brought a law suit just along those lines in Chicago. The *Chicago Park District* case, wherein Chicago had shortchanged the parks in the minority neighborhoods, and spent a lot of money making nice parks in the nonminority neighborhoods.

And it was our view that even though those parks were not de jure segregated, they were clearly—that the city officials' actions in those cases would be unconstitutional.

Senator HATCH. Senator Kennedy, would you yield for just one question? I have not been here, but would you be willing to supply for the record an approximation of the number of cases reviewed by the Civil Rights Division on an annual basis during your service there. Would you be willing to do that?

Mr. COOPER. Senator Hatch, I would be happy to do that. I would like to point out that I have provided to the committee, in response to its request for a list of matters that I have had a significant role in, as exhaustive and comprehensive a list as our records, as my memory, and the memories of the people——

Senator **Hatch**. So you feel that the list you have provided is the best you can offer?

Mr. **Cooper**. Well, I do not know how—I could not improve upon it in terms of completeness.

Senator **Hatch**. All right. I just wanted to ask that question.

Mr. **Cooper**. It is every appellate case, every litigated case that I have had a significant role in for 4 years.

Senator **Hatch**. Good enough. I am sorry, Senator.

Senator **Kennedy**. Mr. Chairman, I regret not being able to continue. I have additional questions but I really have to be at another place at this time. I do not know what the wishes of the Chair are, as to whether there are others, whether they have all completed their questions. If they have, then I will submit them; if they have not, I would like to try and work out and accommodate the Chair and the other members of the committee, and continue questioning.

Senator **Hatch**. We will put this document dated October 16, 1985, that you have submitted into the record. It is entitled "On Appellate Matters."

[The material referred to by Senator Kennedy follows:]

APPELLATE MATTERS October 16, 1985

CASE NAME	COURT	SUBJECT MATTER
LEGAL MEMO RE 504 & MEDICAL CARE		Handicap discrimination
AFSCME V. WASHINGTON	9TH	Comparable worth
ALEXANDER V. CHOATE	SCT	Handicap discrimination
AMA & AHA V. HECKLER	2D;SCT	Handicap discrimination
AMERICAN NURSES V. ILLINOIS	7TH	Employment discrimination
ARKANSAS V. U.S. & SOUTH CONWAY CTY	8TH	School desegregation
ARRIOLA V. HARVILLE	5TH	Voting Rights Act - attorneys' fees
ASHLEY V. JACKSON & U.S.	SCT	Employment discrimination
ATASCADERO V. SCANLON	SCT	Eleventh Amendment
AYERS V. ALLAIN	5TH	Desegregation of higher education
AZ GOV. COMM. V. NORRIS	SCT	Employment discrimination
BAHAM V. TREEN	SCT	Voting discrimination
BATTLE & U.S. V. ANDERSON	10TH	Injunctions against prison officials
BAYLOR UNIV. V. U.S.	SCT	Handicap discrimination in federally assisted education programs
BAYMAN V. SOUTH BEND	7TH	School desegregation
BAZEMORE V. FRIDAY	4TH/SCT	Employment discrimination
BENNETT V. ARRINGTON	11TH	Employment discrimination
BIRMINGHAM V. U.S.	6TH;SCT	Housing discrimination
BLEDSOE V. U.S.	SCT	Criminal
BLOCK V. RUTHERFORD	SCT	Injunctions against prison officials
BOB JONES	SCT	Tax exempt status
BOSTON FIRE V. NAACP	SCT	Employment discrimination
BOYD V. POINTE COUPEE	5TH	School desegregation
BRATTON & U.S. V. DETROIT	6TH	Employment discrimination
BRITTON V. SOUTH BEND	7TH	Employment discrimination
BROOKINS V. U.S.	SCT	School desegregation
BROOKS V. WINTER	SCT	Voting discrimination
BURTON V. HOBBIE	SCT	Apportionment
BYRD V. U.S.	SCT	Criminal
CAB V. PARALYZED VETS	DC	Handicap discrimination
CAL FED SAV V. GUERRA	9TH	Employment discrimination
CALIFORNIA V. NAACP	SCT	School desegregation
CHICAGO V. U.S.	SCT	School funding
CITY COUNCIL V. KETCHUM	SCT	Voting discrimination
CLARK & U.S. V. MARENGO	5TH	Voting discrimination
CLEBURNE V. LIVING CTR	SCT	Handicap discrimination
CONRAIL V. DARRONE	SCT	Handicap discrimination
CORLEY V. JACKSON PD	5TH	Employment discrimination
CRAWFORD V. LA	SCT	School desegregation

CASE NAME	COURT	SUBJECT MATTER
CROWN CORK V. PARKER	SCT	Employment discrimination
CURRIE V. U.S.	SCT	Criminal
DAVIS V. BANDEMER	SCT	Political Gerrymandering
DAVIS V. E. BATON ROUG	5TH	School desegregation
DAVIS V. MOBILE CO.	11TH	School desegregation
DEVERAUX V. GEARY	1ST	Employment discrimination
DIAZ V. SAN JOSE SCH	SCT	School discrimination
EDGE V. SUMTER CO.	11TH	Voting discrimination
EDMISTEN V. GINGLES	SCT	Voting discrimination
EEOC V. SAFEWAY	SCT	Employment discrimination
EL CAMINO CC V. U.S.	SCT	Discrimination in federally assisted programs
ESCAMBIA V. MCMILLIAN	SCT	Voting discrimination
EVANS V. JEFF D.	SCT	Attorneys' fees
FRANKLIN V. U.S.	SCT	Criminal
FRENCH V. OWENS	7TH	Prison conditions
GARC V. MCDANIEL	11TH	Handicap discrimination
GARDNER V. ARMY	8TH	Desegregation of higher education
GARRITY V. GALLEN	1ST	Institution conditions
GEIER V. ALEXANDER	6TH	Intervention; attorneys fees
GOLDSBORO CHRISTIAN SCH. V. U.S.	SCT	Tax exempt status
GOMEZ-BETHKE V. U.S. JAYCEES	SCT	Sex discrimination in public accommodations
GREENSBORO NEWS V. U.S	SCT	Criminal
GROVE CITY V. BELL	SCT	Sex discrimination in federally assisted education programs
GUARDIANS V. NYC CSC	SCT	Discrimination in federally assisted programs
HALD & U.S. V. PENNHURST 2	SCT;3RD	Conditions in institutions for mentally retarded
HANDLEY V. U.S.	SCT	Criminal
HANIGAN V. U.S.	SCT	Criminal
HARRIS V. U.S.	SCT	Criminal
HATHORN V. LOVORN	SCT	Voting discrimination
HECKLER V. AMA	SCT	Handicap discrimination
HILLSDALE V. DOE	SCT	Sex discrimination in federally assisted education programs
HINDS V. HECKLER	5TH	Discrimination in federally assisted programs
HISHON V. KING & SPALD	SCT	Employment discrimination
HOLLOWAY V. VALLEY & U.S.	SCT	School desegregation
HOOKS V. WAINWRIGHT	11TH	Prison conditions
HOOTS V. PENNSYLVANIA	3RD	School desegregation

CASE NAME	COURT	SUBJECT MATTER
HUNTER V. UNDERWOOD	11TH;SCT	Voting discrimination
IRON ARROW V. BELL	11TH;SCT	Sex discrimination in federally assisted programs
IRVING ISD V. TATRO	SCT	Handicap discrimination
JEFFERSON CO. V. U.S.	SCT	Employment discrimination
JENKINS V. MISSOURI	8TH	School desegregation
JONES & U.S. V. CADDO PARRISH	5TH	School desegregation
JORDAN V. GREENWOOD	5TH	Voting discrimination
KELLEY V. NASHVILLE	SCT	School desegregation
KETCHUM & U.S. V. CHICAGO	7TH	Voting discrimination
LEE V. MACON CO[ANNISTON]	11TH	School desegregation
LEGGETT V. LIDDELL	SCT	School desegregation
LIDDELL V. ST. LOUIS	8TH	School desegregation
LITTLE ROCK V. PULASKI	8TH	School desegregation
LOCAL 28 V. EEOC	SCT	Employment discrimination
LOCAL 93, INT'L ASS'N FIREFIGHTERS V. CITY OF CLEVELAND	6TH;SCT	Employment discrimination
LOCKHART V. U.S.	SCT	Voting discrimination
MACNAMARA V. KOREAN	EDPA	Employment discrimination
MCCAIN V. LYBRAND	SCT	Voting discrimination
MCKENZIE V. U.S.	SCT	Criminal
MEMPHIS V. STOTTS	SCT	Employment discrimination
METRO CTY BD. OF EDUC. V. KELLEY	SCT	School desegregation
MILLER-WOHL V. MONTANA	SCT	Employment discrimination
MISS. UNIV. V. HOGAN	SCT	Sex discrimination
MISS. V. SMITH	SCT	Voting discrimination
MOBILE SCH V. JAFFREE	SCT	Moment of silence in public schools
NAACP V. HAMPTON CO.	SCT	Voting discrimination
NEWMAN V. ALABAMA	11TH	Prison conditions
NEWPORT NEWS V. EEOC	SCT	Employment discrimination
ORR V. INDIANAPOLIS	SCT	School desegregation
PALMORE V. SIDOTI	SCT	Race discrimination in child custody proceeding
PARADISE & U.S. V. DEPT. OF PUBLIC SAFETY	11TH	Employment discrimination
PARALYZED VETS V. CAB	SCT;DC	Handicap discrimination
PORT ARTHUR V. U.S.	SCT	Voting discrimination
PRINCE WM. V. MALONE	4TH	School discipline
RAPIDES V. VALLEY & U.S.	SCT	School desegregation
REDWINE V. U.S.	SCT	Criminal

CASE NAME	COURT	SUBJECT MATTER
REICH V. LARSON	SCT	Voting discrimination
RIDDICK V. NORFOLK	4TH	School desegregation
ROGERS V. LODGE	SCT	Voting discrimination
SANTANA V. COLLAZO	1ST;SCT	Conditions in juvenile reformatory
SINGMAN V. U.S.	SCT	Criminal
SIOUX V. PRIOR LAKE	8TH	Voting discrimination
SOUTH FLORIDA CHAPTER V. METRO DADE CTY	11TH	Minority set-aside
ST. PAUL V. REYNOLDS	8TH	Housing discrimination
TENN/MEMPHIS V. GARNER	SCT	Police use of deadly force
THORNBURG V. GINGLES	SCT	Voting discrimination
TIAA-CREF V. SPIRT	SCT	Employment discrimination
UNIV. RICHMOND V. BELL	4TH	Sex discrimination in federally assisted education programs
U.S. V. ALLEG-LUDLUM	7TH	Employment discrimination
U.S. V. AMER FUTURE SYS	3RD	Credit discrimination
U.S. V. BAYLOR HOSPITAL	5TH	Discrimination in federally assisted programs
U.S. V. BLEDSOE	8TH	Criminal
U.S. V. BOWLING & GOMEZ	5TH	Criminal
U.S. V. BROCKWAY	5TH	Criminal
U.S. V. BRONK	7TH	Criminal
U.S. V. BUFFALO	2ND	Employment discrimination
U.S. V. BYRD	4TH	Criminal
U.S. V. CALHOUN	4TH	Criminal
U.S. V. CHARLES & MCANINC	5TH	Criminal
U.S. V. CHICAGO	7TH	Employment discrimination
U.S. V. CHICAGO BD EDUC.	7TH	School desegregation
U.S. V. CINCINNATI	6TH	Employment discrimination
U.S. V. CITY OF MIAMI	5TH	Employment discrimination
U.S. V. CONTRERAS	5TH	Criminal
U.S. V. CONYERS	4TH	Criminal
U.S. V. CRAWFORD	5TH	Criminal
U.S. V. CURRIE	6TH	Criminal
U.S. V. DALLAS COUNTY	11TH	Voting discrimination
U.S. V. DAVILA & JACQ	5TH	Criminal
U.S. V. DEAN	5TH	Criminal
U.S. V. DECOITO	9TH	Criminal
U.S. V. DISE	3RD	Criminal
U.S. V. DISTRICT OF COL.	DC	Employment discrimination
U.S. V. E. BAT RGE[SUPP]	5TH	School desegregation
U.S. V. EBENS	6TH	Criminal
U.S. V. ECTOR CO. ISD	5TH	School desegregation
U.S. V. FRANKLIN	10TH	Criminal

CASE NAME	COURT	SUBJECT MATTER
U.S. V. GARZA	5TH	Criminal
U.S. V. GIBSON	4TH	Criminal
U.S. V. GLISAN	10TH	Housing discrimination
U.S. V. GREGORY	4TH	Employment discrimination
U.S. V. GRIFFIN	4TH	Criminal
U.S. V. HANDLEY	11TH	Criminal
U.S. V. HANIGAN	9TH	Criminal
U.S. V. HAWAII	9TH	Conditions in institutions
U.S. V. HUFF	6TH	Criminal
U.S. V. IRVIN	11TH	Criminal
U.S. V. JURY	5TH	Criminal
U.S. V. KANSAS CITY	10TH	School desegregation
U.S. V. KOZMINSKI	6TH	Criminal
U.S. V. LEE	5TH	Criminal
U.S. V. LUBBOCK ISD	5TH	School desegregation
U.S. V. MARENGO CO.	5TH	Voting discrimination
U.S. V. MARLER	1ST	Criminal
U.S. V. MASS MARITIME	1ST	Sex discrimination
U.S. V. MATTEO	5TH	Criminal
U.S. V. MCKENZIE	5TH	Criminal
U.S. V. MCKINNY	5TH	Criminal
U.S. V. MISSISSIPPI	SCT	Voting discrimination
U.S. V. MS. DEPT. WELFARE	5TH	Employment discrimination
U.S. V. MUSSRY	9TH	Criminal
U.S. V. NEW JERSEY	3RD	Employment discrimination
U.S. V. OLIVER	11TH	Criminal
U.S. V. OTHERSON	9TH	Criminal
U.S. V. PARMA	6TH	Criminal
U.S. V. RAMSEY	11TH	Criminal
U.S. V. SFPD [POA]	9TH	Employment discrimination
U.S. V. SHERER	4TH	Criminal
U.S. V. STARRETT CITY	2ND	Housing discrimination
U.S. V. STONYBROOK	2ND	Handicap discrimination
U.S. V. TEA (PORT ARTHUR)	5TH	School desegregation
U.S. V. TEXAS	5TH	School desegregation
U.S. V. TOWN OF CICERO	7TH	Employment discrimination
U.S. V. UNIV. HOSPITAL	SCT	Handicap discrimination
U.S. V. WAGES	6TH	Criminal
U.S. V. WALKER	5TH	Criminal
U.S. V. WARREN	4TH	Criminal
U.S. V. WARREN	11TH	Criminal
U.S. V. WELLES-BOWEN	6TH	Housing discrimination
U.S. V. WHITE	6TH	Criminal

CASE NAME	COURT	SUBJECT MATTER
U.S. V. WIEMERS & KERN	5th	Criminal
U.S. V. WISCONSIN	7TH	Voting discrimination
U.S. V. WOOD	11TH	Criminal
VALENTINE V. SMITH	SCT	Employment discrimination
VALLEY CON V. MARSH	5TH	Federal contractors
VALLEY V. RAPIDES	5TH	School desegregation
VRA EXTENSION	LEG	Voting discrimination
WAGES V. U.S.	SCT	Criminal
WAINWRIGHT V. HOOKS	11TH	Prison conditions
WALKER V. U.S.	SCT	Criminal
WALLACE V. JAFFREE	SCT	Moment of silence; public schools
WAMBHEIM V. J.C. PENNEY	SCT	Employment discrimination
WARRENSVILLE V. ORS	6TH	Discrimination in federally assisted programs
WASHINGTON V. SEATTLE	SCT	School desegregation
WELCH V. MCKENZIE	5TH	Voting discrimination
WEST MICHIGAN V. FCC	DC	Broadcast licensing
WHITE V. DOUGHERTY CO.	SCT	Voting discrimination
WILLIAMS V. NEW ORLEANS	5TH	Employment discrimination
WISCONSIN V. GOULD	SCT	Preemption
WOOD V. SUNN	D HA	Institution conditions
WYGANT V. JACKSON	SCT	Employment discrimination
ZENTGRAF & U.S. V. TEXAS	5TH	Sex discrimination in federally assisted programs

Senator **Hatch**. With regard to further questioning, I have agreed to stay and give you all the time you need, and then protect the time of Senator Heflin and Senator Biden, who also want to come back and ask some questions. Therefore, I would appreciate it if we could finish. I would like to be finished by 2 if possible, since I have a Utah delegation meeting.

Please continue Senator Kennedy.

Senator **Kennedy**. Well, as I say, I will, if there is going to be additional time in the afternoon, I will try and do it.

Senator **Hatch**. I do not think there will be additional time.

Senator **Kennedy**. But I cannot remain. At this time I will have to submit the——

Senator **Hatch**. All right. If you can submit your questions. We would like those answers back, Mr. Cooper, as soon as possible.

Mr. **Cooper**. Senator Hatch, I will endeavor to provide them as quickly as I can.

Senator **Kennedy**. I will not have the opportunity, if you are going to continue, to hear Mayor Arrington. I just want to extend a warm welcome to the mayor who has had a very distinguished career in public service, and he has been in the leadership on a number of issues, on the questions of basic and fundamental rights, and I know his testimony will be very valuable to this committee. I want to welcome the mayor here. I look forward to reading through his testimony.

Senator **Hatch**. Thank you, Senator Kennedy, and you will submit your questions, and we will try and finish this today.

I would like also to welcome your parents. You have a very fine son, and we appreciate this excellent opportunity he has to serve the country.

Mr. **Cooper, Sr**. And this is quite an opportunity we have to see him in action.

Senator **Hatch**. It is not always easy to see your son probed in the Judiciary Committee but he is handling himself very well.

Let me just ask several questions while we are waiting for the other Senators.

In the Birmingham reverse discrimination case that has been raised, many individual suits were brought by city employees, and they argued that the consent decree contained a provision stating that the city was not required to promote "less qualified" persons, or, "a less qualified person" to satisfy the desegregation order.

The language reads like this:

> Nothing herein shall be interpreted as requiring the city to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure.

Now, as I understand, that is the relevant language. Now this provision of the consent decree suggests that the city was not required to promote a less-qualified person to satisfy some demands for racially preferential promotion policies.

Now this seems to indicate that a consent decree does not require the actions of which the city employees complain. Is that true?

Mr. **Cooper**. Senator, we have advanced that understanding of the language. We think it comports with the plain language of the provision and also, that the interpretation that we have advanced is one that will preserve the validity of the decree, in that it would be in harmony with Federal cases, the Federal case law in this area.

Senator **Hatch**. Moreover, can a consent decree bind parties who were not parties in the original case?

Mr. **Cooper**. Well, that is actually the case law that we are trying to make sure the consent decree does not come into collision with because there have been decisions by the Supreme Court and by the courts of appeals that are binding in the eleventh circuit, that indicate that remedial provisions entered into by consent decree, that adversely affect third parties who were not a party to that decree, and here they objected to the decree, are not enforceable if they adversely affect their legally enforceable interests, and——

Senator **Hatch**. Well as I understand it, these city employees were not part of the original litigation. Am I correct on that?

Mr. **Cooper**. That is accurate. Their petition to intervene was denied.

Senator **Hatch**. So they were not part of the original litigation that produced the disputed decree, and since they were not party to it, could they be bound by a decree to which they were not a party?

Mr. **Cooper**. The law, on the questions of collateral attack, is different in various circuits, but in the eleventh circuit, it is quite clear that under no understanding of res judicata and collateral attack are these nonminority employees bound by the requirements of the decree.

Senator **Hatch**. I notice that the mayor of Birmingham who will testify later, says that, in his statement: "The city still waits in vein for actions giving meaning to Cooper's empty promise." To defend the consent decree is what I think is meant.

Have you undertaken to defend the decree, as promised?

Mr. **Cooper**. Senator, we believe that we have, in good faith, at every step.

Senator **Hatch**. The mayor, in good faith, believes you have not.

Mr. **Cooper**. Well, this has been a hotly contested case. It arises in a context—it brings issues, and raises issues that are very emotional, and that people care a lot about, and unfortunately, there have been some hard feelings that have been generated by this matter and I regret them very deeply.

But I must take exception to the proposition that either I, or the Department has proceeded in this matter in bad faith, or has entered into an attempt to mislead anybody.

Senator **Hatch**. You know, in a recent brief to the Supreme Court, in the case of *U.S.* v. *Friday*—which I believe is sometimes referred to as the *Basemore* case——

Mr. **Cooper**. Yes, sir. That is correct. It is Basemore. It formerly was Basemore against Friday.

Senator **Hatch**. Thank you. You argued that "The mere existence of all-white and all-black 4-H clubs, and Extension Homemaker Clubs in some racially mixed communities, violates neither title VI nor the Equal Protection Clause."

Now, in your opinion, what duty does a private club have to ensure that it complies with legal desegregation requirements?

What actions had the club taken, in this particular case, to remedy what had been a policy of separation of the races prior to the 1964 Civil Rights Act?

Mr. COOPER. Yes, Senator. The position you have just read from our brief is the one that was adopted by the Solicitor General and it is a position on which I concur.

The duty, we believe, in the context——

Senator HATCH. Go ahead.

Mr. COOPER. Yes, sir. The affirmative duty to dismantle de jure discrimination in the context of entirely private and voluntary associations of this kind, such as the attendance at a public park, as I was reflecting upon earlier, is to ensure, is for the public officials to ensure that no one is in any way deterred, discouraged, or excluded on the basis of their race, from participating in those activities, whether it be a public park, or some kind of a private club like a 4-H club. We think that an unequivocal and certain racially neutral membership, or attendance policy, is what is required. One does not—one is not required to insist that individuals attend a particular park over another park, or, a particular club over another club.

Senator HATCH. Am I to understand that these clubs adopted a policy allowing admissions without regard to race?

Mr. COOPER. That was the finding of two courts now, the district court, and the court of appeals, believe that that is the state of facts that were presented in this case.

Senator HATCH. Well, I understand that the position is permitting desegregation to take place at a rate dictated by the choices of individuals. Joining the clubs, however, seems to conflict with the public school desegregation cases, which found that "a freedom of choice" plan, would have resulted in a perpetuation of the separation of the races.

Now how does your brief reconcile these two cases to justify the use of freedom of choice, i.e. a freedom of choice plan for these private clubs?

Mr. COOPER. Well, sir, based upon the fundamental difference between the public education context, and the context in which people associate voluntarily in groups, and in associations that are entirely, as I say, private and voluntary. We think that is a very crucial distinction, and the argument that *Green*, the *Green* case does apply in this context, has been advanced, and is before the Supreme Court, and our view to the contrary is before the Supreme Court and they will decide whether or not that issue is something they want to review on the merits.

But the court of appeals in the case agreed with our view that, indeed, this was simply a different context from public education, and Green does not require more than entirely nondiscriminatory membership policies.

Senator HATCH. Recently, the Supreme Court held in *Memphis Firefighters* v. *Stotts*, that the relief afforded in an employment case ought to be limited to those litigants who can show actual personal harm.

Thus, only those individuals who can show that they lost a job, or other benefits due to impermissible racial discrimination can file suit.

Such individuals must, in order to recover, also show actual harm in order to obtain any form of relief. Now, could you explain the Department's efforts to comply with this decision, and do you think it will frustrate efforts to gain relief for a large class of victims or in any other way set civil rights enforcement back? Because a lot of people have argued that it will.

I would just like your point of view.

Mr. COOPER. Senator, your description of the holding in *Stotts* is one in which the Department concurs and one that I personally concur in.

I have to say that the proper interpretation of the Court's decision in *Stotts* is a matter right now of——

Senator HATCH. Of some dispute.

Mr. COOPER. Of some dispute, yes, indeed. And the courts of appeals, I'm frank to say, have generally seen fit not to adopt our understanding of the *Stotts* case.

Two of the courts of appeals, however, who have ruled in a way that we think is inconsistent with the meaning of *Stotts* two of those decisions have now been taken for review by the Supreme Court, and presumably sometime this term, and hopefully a definitive resolution of this very difficult question will be forthcoming.

Our action in response to *Stotts* and in response to our reading and understanding of the Court's ruling in *Stotts* compelled us to review consent decrees and—well, just decrees of all kinds, litigated as well as consent—to review those decrees to see if the United States was a party to some that contained relief provisions that we did not think could be squared with the Supreme Court's ruling in *Stotts*.

We did that. We undertook to contact the other parties to these consent decrees, made known to them our view that we think there's a problem here with provisions of the consent decree, and we would like to sit down with you in the light of of *Stotts* and work out maybe resolving that problem.

And that process went forward, and it is going forward now on—well, actually I should say it's more or less been placed in suspension now in light of the fact that the Supreme Court has taken two cases.

But that is what we did in the aftermath of the *Stotts* decision.

Senator HATCH. Thank you. I think you've been sitting there for quite some time. We ought to take a 5 minute break. I would like to ask the staffs for Senator's Heflin and Biden to ask them to return. I would like to resume again in 5 minutes, and hopefully we can finish the remainder of the questions before 2 o'clock.

[A short recess was taken.]

Senator HATCH. The committee will reconvene. Let me ask you one more question, Mr. Cooper. I would just like to clarify one point. You stated in response to one of Senator Heflin's questions earlier that you were willing to throw the test scores out the window on the *Birmingham* case. Tell us what you meant by that.

Mr. COOPER. Well, all I mean is that our litigation strategy has not been based on, entirely, on the test scores. It has not been our position that the test scores, proof of, the relative position on the eligibility list, is necessarily proof of relative qualifications.

On the contrary, we have prepared our litigation thus far, such that we could go to trial on nontest evidence of relative qualifications. We do not base our cases on those test scores.

Senator HATCH. Thank you. I'm going to turn to Senator Heflin at this point to let him finish his questions, then hopefully—

Senator HEFLIN. I don't have any further questions. I understand that Senator Biden cannot come back and he would like to request that the hearing record be held open until next Wednesday for submission and answering of written questions by he and some other Senators.

Senator HATCH. Well, let me do this: As I understand it, if we hold the hearing today, your name will be placed on the agenda for tomorrow morning. I presume somebody's going to move to hold that over.

And, that will give us till next Wednesday to have the questions.

Senator HEFLIN. I don't know. All I'm doing is parroting what I've been asked to do.

Senator HATCH. All right. As I understand it, there is an agreement that we will vote on Mr. Cooper on the 31st. So with that understanding, if there are no further questions——

Senator HEFLIN. I have no further questions.

Senator HATCH. I don't either. And, frankly, with that understanding, we'll close the hearing, keeping the record open for any questions that anybody wants to submit to Mr. Cooper, all questions hopefully would be submitted before the end of this week. Mr. Cooper, I'd like to have your answers back by next Wednesday.

Senator HEFLIN. He says he'd like to hold it open until 5 o'clock Wednesday.

Senator HATCH. Hold what open? The right to submit questions till Wednesday of next week? But you'll try to get your questions in by the end of this week so he can answer them, have some time to answer them by 5 o'clock on next Wednesday. That's all we're going to do.

All right. I want to thank you for appearing. I think you've acquitted yourself very well, and we look forward to confirming you. Thank you so much.

Mr. COOPER. Thank you very much, Mr. Chairman.

[Responses to written questions of Senator Kennedy follow:]

Questions for Robert S. Pomerance

1. Are you one of the attorneys who was involved in preparing the draft brief on behalf of the United States to the Supreme Court in *Bob Jones University v. U.S.A.* that was ready to be printed for timely filing in early January 1982, but was not filed by the Department of Justice?

Yes. I was then a line attorney in the Appellate Section of the Tax Division. I wrote most of the Tax Division's draft of that brief.

2a. Prior to the reversal of the Justice Department's position in the case in January 8, 1982, did you attend any meetings or have any discussions with anyone at the Justice Department where you were asked to revise in any way the draft *Bob Jones* brief referred to in Question 1?

The draft I prepared was, of course, reviewed by senior attorneys within the Tax Division, including Michael L. Paup, Chief of the Appellate Section. Apart from that, I attended one meeting with people outside the Division where I was asked to revise the draft brief. See responses to questions below.

2b. For each such meeting or discussion, name the persons present, state the date and place it occurred and describe as precisely as you can recollect the substance of the discussion, including who said what.

See attached sheets

2c. If Mr. Charles Cooper was present at any such meetings or discussions, did Mr. Cooper say anything to indicate he wanted you to change the draft brief? If so, what did Mr. Cooper say?

I understood Mr. Cooper's statement at the meeting (see response to question 2b) to indicate that he wanted the Tax Division to change the draft brief.

2d. If Mr. Cooper was present at any such meetings or discussions, did he indicate any disagreement with suggestions made by others to change the draft brief? If so, what did Mr. Cooper say?

At the meeting described above, Mr. Cooper indicated no disagreement with Mr. Fein's suggestions for changing the brief.

3a. In the attached *St. Louis Post Dispatch* article of January 12, 1982, the following is stated: "In the week after Christmas, Fein called the author of the brief and other attorneys to a meeting. He told them, sources said, that he was dissatisfied with the brief because it presented the government's 11-year old position in a positive light and that was not what he wanted." Please state whether you were at any meeting where Mr. Fein, in substance, indicated something to the above effect. State, as best as you can recollect, precisely what Mr. Fein said and how the others at the meeting reacted and responded.

The meeting in question occurred before Christmas, not after. At the meeting, Mr. Fein did express, in substance, what is attributed to him in the newspaper article. See responses to questions 2b, 2c, and 2d.

3b. Was Mr. Charles Cooper present at this meeting.

See responses to questions 2b, 2c, and 2d.

3c. If Mr. Cooper was present at this meeting, did he indicate whether he agreed with Mr. Fein's position? If so, how did he so indicate?

See responses to questions 2b, 2c, and 2d.

3d. If Mr. Cooper was present at this meeting, did he indicate whether he disagreed with Mr. Fein's position? If so, who did he so indicate?

See responses to questions 2b, 2c, and 2d.

4. Have you discussed these questions and answers with anyone? If yes, please state with whom you have discussed them.

I have discussed these questions and answers with Messrs. Murray and Paup.

ATTACHMENT

2b. The Tax Division's draft of the brief was completed by December 17, 1981. On December 22, 1981, I attended a meeting in the office of Bruce E. Fein, then Associate Deputy Attorney General. Present were Mr. Fein, Charles Cooper, then a Special Assistant to the Assistant Attorney General of the Civil Rights Division, and, from the Tax Division, John F. Murray, then Acting Assistant Attorney General, Gilbert E. Andrews, then Deputy Assistant Attorney General, Mr. Paup, and myself.

At the meeting, Mr. Fein directed most of his remarks to the four of us from the Tax Division. He said that he was speaking for Edward Schmults, then Deputy Attorney General, who, Mr. Fein said, was number two in the Department in terms of authority. Mr. Fein said that he (Fein) was dissatisfied with the Tax Division's draft brief, and that there were several changes that he wanted us to make to the brief.

First, Mr. Fein said that he wanted us to find out, and put in the brief's statement of facts, how much it cost to educate a child in the public schools of South Carolina, where Bob Jones University is located. He said that he wanted the brief to show that the University, by educating children who would otherwise attend the public schools, was to that extent relieving the burden of the taxpayers of South Carolina.

Second, Mr. Fein said that he wanted us to strike from the brief the argument that the racially restrictive admissions policies of Bob Jones University and Goldsboro Christian Schools violated the provisions of the Civil Rights Act of 1866 which guarantee blacks the same right to make and enforce contracts as white people have. Our argument to that effect was based on Runyon v. McCrary, 427 U.S. 160 (1976).

Third, Mr. Fein said that we should drop our argument that the Commissioner of Internal Revenue had discretion to construe the charitable exemption provisions of the tax code in light of Brown v. Board of Education, 347 U.S. 483 (1954), the Civil Rights Act of 1964, and other evidence of contemporary public policy regarding race discrimination. Mr. Fein said that we should indicate in the brief, instead, that the interpretation of the charitable exemption provision was controlled by the intent of the Congress that first enacted that provision in 1894.

At several points during this meeting, the four of us from the Tax Division indicated to Mr. Fein that there was sufficient authority for the positions taken in the brief, and that Mr. Fein's proposed changes would make the brief less effective. The Tax Division never made any of the changes that Mr. Fein suggested.

I recollect Mr. Cooper making one statement during the course of this meeting. As I recall it, he said of our draft brief that "the brief would be fine as it is, if we wanted to win the case."

11/1/85

Questions for Lawrence G. Wallace

1. Are you one of the attorneys who was involved in preparing the draft brief on behalf of the United States to the Supreme Court in Bob Jones University v. U.S.A. that was ready to be printed for timely filing in early January 1982, but was not filed by the Department of Justice?

Yes.

2a. Prior to the reversal of the Justice Department's position in the case in January 8, 1982, did you attend any meetings or have any discussions with anyone at the Justice Department where you were asked to revise in any way the draft Bob Jones brief referred to in Question 1?

No. The only meetings I attended involved discussion of whether the government should change its position, but no one at these meetings asked me to revise the draft brief in any way. It was always the understanding that I had to have a draft brief ready for filing in case the conclusion of discussions would be that the government would not change its position, and that other lawyers in the Department who advocated a change would prepare an alternative brief (based in part on the draft brief) if that became necessary.

2b. For each such meeting or discussion, name the persons present, state the date and place it occurred and describe as precisely as you can recollect the substance of the discussion, including who said what.

As I have explained, there were no such meetings or discussions.

2c. If Mr. Charles Cooper was present at any such meetings or discussions, did Mr. Cooper say anything to indicate he wanted you to change the draft brief? If so, what did Mr. Cooper say?

As I have explained, there were no such meetings or discussions.

2d. If Mr. Cooper was present at any such meetings or discussions, did he indicate any disagreement with suggestions made by others to change the draft brief? If so, what did Mr. Cooper say?

As I have explained, there were no such meetings or discussions.

3a. In the attached St. Louis Post Dispatch article of January 12, 1982, the following is stated: "In the week after Christmas, Fein called the author of the brief and other attorneys to a meeting. He told them, sources said, that he was dissatisfied with the brief because it presented the government's 11-year old position in a positive light and that was not what he wanted." Please state whether you were at any meeting where Mr. Fein, in substance, indicated something to the above effect. State, as best as you can recollect, precisely what Mr. Fein said and how the others at the meeting reacted and responded.

I attended no meeting at which Mr. Fein made any remarks to that effect.

3b. Was Mr. Charles Cooper present at this meeting.

I attended no such meeting.

3c. If Mr. Cooper was present at this meeting, did he indicate whether he agreed with Mr. Fein's position? If so, how did he so indicate?

I attended no such meeting.

3d. If Mr. Cooper was present at this meeting, did he indicate whether he disagreed with Mr. Fein's position? If so, who did he so indicate?

I attended no such meeting.

4. Have you discussed these questions and answers with anyone? If yes, please state with whom you have discussed them.

No.

Lawrence G. Wallace
Deputy Solicitor General
November 1, 1985.

Questions for John F. Murray

1. Are you one of the attorneys who was involved in preparing the draft brief on behalf of the United States to the Supreme Court in Bob Jones University v. U.S.A. that was ready to be printed for timely filing in early January 1982, but was not filed by the Department of Justice?

No, except that it was prepared under my general overall supervision as Acting Assistant Attorney General for the Tax Division for this particular case. The Assistant Attorney General, Glenn L. Archer, Jr., was disqualified. I took no part in the actual preparation of the brief.

2a. Prior to the reversal of the Justice Department's position in the case in January 8, 1982, did you attend any meetings or have any discussions with anyone at the Justice Department where you were asked to revise in any way the draft Bob Jones brief referred to in Question 1?

I attended one meeting where the draft brief prepared by the Tax Division was discussed but that meeting did not result in a request to me or any Tax Division personnel to revise the brief.

2b. For each such meeting or discussion, name the persons present, state the date and place it occurred and describe as precisely as you can recollect the substance of the discussion, including who said what.

The meeting took place on December 22, 1981, in the office of Bruce Fein, Associate Deputy Attorney General. In attendance were Mr. Fein; Gilbert E. Andrews, Deputy Assistant Attorney General from Tax Division; Michael Paup, Chief of Appellate Section, Tax Division; Robert Pomerance, line attorney in Appellate Section of Tax Division; Charles Cooper, then Special Assistant in Civil Rights Division; and myself.

I have no notes or memoranda as to the meeting in Mr. Fein's office. However, I have consulted with Messrs. Paup and Pomerance in an effort to recall what occurred. As thus aided, the things I recall are that Bruce Fein was dissatisfied with our submission and had several suggested changes both to the statement of facts and the argument portion. He said the statement should include figures as to the cost to educate students in public schools in North and South Carolina, thus showing the monetary savings to the states which result from private schools. He said our legal argument should focus on 1896, when the statute was passed, and we should seek the legislative intent as of that time. He disagreed with our emphasis on the Civil Rights Act and the Supreme Court decision in Runyon v. McCrary. I have no recollection of any comments made by Mr. Cooper. The meeting ended with Mr. Fein's statement that he, assisted by Mr. Cooper, would work on revising the brief.

2c. If Mr. Charles Cooper was present at any such meetings or discussions, did Mr. Cooper say anything to indicate he wanted you to change the draft brief? If so, what did Mr. Cooper say?

See 2b. Mr. Cooper said nothing, to my recollection.

2d. If Mr. Cooper was present at any such meetings or discussions, did he indicate any disagreement with suggestions made by others to change the draft brief? If so, what did Mr. Cooper say?

See 2b. and 2c.

3a. In the attached St. Louis Post Dispatch article of January 12, 1982, the following is stated: "In the week after Christmas, Fein called the author of the brief and other attorneys to a meeting. He told them, sources said, that he was dissatisfied with the brief because it presented the government's 11-year old position in a positive light and that was not what he wanted." Please state whether you were at any meeting where Mr. Fein, in substance, indicated something to the above effect. State, as best as you can recollect, precisely what Mr. Fein said and how the others at the meeting reacted and responded.

The meeting referred to occurred on December 22, 1981, not after Christmas, and is discussed in the fullest detail I can possibly recall in my answer to Question 2b.

3b. Was Mr. Charles Cooper present at this meeting?

See answers to 2b. through 2d.

3c. If Mr. Cooper was present at this meeting, did he indicate whether he agreed with Mr. Fein's position? If so, how did he so indicate?

See answers to 2b. through 2d.

3d. If Mr. Cooper was present at this meeting, did he indicate whether he disagreed with Mr. Fein's position? If so, who did he so indicate?

See answers to 2b. through 2d.

4. Have you discussed these questions and answers with anyone? If yes, please state with whom you have discussed them.

Yes, I discussed with Messrs. Paup and Pomerance my and their recollections of the December 22, 1981, meeting referred to above.

11/1/85

[From the St. Louis Post Dispatch Jan. 12, 1982]

POLITICAL AIDES FORCED SHIFT ON BIAS POLICY

(By Lawrence M. O'Rourke)

WASHINGTON.—Political appointees of the Reagan administration overrode career Justice Department lawyers in reversing a federal policy denying tax-exempt status to private schools and colleges that practice racial discrimination, according to those familiar with the chain of events.

Sources said Monday that on one occasion an aide to Attorney General William French Smith told the lawyers and Deputy Solicitor General Lawrence G. Wallace that their legal arguments against the racially segregating schools would have to yield to the Republican Party platform.

Washington lawyers said Wallace refused last month to a four-page document written by Smith aide Bruce H. Fein stating that the Justice Department had decided that its 11-year policy of denying tax-exempt status to those schools had been in error, Wallace was the top official on the case from the solicitor's office.

Sources said Fein, our associate deputy attorney general, called Wallace and threatened to have him disciplined by Solicitor General Rex Lee. Lee previously had disqualified himself from the case.

After further negotiations, Wallace agreed to sign a factual statement in which the Reagan administration reversed the Justice Department policy.

Lawyers in a position to know the details of the case said Fein had exerted pressure in recent months upon staff lawyers in the tax division and in the Internal Revenue Service to reverse the federal position.

The policy had been developed in the Nixon administration in response to a court case. The Justice Department had reaffirmed the policy as recently as last September. When the department asked the U.S. Supreme Court to affirm lower court decisions upholding the tax-exempt ban.

The high court then was considering a case involving Bob Jones University of Greenville, S.C. and Goldsboro Christian Schools of Goldsboro, N.C.

Although some Justice Department lawyers opposed agreeing to Supreme Court review of lower court decisions on the tax exemption issue, they joined in preparing the government's statement after they were assured personally by Wallace that the policy remained unchanged in the Reagan administration.

The job of writing the federal position was assigned to a lawyer in the Justice Department's tax division. He wrote a brief restating the federal attitude that the schools should not enjoy tax-exempt status because their practices of racial discrimination violate the Constitution.

The lawyer completed his brief in early December and submitted it as required to the Solicitor general's office. Fein and Deputy Attorney General Edward C. Schmults were given copies at their request.

In the week after Christmas, Fein called the author of the brief and other lawyers to a meeting. He told them, sources said, that he was dissatisfied with the brief because it presented the government's 11-year-old position in a positive light and that was not what he wanted.

When the lawyers refused to draft a brief reversing the federal position, a decision was made that the government could not go forward with an updated policy statement. The government asked the court for additional time, and it was granted.

It was at this point, sources said, said that Fein wrote a four-page "confession of errors," reversing the government's position, and gave it to Wallace for submission to the Supreme Court. Wallace refused to file the document and Fein threatened to have him disciplined.

There were previous conflicts between Fein and various Justice Department attorneys over the tax exemption issue. Fein had been involved in the unusual practice of forwarding to the staff lawyers letters from Southern members of Congress calling upon the administration to reverse its policies.

Sources said the lawyers were instructed on one occasion to meet with Fein, acting tax division head John Murray and Carolyn Kubl, a special assistant to Attorney General Smith.

After Wallace explained the Federal policy, sources said. Ms. Kubl said the legal arguments had to yield to the Republican Party platform position on tax-exempt status for private schools that segregate.

Senator HATCH. We'll now finish the hearing by calling our last witness to the stand, Hon. Richard Arrington, Jr., the mayor of the city of Birmingham, AL.

Senator HEFLIN. Mr. Chairman, as a matter of personal privilege, I would like to introduce Mayor Arrington to the committee.

Senator HATCH. We'd be glad to have you do that, Senator.

Senator HEFLIN. I'm delighted to welcome Mayor Richard Arrington of Birmingham, and introduce him to this committee.

Mayor Arrington was elected to the city's highest office in 1979, and he is currently serving his second term. Prior to his election, Mayor Arrington was a highly respected and accomplished educator. He holds a Ph.D. in zoology and biochemistry. Mayor Arrington served as an academic dean at Miles College and as an assistant professor at the University of Alabama at Birmingham. He's a National Science Foundation Research Fellow, a consultant in the field of higher education for the U.S. Office of Education and the Ford Foundation.

He also served as executive director of the Alabama Center for Higher Education. During his term as mayor, there have been remarkable accomplishments made in Birmingham. Under his leadership the crime statistics have drastically dropped. The inner city has had a remarkable growth. Now you can see buildings, skyscrapers going up which he has encouraged, and under his leadership fostered and nurtured and brought about. And Birmingham, in my judgment, has been revitalized under his leadership, and it is my pleasure to present to the committee my friend Dick Arrington.

Senator HATCH. Mayor Arrington, I want to welcome you as well, and to have that kind of introduction by your own senior Senator is, I think, quite a tribute.

Mayor ARRINGTON. Thank you, Senator.

Senator HATCH. We'd like to swear you in before we begin. Senator Thurmond does that with all witnesses.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mayor ARRINGTON. I do.

Senator HATCH. Thank you. We're delighted to have you here. We look forward to your testimony, and if you could summarize, we would appreciate it. We were going to limit you to five minutes, but since you're the last person testifying, I'd like to give you what you need. However it would be appreciated if you would summarize your statements.

STATEMENT OF HON. RICHARD ARRINGTON, JR., MAYOR OF THE CITY OF BIRMINGHAM, AL

Mayor ARRINGTON. Thank you, Mr. Chairman.

What I would like to submit for the record with the approval of the committee are a couple of documents that I think will supplement and expand upon the statement I have made.

One is a letter addressed to the chairman of the committee by the counsel for the city in this case. And I would like permission for that to become a part of the record. I have copies here.

I will also make some brief references to the testimony and the involvement of Mr. Richard Ritter of the Justice Department, and I would like to request that his deposition be included as a part of the record.[1]

Senator HATCH. Without objection, we'll place both documents in the record at this point, and take your testimony.

[The material follows:]

---

[1] Material can be found in committee files.

LAW OFFICES
JOHNSTON, BARTON, PROCTOR, SWEDLAW & NAFF
1100 PARK PLACE TOWER
BIRMINGHAM, ALABAMA 35203

GILBERT E. JOHNSTON
JAMES C. BARTON
G. BURNS PROCTOR, JR.
ALFRED SWEDLAW
ALFRED M. NAFF
SYDNEY LAVENDER
ALAN W. FELDMAN
JEROME K. LANNING
[illegible], JR.
CHARLES L. ROBINSON
HUBERT A. GRISSOM, JR.
J. WILLIAM ROSE, JR.
GILBERT E. JOHNSTON, JR.
DAVID P. WHITESIDE, JR.
TIMOTHY S. CORLEY
RALPH H. SMITH
PATRICIA CLOTFELTER
MICHAEL L. HALL
JAMES C. BARTON, JR.
THOMAS E. WALKER
ANNE P. WHEELER
DAVID R. TINKLER
HOLLINGER F. BARNARD
BRUCE H. WYNN
WILLIAM D. JONES III
PATRICK H. LAVETTE
[illegible]

TELEPHONE [illegible]
AREA CODE [illegible]

October 29, 1985

The Honorable Strom Thurmond
Chairman, Senate Committee
on the Judiciary
Room 224, Dirksen Senate Office Building
Washington, D.C. 20510

Re: Charles J. Cooper Confirmation Hearing

Dear Mr. Chairman:

I am the lead attorney representing the Personnel Board of Jefferson County, a party to the lawsuits involved in the Birmingham Reverse Discrimination cases and a signatory to one of the consent decrees that form the central focus of this litigation. We have represented the Personnel Board in these matters since 1975, many years before Mr. Charles J. Cooper of the Department of Justice became involved in the case.

Your file on the nomination of Mr. Cooper to be Assistant Attorney General for the Office of Legal Counsel will reflect that I have earlier made my personal support of this nomination known to Senators Heflin and Denton by letters of October 22, 1985. I have recently been provided a copy of Mayor Richard Arrington's testimony opposing Mr. Cooper's confirmation, however, and I believe that an elaboration on my thoughts about Mr. Cooper is now warranted.

While I was not acquainted with Mr. Cooper prior to his activity in the Birmingham Reverse Discrimination cases, I have come to know him through his involvement in this litigation. I can state without hesitation or qualification that his professional conduct and personal demeanor in this matter have been exemplary in every respect. His personal demeanor, both before the court and in private dealings among counsel for the parties, has been unfailingly courteous and respectful. He has advanced the position of the United States in an entirely professional and straightforward manner.

The contrary claims of Mayor Arrington spring largely from the charge that the Department of Justice has attacked the City of Birmingham's consent decree previously entered in the Birmingham Reverse Discrimination case, despite Mr. Cooper's vow to defend the decree's validity. In fact, the Department has defended the Birmingham decree, urging the court to dismiss the claims of the complaint that attack the validity of the decree. The dispute in the case has centered largely on the decree's proper interpretation, and the Justice Department has advanced a legitimate interpretation of the Birmingham decree. The City of Birmingham disagrees with the Justice Department's interpretation of the decree, but there is simply no basis for the charge that the Department or Mr. Cooper has misled anyone on this or any other matter arising in this litigation. I firmly believe that the Department and its lawyers, including Mr. Cooper, have advanced the position of the United States in good faith, and there is absolutely no evidence to support a contrary claim.

In sum, I believe Chuck Cooper to be an honest and honorable man, and his conduct in this case has reinforced, not diminished, that belief.

Very truly yours,

David P. Whiteside

David P. Whiteside, Jr.

Senator HEFLIN. Mr. Chairman, before we start, in view of the other documents that should be put in the record, I suppose since we've gone over this case in a previous hearing, but pertaining to Mr. Reynolds, I think there are some other documents. I hadn't thought about that.

Senator HATCH. Why don't we keep the record open and have the chairman and ranking minority member work those out. Some of them are privileged, and we will have to have them work it out. But I'm sure they can.

I'm glad you raised that.

Senator HEFLIN. There are various letters and other documents that should be put in the record to make it complete.

Senator HATCH. Without objection, we'll keep the record open on that basis, that the chairman and the ranking minority member will resolve those documentary problems, and we'll go from there.

Mayor, the time is yours.

Mayor ARRINGTON. Thank you, sir.

It is my understanding that the text of my testimony, which I have submitted, will be included in the record in its totality. So I shall just speak to a few points and try to direct my remarks largely to matters that I think relate directly to the matter that's before you as it relates to the nomination of Mr. Charles J. Cooper to the Office of Legal Counsel in the Justice Department.

Let me say I come before you today not as a Democratic mayor, nor as a black mayor, but certainly as the elected mayor of Birmingham, AL, a city that is slightly over one-half black, slightly under one-half white.

Most importantly, I come here not to fight over Birmingham's regrettable history of racial oppression, but to fight for the city's bright future of racial harmony.

I need not belabor Birmingham's history of racial injustice, nor should I minimize the significant progress that we have made in the city of Birmingham in the past 20 years. Without that progress, I would not be here today addressing this committee on this matter, or serving in the position in which I serve.

But I do have to point out that many blacks and women ironically employed by the city of Birmingham have not enjoyed the benefits of that progress that I have mentioned. Rather, they continue to suffer the effects of a long history of insitutional discrimination, based on race and sex.

In 1974 the records will show that several blacks and a Birmingham chapter of the NAACP brought this discrimination lawsuit against the personnel board in that county. It will also show that subsequently the Department of Justice also filed a title VII lawsuit, and that those suits were consolidated. The cases were litigated for about 7 years. Finally, at the suggestion and at the instigation of the Justice Department, all parties involved, the city, the Department of Justice, and the private plaintiffs, entered into negotiations to settle the lawsuits.

Those negotiations resulted in a court-approved consent decree signed by the private plaintiffs, signed also by the city of Birmingham, and by the Department of Justice, and became effective on August 21, 1981.

During that litigation, some issues were litigated to conclusion, especially in the fire and police departments, and findings were entered by the court.

Now, this consent decree was signed by lawyers for the private plaintiffs, by the city attorney, by Mr. Richard Ritter of the Justice Department's Civil Rights Division.

At that time, Mr. Ritter was lead counsel for the Justice Department in the Birmingham discrimination litigation, and was the Justice Department lawyer who successfully negotiated the city's consent decree, as well as a companion personnel board decree among parties with widely divergent interests.

Before the consent decree was signed, the Federal district juries did have the fairness hearing. At that hearing, there was one objection from the Fire Fighters' Association. The objections were overruled by the Federal district judge who stated that the hiring and promotion goals, though clearly preferential, were constitutional and otherwise lawful.

Thus, in 1981, before Mr. Charles Cooper became involved in the Birmingham employment discrimination matters, the city of Birmingham, with the help, and even the prodding of the Justice Department, had begun to promote qualified blacks and women, and thereby correct the effects of long-time discrimination.

After signing of the consent decree, the Civil Rights Division of the Justice Department, and its then lawyer in the Birmingham case, Richard Ritter, were supportive of the Birmingham decree.

To that end, when the decree was challenged in court by seven employees of the city engineering department, Mr. Ritter, on behalf of the Justice Department, on October 12, 1982, filed a motion to dismiss the challenge, or alternatively, a motion for summary judgment in favor of the city of Birmingham and other defendants.

Mr. Ritter and the Civil Rights Division maintained that the plaintiff's action constituted an impermissible collateral attack on the consent decree entered into by the United States with the city of Birmingham and the Jefferson County Personnel Board.

I mention that point here because subsequently Mr. Cooper would later move to have Mr. Ritter's motion dismissed in court.

Now, let me turn to my comments that I think bear directly upon the question of Mr. Cooper's nomination. Our perception of Mr. Cooper is that he is the active lead attorney in what is called the reverse discrimination suit in the city of Birmingham.

He has participated in the arguments, at least twice, before the district courts. He has participated in the depositions that have been taken, and, quite frankly, my perception and that of our attorneys is that the Justice Department has closely aligned itself with the attorneys for the white male plaintiffs in this case.

Far from being what we call an objective factfinder, whom we think would have shared information with all parties, the sharing of information between Mr. Cooper and his staff in this case has largely been with those plaintiffs, the white males who have filed this suit.

Mr. Charles Cooper made his first appearance in this litigation at the invitation of the Honorable William M. Acker, Jr., U.S. District Judge for the Northern District of Alabama at a hearing on

February 28, 1984. That was without consultation with other parties, and certainly counsel for the city informs me that the judge nor anyone in the Justice Department consulted with them prior to this time.

At that hearing, Mr. Cooper made known the Justice Department's intention to enter a reverse discrimination lawsuit against the city of Birmingham as a party-plaintiff—although Judge Acker invited intervention, he did not suggest that the U.S. intervene on behalf of plaintiffs—Mr. Cooper thereby aligning himself, and the Justice Department, with the white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the consent decree.

Mr. Ritter's signature on behalf of the Justice Department on the consent decree apparently meant very little to Mr. Cooper.

At that hearing, he made it clear to the court and to all parties that he, Charles Cooper, and not Attorney Ritter, was to receive all correspondence for the Justice Department's Civil Rights Division, in the reverse discrimination litigation.

Clearly, Charles Cooper's appearance in this case drastically altered both the substance and tone of the Justice Department's position in these lawsuits.

Paradoxically, however, despite his stated intention to intervene as a party plaintiff, and contest promotions made pursuant to the consent decree's goals, Mr. Cooper also vowed that the United States plans to vigorously defend the validity of those consent decrees, and to defend the validity of any remedial measures required by those consent decrees.

Now, 1½ years later, the city still waits in vain for actions that give meaning to Mr. Cooper's empty promises.

It seems to me that by definition the United States entry into this lawsuit as a party plaintiff to challenge the consent decree was in direct violation of his obligation under paragraph 3 of the consent decree to defend the consent decree against collateral attack.

Further, a month later, Mr. Cooper filed a motion on behalf of the United States to withdraw the earlier motion filed by Mr. Ritter on behalf of the United States which had asked that the attack on the consent decree be dismissed, or in the alternative, that summary judgment be issued for the city of Birmingham.

Again, how Mr. Cooper justifies this action in light of the solemn obligation of paragraph 3 of the consent decree I do not know. Particularly perplexing is his continuing vow to defend the consent decree, even while filing papers attacking that same decree.

On May 4, 1984, Mr. Cooper filed a brief in response to the city's motion to dismiss the collateral attack upon the decree. In that brief, Mr. Cooper outlined a theory of the consent decree that, at best, can be described as disingenuous, and can be more accurately described as an Orwellian "newspeak" approach to interpreting the goals provided in the consent decree.

Cooper's theory states that the goals and preferences as to race and sex in hiring and promotion take race into account in what he calls the tie-breaker situations, that is, when two candidates in every respect are equally well qualified.

Mr. Cooper has maintained that position as recently as July 3, 1985, when again before Judge Pointer he stated that it was the

Justice Department's position that the decree would contemplate a tie-breaker use of race, but that would be it.

It was our position he said in that document that the use of race beyond that narrow limitation would be inconsistent with existing Federal law.

After first hearing of the tie-breaker theory of the consent decree, Judge Pointer rejected that view out of hand, saying, "I do not view it as the United States does, however, as merely being a tie breaker situation. That is not the words, either, of the consent decree."

Further, the court cautioned the United States in this area, stating, "Now I have indicated I have some disagreement with the United States' position, as it talks only about the tie breaker. And as I view it, there is a broader area of mandated requirements under the decree."

Clearly Judge Pointer, as well as Mr. Ritter of the Justice Department, and the city of Birmingham understood the consent decree to allow the city to grant preferences based on race and sex, as to hiring and promotion so long as the individuals were qualified. Mr. Cooper consistently fails to understand this reading of the consent decree.

Again in the May 1984 hearing before Judge Pointer, as in February, the hearing before Judge Acker, Mr. Cooper vows that the United States has every intention of vigorously defending the validity of the decree, and all of the relief required by the decree.

He said, "Your Honor, we have not taken one false step from that commitment and that obligation." The court's response was, "That is a matter that obviously is debatable."

Now, with all due respect to Mr. Cooper and to this Committee, Mr. Cooper's vows to defend the decree and his comment that no false steps have been taken from the Justice Department's commitment to the decree are not true.

The only arguable justification for Mr. Cooper's attack on the consent decree in February 1984 before Judge Acker, or his motion before Judge Pointer of March 1984, or his brief before Judge Pointer of May 1984, and for his appearance before Judge Pointer on May 14, 1984, would be that the Justice Department's failure to defend the decree was justified by an arguable change in the law in the Supreme Court's decision in what's known as the Stotts case.

Yet, the Supreme Court of the United States did not render that decision until June 12, 1984, after Mr. Cooper had already taken these positions. Moreover, I am informed that none of the courts of appeals have accepted the sweeping construction advocated by Mr. Cooper in that particular decision.

Consequently, the city of Birmingham feels that it has been betrayed by the Civil Rights Division of the Justice Department, but, more specifically, that it has been betrayed by Charles J. Cooper of the Civil Rights Division.

We cannot fail to note that as long as Richard Ritter was handling this case for the Justice Department that the positions taken by that Department were generally consistent with the obligations it imposed upon itself by signing the consent decree with the city of Birmingham.

On the other hand, actions taken by Mr. Cooper have been blatantly inconsistent with the obligations of the decree, and have also been intrinsically contradictory by his vows to continue to defend the decree while at the same time challenging the decree as a plaintiff in a reverse discrimination lawsuit.

Further, his theories about the provisions requiring affirmative action goals and preferences to be used only in tie-breaker situations are facile and disingenuous.

Finally, I would like to raise the issue of the Justice Department's efforts to prevent the city and the other defendant intervenors in the reverse discrimination litigation from taking the deposition of Mr. Ritter who is still a lawyer with the Civil Rights Division of the Justice Department.

Mr. Cooper's attempts to prevent this deposition from being taken included a last minute effort of his attorneys to have the deposition sealed ex parte, a decision that was later overturned by Judge Pointer in Birmingham.

I can only conclude that Mr. Cooper feared the revelation of the degree of difference in the Justice Department's interpretation of the decree in 1981 as opposed to its interpretation after Mr. Cooper entered the lawsuit.

Mr. Cooper maintains that the Justice Department's interpretation has not changed since August 1981. But even a cursory reading of the Ritter deposition, which we have put in the record here, would reveal that Mr. Ritter the lawyer who negotiated the decree would dispute that belief.

To that extent, I believe that Mr. Cooper was not simply a lawyer doing his job, but, in fact, was a lawyer who was actively misrepresenting facts and allegations before a court of law, and was a lawyer who was openly betraying a solemn obligation of the U.S. Justice Department that had been incurred before his arrival, and that because that obligation arose before he entered the lawsuit, he apparently felt not bound by that obligation.

Now, if public office holders were bound only by the formal obligations incurred during their own terms of office, then Government, and governmental services would come to a screeching halt after every appointment or election. Each successive office holder or administration would be forced to reinvent the wheel, instead of building upon the good works of previous office holders.

In closing, let me say I have outlined for you the reasons for my opposing this nomination. In sum, I would like to point out several things.

First, my objection is not simply based on a preference for the policies of one administration over those of another administration for, as you will note, the consent decree with the city of Birmingham was signed over 6 months after the current administration had taken office.

Second, my objections are not based on an arguable difference in interpretation of laws or over an arguable view that the law has changed, but rather that the United States attacked the consent decree with the city of Birmingham and thereby violated its obligations of paragraph 3 of the consent decree with the city of Birmingham.

Third, Mr. Cooper has attempted to mislead the Federal court in Birmingham as to the Department's intention to defend vigorously the provisions of the consent decree.

Fourth, Mr. Cooper's interpretation of the decree is clearly incorrect, insupportable and obviously has been rejected by the court and contradicted by Mr. Ritter.

Fifth, he has forced the city to incur extraordinary legal fees in defending against the Justice Department's attempts to violate the provision of a document that the Justice Department itself encouraged the city to sign some years ago.

In short, I believe that Mr. Cooper has betrayed his obligations to the city under the consent decree, has mislead the Federal court in Birmingham, and I encourage you to reject his nomination for the Office of Legal Counsel in the Justice Department.

Thank you very much.

[The statement of Mayor Arrington follows:]

TESTIMONY OF RICHARD ARRINGTON, JR., MAYOR OF BIRMINGHAM, ALABAMA BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY

OCTOBER 23, 1985

* *

Mr. Chairman, members of the Judiciary Committee, I welcome the opportunity to speak briefly to this distinguished Committee on a subject that is most troubling to me, namely, the nomination of Charles J. Cooper to the Office of Legal Counsel in the Justice Department.

I come before you today, not as a Democratic mayor, nor as a black mayor, but simply as the elected Mayor of Birmingham, Alabama, a city that is slightly over one-half black, slightly under one-half white. Most important, I come here not to fight over Birmingham's regretable history of racial oppression, but to fight for the City's bright future of racial harmony.

I need not belabor Birmingham's history of racial injustice. Nor do I wish to minimize the progress that has been made in twenty years. Absent progress, I would not be addressing this body today. Many blacks and women, ironically employed by the City itself, however, have not enjoyed the benefits of that progress. Rather, they continue to suffer the effects of a long history of institutional discrimination based on race and sex.

In 1974, several blacks and a Birmingham chapter of the NAACP, brought an employment discrimination lawsuit against the Jefferson County Personnel Board (the local civil service system), the City of Birmingham, and other municipalities, under Title VII of the Civil Rights Act of 1964. Subsequently, the Department of Justice also filed a Title VII lawsuit against the City charging the City with both race and sex discrimination in employment. The cases were consolidated in Federal District Court in Birmingham, and were litigated ~~being prepared for litigation by lawyers~~ for approximately seven years.[1] Finally, at the suggestion and instigation of the Department of Justice, all parties -- the City, the Department of Justice, and the private plaintiffs — entered into negotiations to settle the lawsuits. Those negotiations resulted in a court-approved consent decree, signed by the private plaintiffs, by the City of Birmingham, and by the Department of Justice, which became effective on August 21, 1981.

As its lynchpin, the Consent Decree included an affirmative action program whose long-term goal was to achieve a municipal work force whose percentages of whites, blacks and women was in reasonable proportion to the percentages of those groups in the labor force of Jefferson County. The Decree also provided interim goals that encouraged the City to hire and promote qualified blacks and women, where available, to City vacancies at rates that ranged from 15% to 30% annually for women in particular job classifications and that ranged from 33% to 50% annually for blacks in particular job classifications. For the past four years the City has complied with the Consent Decree goals to the extent that persons qualified for hiring or promotion were available. Because the Consent Decree had goals —

1/ Some issues - involving employee testing for ~~certain jobs —~~ police and fire were tried to conclusion.

and not quotas -- the City was never compelled to hire any particular individual who was not qualified for his or her position.

Moreover, the Consent Decree contained a provision that was designed to prevent the City from being liable to a subsequent discrimination charge brought by a passed-over employee for the City's failure to promote, _inter alia_, that employee pursuant to the affirmative action goals. That provision, in paragraph 2, stated: "Nothing herein shall be interpreted as _requiring_ the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less-qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure." This provision allowed the City the flexibility to decline to hire or promote an individual even though that individual might otherwise be a prospect for hire or promotion under the Consent Decree. Finally, paragraph 3 of the Consent Decree provided that "the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack." In short, the City understood that the Consent Decree provided redress for past discrimination, allowed the City to maintain qualified employees consistent with the civil service law, and required all parties to defend the Decree so that, among other things, the City would not have to expend taxpayer dollars on legal fees for the defense of employment discrimination lawsuits. After seven years of litigation, the City hoped to put those tax dollars to constructive use.

This Consent Decree was signed by lawyers for the private plaintiffs, by the City Attorney, and by Richard Ritter, of the Justice Department's Civil Rights Division. At that time, Mr. Ritter was lead counsel for the Justice Department in the Birmingham Discrimination litigation, and was the Justice Department lawyer who successfully negotiated the City Consent Decree, as well as the companion Personnel Board decree, among parties with widely divergent interests.

Before the Consent Decree was signed, the Federal District Court judge held a fairness hearing in which parties and non-parties had an opportunity to object to the provisions of the Consent Decree. At that time, the Birmingham Firefighter's Association (a quasi union), which was not a party to the earlier litigation, was the principal objecting group. Their objections were overruled by the Federal District Court judge, who stated that the hiring and promotion goals, though clearly preferential, were constitutional and otherwise lawful.

Thus, in 1981 — before Charles Cooper became involved in the Birmingham Employment Discrimination matters — the City of Birmingham, with the help, and even the prodding of the Justice Department, had begun to promote qualified blacks and women and thereby correct the effects of long time discrimination. For example, the Birmingham Police Force currently has about one and a half times more blacks employed than at the time of the signing of the decree. The number of black police sergeants increased from three to twenty-four; the number of black police lieutenants increased from zero to three; the number of black police captains increased from zero to one. In the Fire Department, the number of blacks has almost doubled since the signing of the decree. In the officer ranks of the Birmingham Fire Department, there are now thirteen lieutenants and one captain who are black. At the time of the decree there were none.

The twenty percent black representation in the Birmingham Police Force, and the twelve percent black representation in the Birmingham Fire Department remain token percentages for a city whose population is over 50% black. But even those small fair employment advances are almost entirely attributable to the employment goals and timetables which the Consent Decree directs the City to follow.

After the signing of the Consent Decree, the Civil Rights Division of the Justice Department, and its then lawyer in the Birmingham case, Richard Ritter, were supportive of the Birmingham decree. To that end, when the Decree was challenged in court by seven employees of the City Engineering Department, Mr. Ritter, on behalf of the Justice Department, on October 12, 1982, filed a motion to dismiss the challenge or alternatively a motion for summary judgment in favor of the City of Birmingham and other defendants. Mr. Ritter, and the Civil Rights Division, maintained that the plaintiff's action "constituted[d] an impermissible collateral attack on the Consent Decree entered into by the United States with the City of Birmingham and the Jefferson County Personnel Board . . . ".2/

2/ Motion of United States to Dismiss or Alternatively Motion for Summary Judgment, October 12, 1982.

Charles Cooper made his first appearance in this litigation at the invitation of the Honorable William M. Acker, Jr., U.S. District Judge for the Northern District of Alabama, at a hearing on February 28, 1984. At that hearing Cooper made known the Justice Department's intention to enter a reverse discrimination lawsuit against the City of Birmingham as a party plaintiff (although Judge Acker invited intervention, he did not suggest that the U.S. intervene on behalf of plaintiffs), thereby aligning itself with white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the Consent Decree. Mr. Ritter's signature, on behalf of the Justice Department on the Consent Decree apparently meant little to Mr. Cooper. At that hearing, he made it clear to the Court and to all parties that he, Charles Cooper, and not Attorney Ritter was to receive all correspondence for the Justice Department's Civil Rights Division in the Reverse Discrimination litigation. Clearly, Charles Cooper's appearance in this case drastically altered both the substance and tone of the Justice Department's position in these lawsuits. Paradoxically, however, despite his stated intention to intervene as a party plaintiff and contest promotions made pursuant to the Consent Decree's goals, Mr. Cooper also vowed "that the United States plans vigorously to defend the validity of those consent decrees and to defend the validity of any remedial measures required by those consent decrees."[3] Yet, a year and a half later, the City still waits in vain for actions that give meaning to Cooper's empty promise. It seems to me that, by definition, the United States' entry into this lawsuit as a party plaintiff to challenge the

---

[3] Hearing before the Honorable William M. Acker, Jr., February 28, 1984, at p. 29.

Consent Decree, was in direct violation of its obligations under paragraph 3 of the Consent Decree to defend the Consent Decree against collateral attack.

Further, a month later, Mr. Cooper filed a motion on behalf of the United States to withdraw the earlier motion filed by Mr. Ritter on behalf of the United States which had asked that the attack on the Consent Decree be dismissed, or in the alternative, that summary judgment be issued for the City of Birmingham. Again, how Mr. Cooper justifies this action in light of the solemn obligations of paragraph 3 of the Consent Decree, I do not know. Particularly perplexing is his continuing to vow to defend the Consent Decree even while filing papers attacking that decree!

On May 4, 1984, Mr. Cooper filed a brief in response to the City's motions to dismiss the collateral attack upon the Decree. In that brief, Mr. Cooper outlined a theory of the Consent Decree that, at best, can be described as disingenuous, and can be more accurately described as an Orwellian "newspeak" approach to interpreting the goals provided in the Consent Decree. Cooper's theory states that the goals and preferences as to race and sex in hiring and promotion take race into account in "tie-breaker situations", that is, when two candidates in every respect are equally well qualified. Mr. Cooper has maintained that position as recently as July 3, 1985, when, again before Judge Pointer, he stated that it was the Justice Department's position that "the decree would contemplate a tie-breaker use of race, but that would be it. It was our position in that document that a use of race beyond that narrow limitation would be inconsistent with existing federal law . . . ".[4/]

After first hearing of the tie breaker theory of the Consent Decree, Judge Pointer rejected that view out of hand, saying "I do not view it as the United States does, however, as merely being a tie breaker situation. That is not the words either of the Consent Decree." Further, the Court cautioned the United States in this area stating: "Now I have indicated I have some disagreement with the United States' position as it talks only about the tie breaker and, as I view it, there is a broader area of mandated requirements under the decree . . . ".[5/] Clearly, Judge Pointer, as well as Mr. Ritter of the Justice Department and the City of Birmingham understood the Consent Decree to allow the City to grant preferences based on race and sex as to hiring and promotion so long as the individuals were qualified. Mr. Cooper consistently fails to understand this reading of the Consent Decree.

Again, in the May, 1984 hearing before Judge Pointer, as in the February hearing before Judge Acker, Mr. Cooper paradoxically vows that "the United States has every intention of vigorously defending the validity ofthe Decree and all of the relief required by the Decree, Your Honor, we have not taken one false step from that commitment and that

---

[4/] Hearing before the Honorable Sam Pointer, Jr., July 3, 1985, at p. 44.

[5/] Hearing before the Honorable Sam Pointer, Jr., May 14, 1984, at p. 23.

obligation." The Court's response: "That is a matter that obviously is debatable."[6] With all due respect to Mr. Cooper and to this Committee, Mr. Cooper's vows to defend the decree and his comment that no false steps have been taken from the Justice Department's commitment to the Decree are not true.

The only arguable justification for Mr. Cooper's attack on the Consent Decree in February, 1984, before Judge Acker, for his motion before Judge Pointer of March, 1984, for his brief before Judge Pointer of May, 1984, and for his appearance before Judge Pointer on May 14, 1984, would be that the Justice Department's failure to defend the Decree was justified by an arguable change in law in the Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts, better known as the Memphis Firefighters case. Yet the Supreme Court of the United States did not render the Stotts decision until June 12, 1984, months after Mr. Cooper's about-face. Moreover, I am informed that none of the courts of appeals have accepted the sweeping construction advocated by Mr. Cooper. Consequently, the City of Birmingham feels that it has been betrayed by the Civil Rights Division of the Justice Department, but more specifically that it has been betrayed by Charles J. Cooper of the Civil Rights Division. We cannot fail to note that as long as Richard Ritter was handling this case for the Justice Department that the positions taken by that Department were generally consistent with the obligations it imposed upon itself by signing the Consent Decree with the City of Birmingham. On the other hand, the actions taken by Mr. Cooper have been blatantly inconsistent with the obligations of the Consent Decree and have also been intrinsically contradictory by his vows to continue to defend the Decree while at the same time challenging the Decree as a plaintiff in a reverse discrimination lawsuit. Further his theories about the provisions requiring affirmative action goals and preferences to be used only in tie-breaker situations, are facile and disingenuous.

---

[6] Hearing before the Honorable Sam C. Pointer, Jr., May 14, 1984, at p. 38.

Finally, I would like to raise the issue of the Justice Department's efforts to prevent the City and the other defendant intervenors in the reverse discrimination litigation from taking the deposition of Mr. Ritter, who is still a lawyer with the Civil Rights Division of the Justice Department. Mr. Cooper's attempts to prevent this deposition from being taken included a last-minute effort of his attorney's to have the deposition sealed ex parte, a decision that was later overturned by Judge Pointer in Birmingham. I can only conclude that Mr. Cooper feared the revelation of the degree of difference in the Justice Department's interpretation of the decree in 1981 as opposed to its interpretation after Mr. Cooper entered this lawsuit. Mr. Cooper maintains that the Justice Department's interpretation has not changed since August of 1981. Even a cursory reading of the Ritter deposition will reveal that Mr. Ritter, the lawyer who negotiated the decree, would dispute that belief. To that extent, I believe that Mr. Cooper was not simply a lawyer doing his job, but, in fact, was a lawyer who was actively misrepresenting facts and allegations before a court of law, and was a lawyer who was openly betraying a solemn obligation of the United States' Justice Department that had been incurred before his arrival and that because that obligation arose before he entered the lawsuit he apparently felt not bound by such obligation. If public office holders were bound only by the formal obligations incurred during their own terms of office, then government and governmental services would come to a screeching halt after every appointment or election. Each successive office-holder or administration would be forced to "re-invent the wheel", instead of building upon the good works of previous office-holders.

I have outlined for you the reasons for my opposing this nomination. In sum, I would like to point out several things. First, my objection is not simply based on a preference for the policies of one administration over those of another administration for, as you will note, the Consent Decree with the City of Birmingham was signed over six months after the current administration had taken office. Second, my objections are not based on an arguable difference in interpretation of laws or over an arguable view that the law has changed, but rather that the United States attacked the Consent Decree with the City of Birmingham and thereby violated its obligations of paragraph 3 of the Consent Decree with the City of Birmingham. Third, Mr. Cooper has attempted to mislead the Federal Court in Birmingham as to the Department's intention to defend vigorously the provisions of the Consent Decree. Fourth, Mr. Cooper's interpretation of the decree is clearly incorrect, insupportable and obviously has been rejected by the Court and contradicted by Mr. Ritter. Fifth, he has forced the City to incur extraordinary legal fees in defending against the Justice Department's attempts to violate the provision of a document that the Justice Department itself encouraged the City to sign some years ago. In short, I believe that Mr. Cooper has betrayed his obligations to the City under the Consent Decree, has mislead the Federal Court in Birmingham, and I encourage you to reject his nomination for the Office of Legal Counsel in the Justice Department.

Senator HATCH. Thank you, Mayor.

Senator Heflin, do you have any questions?

Senator HEFLIN. Mayor, how much, if you have any idea, do you believe it has cost the city of Birmingham, relative to expenses, legal fees, and other things that have occurred as a result of the reversal, or the change of position by the Department of Justice in this case?

Mayor ARRINGTON. Senator, I do not have the exact dollar amount. I can tell you that it has been significant, and that expense comes to us after the city had been involved in litigation for 7 years and after we thought that the Justice Department would defend attacks on the consent decree and avoid the necessity of the city having to incur additional expense for our taxpayers.

Senator HEFLIN. You were Mayor when this consent decree was entered into, were you not?

Mayor ARRINGTON. Yes.

Senator HEFLIN. At the time the decree was entered into, you mentioned before, that it was attacked on its fairness basis by, I believe firemen. I believe also the record will show that initially some policemen attacked it, but then did not appear.

But what was the issue that they raised at the time that the consent decree was being considered by the court, what was their issue that they raised as to its allegedly unfairness?

Mayor ARRINGTON. I'm not clear on the issue that was raised at that time, Senator. They raised an issue of preferential treatment. I was not clear on the issue that was raised because under our system we are simply given the names of people who are supposedly qualified for a position that we are about to fill. We are not given any test scores. We are given the names of candidates to fill that position. The personnel board informs us that those persons are qualified, and we are free, then, to select from any of the names submitted to us by the personnel board.

Never have we been told that one person scored 90 and another scored 80. Never before entering into this consent decree did the question of preferential treatment arise where in fact persons had been certified as being qualified to do the job.

So I'm not clear on the issue, so I believe the issue was one of preferential treatment. The judge said that yes, it was preferential treatment, but it was not unconstitutional.

Senator HEFLIN. Well, that's the point, before the judge entered the approval of the consent decree, the collateral attacks that are now being directed toward the decree, were in effect, raised at that time. Also, the scenario of facts that later did occur were considered.

And it was clearly before the judge, and before the parties at that time. I think that this is substantiated by the deposition of Mr. Ritter to the effect that if you had qualified blacks and qualified whites; if the qualified white had better qualifications, nevertheless, in order to seek the goal of trying to increase the number of blacks that were employed, the city under the decree, would be authorized to accept a less-qualified black as long as he met the minimum qualifications. This preference, as you say, was raised at that particular time; and that's my understanding of what went on at the fairness hearing.

Mayor **Arrington**. Indeed, we were permitted, and we are permitted under that decree to accept a black who may have a lower score. We are not required to do it, but we are permitted to do it, and the court has, I think, ruled clearly on that issue.

But I would like to just expand on that point for just a moment. I indicated earlier that the way the system works is that we have a county personnel board. When we are ready to fill a position, we requisition the names of persons who are qualified.

The board sends us the names of three persons to fill each position. As I said, we don't know what the score is. We are free to accept either one of those three. Nobody ever raised the question before, when we selected the third person, whether that person, though he was No. 3 on the list, was less qualified than No. 1.

The situation had always been that all of them were qualified to perform the job. In essence, we are still following that practice even under the consent decree.

Senator **Heflin**. You mentioned Mr. Ritter's deposition. In reading portions of it, he was asked the following questions and gave the following answers. There's some interruptions as to objections and other things.

> At the time you signed

asking Mr. Ritter,

> the Justice Department's attorneys—signed the consent decree, at the time you signed the city decree, did you understand to enable the city to achieve the goals set forth in paragraphs five to nine. The city decree authorizes the city to hire, transfer, or promote blacks or female applicants to whom it was certified as qualified by the board, the personnel board. Even if these applicants were demonstrably less qualified than competing white applicants.

And Mr. Ritter's answer was:

> It was my understanding that the city would be permitted to select a qualified black or female applicant who the city was satisfied was qualified in preference to a demonstrably better qualified white as the term is used in the consent decree if the city in good faith believed that the kind of selection was necessary to meet the goal obligation.

Now, you mentioned this, and this tone carries throughout in answers like that, would appear throughout in regard to Mr. Ritter's participation. I just want to bring that out.

We went over this during Mr. Reynolds' hearing. We didn't have Mr. Ritter's deposition at that time. And I gave a lot of weight to it. But I looked at the thing, I suppose, sort of like a judge would, that even if there was a reversible position taken, was there any justification that could be pointed to that changed position? And Mr. Reynolds answered, as Mr. Cooper has basically answered here, that the decree says that nothing herein shall be interpreted as requiring the city to hire unnecessary personnel or to hire, transfer or promote a person who is not qualified, or to hire, transfer, promote a less qualified person in preference to a person who is demonstratively better qualified based upon the result of a job related selection process.

Now, that's the legal peg that they say that the decree allows them to look at individual cases, and that they're not violating the decree because of that provision.

Do you have a position that you would like to state relative to the interpretation of that section of the decree and their position about it?

Mayor ARRINGTON. Well, first of all, I think it's very clear from Mr. Ritter's deposition and from the testimony of Mr. Cooper that there was a different position now in the Justice Department than there was in 1981. I think that's clearly borne out by the deposition and by Mr. Cooper's testimony.

Mr. Ritter affirmed the fact that the consent decree at least permitted the city to hire a less qualified black or female as long as that person was indeed qualified, and he testified that was his understanding of the decree, and that was the understanding we all had.

Now, we are getting a different interpretation which we think represents a reversal of the Justice Department's position.

The item in question in that decree was put in, quite frankly, as I understand it, by our attorneys, in order to protect the city in this matter so that we did not have to, we could not be forced to hire somebody who was not qualified.

But again when you get to the matter of demonstrating somebody's being, an individual being better qualified, that raises another very interesting issue that I think opens a whole keg of worms.

For example, the personnel board—I know in the case of firefighters, and I'm sure it applies in the case of other departments—still adds points to the test scores of individuals based on the number of years that they have been employed. For example, you can get up to 20 points added to your test score.

I know from a hearing held in the district court seeking a temporary restraining order against the city on a promotion of a black that the argument that was being made was—that and I cite an example—of a black who had scored 86 on a test, and whose total written score may have been 82. He got 4 points for 4 years of experience, so he had an 86. And a white fire fighter who had a lower score on the test but had something like 19 years of experience, which gave him a higher score. So that black would be found, of course, less qualified than that white, even though that white had scored lower on the test.

So what we ended up doing was giving people credit for, on the test scores, for periods of time when blacks were not even permitted to qualify for the jobs. And I think that raises another very interesting issue which may be sort of collateral here.

But I think the whole argument about an individual being demonstrably better qualified is a very difficult issue for one to sell or to determine that one is better qualified.

The test scores certainly, they were finding in the police and fire departments that they discriminated against blacks, those test scores did. If you're going to give somebody 10 additional points for the years of service they had in competition with me, when I was not even allowed during those 10 years because of race to even compete for the job, I think you're compounding the injustice, especially if you're going to use that to argue that I am less qualified, and give somebody 10 points when you wouldn't even allow me to compete for the job.

Senator **Heflin**. I realize you're not a lawyer. Maybe this is an unfair question, but it comes up at least in my mind.

We basically have some expressions by the judge preliminarily that would indicate that he thinks that the Department of Justice has reversed its position.

But on a motion to hold them in contempt of court for it, which would in effect be saying, well, perhaps you did reverse your position, and if I hold you in contempt of court I have to say that there was no justification for your changed position. And he doesn't hold them in contempt of court, which, in effect he may say arguably, legally, you may have, under the decree, a right to assume the position that you did.

I don't know whether that entered his mind or not, but that's possible. And he does allow the United States to in effect intervene in the litigation. He uses the words, "to the extent the United States in good faith believes that the actions of the city are discriminatory against plaintiffs," meaning whites there, are neither required nor permitted by the consent decree, it may support the plaintiff's position in this litigation without violating the terms of the consent decree. And accordingly may be allowed to align itself as a party plaintiff.

He does allow that. Now, I suppose what I'm saying to you, I'd like for you to have something which you say that in effect, I or the members of the committee, should not pay attention, or give any credence to, the fact that the judge did not hold them in contempt of court, or if he had not allowed them to go ahead and align themselves with the plaintiffs, in view of everything else he said.

Maybe there are two issues. Maybe there's an issue of you have to believe first whether it was a reversal, and then whether or not there is any justification for the reversal.

That's strictly from a legalistic viewpoint, but would you address yourself as to whether or not there is any justification for their position of reversal in this instance.

Mayor **Arrington**. Well, of course, we maintain that there is no justification for the reversal. We maintain there has been a reversal of position by the Justice Department.

I think we would also point out that our counterclaims about the Justice Department's reversal have not yet been heard by Judge Pointer. They have yet to be heard.

But counsel informs me that it clearly represents a reversal and that is where the matter stands at this time.

I assume that our counterclaims on the reversal will be heard by Judge Pointer.

Senator **Heflin**. Thank you. That's all.

Senator **Hatch**. Well, thank you, Senator. I have been interested in your testimony, Mayor Arrington, and I can attest to its sincerity.

Having tried a number of lawsuits, and having interpreted a lot of different language in my day, I can see how this dispute could have arisen. I also see why you feel so strongly about it.

I can see how all parties could be acting in good faith, under the circumstances. Individual attorneys do differ mentally on various things. They can have different viewpoints as to what language means and to what it doesn't mean—all of us may have those problems.

Now, Mr. Cooper, we've heard some strong statements from Mayor Arrington, and we all do hold the mayor in very high esteem.

Senator Simon has asked you to respond in writing to the issues he has raised in pages 11 and 12 of his testimony today, and his statement. So what I would like you to do is enlarge your response to include a response to his complete statement just for our record. I haven't interpreted Mayor Arrington's statement to be that you have acted dishonestly or corruptly, but he does feel that you have ignored Mr. Ritter's expressed statements, or expressed, what he thinks are his expressed beliefs. Therefore, I think it's important that we make the record clear on that. So if you'll respond to the complete statement, and we'll add that to what Senator Simon asked of you.

We consider these statements made by the mayor to be important, and I think your response would be equally important. We'd like to have that as soon as we can, but certainly no later than 5 o'clock next Wednesday.

Now, Mayor, I understand your feelings. You have a tough job, and from all that I've been able to learn about it, you do an excellent job, we are proud to have you here.

Mayor ARRINGTON. Thank you, sir.

Senator HATCH. I would hope that Mr. Cooper would be given the benefit of the doubt on these issues, because being an active prosecutor, an active representative of the Government, and an attorney, are very difficult at best. You always have someone who disagrees or second guesses everything you do, and especially in these cases.

As you know, these are very difficult cases. You have to deal with them. You're concerned about them. You have to live with them. And you don't want to see a reversal to the success that you achieved. I understand that, and we appreciate that in this committee.

I also know Mr. Cooper and I believe him to be an honorable and good person. I don't know Mr. Ritter, but I'm sure he is likewise. But I can see that these disputes can arise, especially in the context of civil rights laws, because they are difficult at the very best.

I must admit we have differences right on the committee. I don't think there is a person on this committee who is not committed to civil rights. But we have some real differences as to just what are the right ways to go, what are the right rules.

I feel that I am right on the positions that I advocate. I wouldn't advance those positions if I didn't think I was right. I guarantee that I wouldn't do it for ideological reasons.

Neither would any other Senator on this committee, Now, your testimony has been very important to the committee. We honor you for coming up here, and we appreciate you taking the time.

With that, unless there are any other questions or comments, I think we will recess this committee. We will stand adjourned. Mr. Cooper will have everything done by next Wednesday, and I'm cautioning all Senators to get their questions to you as early as they can so that you have enough time to respond. We've all agreed to vote on your nomination when you return on the 31st.

I'm hopeful that we can dispose of it at that particular time in a good manner.

I want to thank everyone for participating. With that we will adjourn until further notice.

[Whereupon, at 2:08 p.m., the committee was adjourned.]

APPENDIX

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 16, 1985

Honorable Strom Thurmond
Chairman, Senate Committee
on the Judiciary
Room 224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On October 11, 1985, we received the Committee's request for "a list of all matters (including cases, regulatory matters, appointments or nominations, and policy-making decisions) in which Mr. Cooper has played a role, including but not limited to matters in which he prepared any written memoranda or correspondence or participated in the drafting of any brief." On the basis of various conversations with the chief counsel of the majority staff of the Committee, we initially understood that this request referred to those matters in which Mr. Cooper's role was "significant." We therefore compiled a list which we believe responded to this understanding of the request.

On the basis of a subsequent conversation late this morning with Dennis Shedd, we now understand that the request pertained only to those matters which involved Mr. Cooper's memoranda, correspondence or briefs. However, in order to avoid the delay involved in revising the list to conform with this new understanding of the request, and to provide the Committee with more comprehensive information, we are nevertheless forwarding today five copies of a more inclusive list reflecting those matters in which Mr. Cooper's role was "significant."

We have attempted to "err on the side of inclusion" concerning those matters in which Mr. Cooper's role has been deemed "significant." The list therefore includes matters in which Mr. Cooper's involvement ranged from quite minor to quite substantial. Of necessity, the listing of matters arising over the past four years has been compiled from a search of relevant records and the collective memories of various Division attorneys. Moreover, the determination concerning what constitutes "significant" involvement is necessarily imprecise and subjective. Accordingly, although the list is as accurate as possible under these circumstances, there is a real possibility that additional matters that should have been included will surface. If we subsequently discover any such matters, we will, of course, supplement the existing list accordingly.

Should you have any further questions concerning this matter, please contact me.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

HOUSING

U.S. v. Alta Apartments (Title VIII)

Arthur v. Starrett City Associates (Title VIII)

U.S. v. Bradtree (Title II)

U.S. v. Loren Champlin (Title VIII)

U.S. v. Cicero (Title VIII; Title VII)

U.S. v. Gersten Companies (Title VIII)

U.S. v. GMAC (ECOA)

U.S. v. Gura Nevada (Title VIII; ECOA)

U.S. v. Oceanside Properties (Title VIII)

Oshkosh Ordinance on Testers

Panola Land Buying Ass'n Housing Development v. Shuman (Title VIII)

U.S. v. Southland Marketing, Inc. (Title VIII; and Title II)

Termination Clause in Consent Decrees

U.S. v. Treasure Isle (Title VIII)

U.S. v. Wilson-Covington Construction (Title VIII)

EMPLOYMENT LITIGATION

Alabama State Police (*Paradise* v. *Prescott*)

Birmingham Reverse Discrimination Employment Litigation, Ala.

U.S. v. *Buffalo Police and Fire Dept.*, N.Y.

U.S. v. *Chicago Fire Department*, Ill.

U.S. v. *Chicago Police Dept.*, Ill.

U.S. v. *Clayton County Bd. of Educ.*, Ga.

U.S. v. *District of Columbia Fire Dept.*

U.S. v. *Gwinnett County Sch. Dist.*, Ga.

U.S. v. *City of Jackson*, Miss.

U.S. v. *City of Miami*, Fla.

U.S. v. *New Jersey Fire Depts.*

U.S. v. *New Orleans Police Dept.*, La.

North Carolina Agricultural Extension Service
(*Bazemore* v. *Friday*)

U.S. v. *City of North Little Rock*, Ark.

U.S. v. *Pasadena Independent School Dist.*, Tex.

U.S. v. *Reno Fire Dept.*, Nev.

U.S. v. *Virginia State Police*

U.S. v. *Virginia Dept. of Highways*

NOTE

Mr. Cooper was consulted concerning the sending of letters to approximately 51 defendant jurisdictions requesting the modification of existing employment decrees with the United States to conform with the Supreme Court's decision in *Memphis Firefighters* v. *Stotts*.

MATTERS BEING HANDLED BY CIVIL DIVISION, DEPARTMENT OF JUSTICE

Glad v. *KCET* (Section 504)	Central Dist. Calif.
Williams v. *U.S.* (Section 504)	Central Dist. Calif.

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT ACTIVITIES

Name	State	Type
Cummins Unit	AR	PRIS
Ellisville State School	MS	MR
Westboro State Hospital	MA	MH
Montgomery Dev Center	OH	MR
Napa State Hospital	CA	MH
Golden Grove Corr Inst	VT	PRIS
Los Angeles Juv Halls	CA	JUV
San Francisco Youth Guid Ctr	CA	JUV
Vacaville Medical Fac	CA	PRIS
Kalamazoo Reg Psych Hosp	MI	MH
Fort Stanton Hosp & Trng Sch	NM	MR
Belle Chasse State Sch	LA	MR
Julia Tutwiler Prison	AL	PRIS (Sex Discr.)
Clinton Corr Fac	NY	PRIS
Southbury Training Sch	CT	MR
Bedford County Jail (*U.S.* v. *Bedford County*)	TN	JAIL
South Beach Psych Ctr	NY	MH
Wheat Ridge Hosp & Trng Sch	CO	MR
Ypsilanti Psych Hosp	MI	MH
Central State Hosp (*U.S.* v. *Indiana*)	IN	MH
South Carolina St Hosp	SC	MH
Houston City Jail	TX	JAIL
Sing Sing Corr Fac	NY	PRIS
Fairview Training Ctr	OR	MR
Graterford State Corr Inst	PA	PRIS
Elgin Mental Health Ctr	IL	MH
Ada County Jail (*U.S.* v. *Ada County*)	ID	JAIL
Hazelwood ICF/MR	KY	MR
Northville Reg Psych Ctr	MI	MH
Grenada County Jail	MS	JAIL
Worcester State Hosp (*U.S.* v. *Mass.*)	MA	MH
Harrison County Jails	MS	JAIL
Talledega County Jail (*U.S.* v. *Talladega County*)	AL	JAIL
Spring Grove Hosp Ctr	MD	MH
Atascadero State Hosp	CA	MH
Jackson Special Hosp	LA	PRIS
Logansport State Hosp (*U.S.* v. *Indiana*)	IN	MH
Halawa High Security	HI	PRIS
Oahu Community Corr Ctr	HI	PRIS
New Hampshire Youth Dev Ctr	NH	JUV
Pauls Valley St Sch	OK	MR
Manteno Mental Health Ctr	IL	MH
Enid State School	OK	MR
Newark City Jail (*U.S.* v. *Newark*)	NJ	JAIL
Michigan Prison System (*U.S.* v. *Michigan*)	MI	PRIS

Name	State	Type
South Florida St Hosp	FL	MH
Benton Services Ctr	AR	MH
West Va Indust Sch for Boys	WV	JUV
Cornwell Hts Youth Dev Ctr	PA	JUV
Rosewood Center (U.S. v. Maryland)	MD	MR
East Louisiana St Hosp	LA	MH
Feliciana Forensic Fac (Davis v. Henderson)	LA	MH
Cook County Jail	IL	JAIL
Folsom State Prison	CA	PRIS
Costello v. Wainwright	FLA	
Balderas v. Matheson	UT	PRIS
Newman v. Alabama	ALA	PRIS
Halderman v. Pennhurst	PA	MR
Ruiz v. Estelle	TEX	PRIS
RAJ v. Miller	TEX	MH
Lamar v. Coffield	TEX	PRIS (Race Seg.)
Gates v. Collier	MS	PRIS
Evans v. Barry	DC	MR
West v. Lamb (Las Vegas Jail)	NEV	JAIL
French v. Owens	IND	PRIS
Devonish v. Garza (San Antonio Jail)	TEX	JAIL
Stewart v. Rhodes (Columbus Correctional Center)	OH	PRIS
Garrity v. Thompson, Gallen & Sununu (Luconia School System)	NH	MR
Santana v. Collazo	PR	JUV
Canterino v. Wilson	KY	PRIS (Title IX of 1964 Civil Rights Act)
U.S. v. Baylor Univ	TEX	504 Program speci.
Hinds v. Heckler	MS	504
U.S. v. Hawaii	HI	PRIS
U.S. v. University Hosp	NY	Baby Doe
SC Dept. of Mental Health v. U.S.	SC	MH
CARC v. Thorne	CN	MR

Key: PRIS = Prison
MR = Mental Retardation Facility
MH = Mental Health Facility
JUV Juvenile Facility

EDUCATION

I. CASES

1. United States v. Richland Parish Board of Education, La.

2. Cowan v. Bolivar County Board of Education

3. U.S. v. Bakersfield City School District

4. Keyes v. School District No. 1, Denver, Colorado

5. Zentgraff and U.S. v. Texas A&M University (sex discrimination)

6. U.S. v. Hardeman County Board of Education, Tenn.

7. U.S. v. Phoenix Union High School District No. 210

8. United States v. Phoenix Union High School District No. 210 (Access to records).

9. Brumfield v. Dodd

(applications for state assistance to private schools.)

10. U.S. v. Texas Education Agency (Lufkin Independent School District)

11. United States v. Henry County Board of Education, Alabama

12. U.S. v. State of Mississippi (Hattiesburg Municipal School System)

13. Ross v. Houston Independent School District

14. Hughes v. Department of Education

(higher education)

15. Board of Education of Perry County v. T.H. Bell

16. U.S. v. State of Mississippi (Simpson County School System)

17. United States v. State of Georgia (Americus City and Sumter County)

18. Hereford and U.S. v. Huntsville Board of Education

19. Board of Education of the City of Peoria, School District No. 150 v. U. S. Department of Education

20. U.S. and CRUCIAL v. Ector County Independent School District, Texas

21. U.S. v. Marion County School District, Florida

22. U.S. v. Texas Education Agency (Lubbock Independent School District

23. U.S. v. Lincoln Parish, Louisiana School Board

24. Lee v. Macon County Board of Education (Conecuh County Board of Education).

25. U.S. v. Henry County School District and St. Lucie County School District

26. Carr and U.S. v. Montgomery County Board of Education

27. U.S. v. Amite County School District

28. U.S. v. Kansas City Unified School District No. 500

29. Lee and United States v. Auburn City Board of Education

30. U.S. v. Clinch County Board of Education

(back pay claim of a black principal)

31. Lee v. Macon County Board of Education (Talledega County)

32. Geier v. Alexander

33. U. S. v. Marshall Independent School District

34. United States v. Board of Education, Independent School District No. 1, of Tulsa County, Oklahoma

35. Lee and United States v. Butler County Board of Education

36. U.S. v. State of Mississippi, (Hinds County School District)

37. Los Angeles, California, School District

38. United States v. Georgetown County School District

39. United States v. Oktibbeha County School System

40. Mills & U.S. v. Board of Public Instructor of Polk County, Florida

41. U.S. v. Charleston County School District

42. Robinson and U.S. v. Shelby County, Tennessee Board of Education

43. United States and G.I. Forum v. State of Texas

44. Davis and United States v. Board of School Commissioners, Mobile County, Alabama

45. United States v. Massachusetts Maritime Academy

(sex discrimination)

46. Davis and U.S. v. East Baton Rouge Parish School Board

47. United States v. Choctaw County School District

48. United States v. Lawrence County School District

49. United States v. Big Springs Independent School District

50. Lee and United States v. Macon County (Anniston)

II. SPECIAL PROJECTS

A. Compliance Monitoring Unit

B. Unitary Status Project

C. Racial Discrimination in Special Education Placements

VOTING RIGHTS ACTIVITY

Monterey County, Calif.	Preclearance under Section 5 of change in bilingual procedures

REGULATIONS

Baby Doe Regulation

Section 504/Federally Assisted - DOJ Coordination Regulation Review

Legal Equity for Women Task Force

APPELLATE MATTERS October 16, 1985

CASE NAME	COURT	SUBJECT MATTER
LEGAL MEMO RE 504 & MEDICAL CARE		Handicap discrimination
AFSCME V. WASHINGTON	9TH	Comparable worth
ALEXANDER V. CHOATE	SCT	Handicap discrimination
AMA & AHA V. HECKLER	2D;SCT	Handicap discrimination
AMERICAN NURSES V. ILLINOIS	7TH	Employment discrimination
ARKANSAS V. U.S. & SOUTH CONWAY CTY	8TH	School desegregation
ARRIOLA V. HARVILLE	5TH	Voting Rights Act - attorneys' fees
ASHLEY V. JACKSON & U.S.	SCT	Employment discrimination
ATASCADERO V. SCANLON	SCT	Eleventh Amendment
AYERS V. ALLAIN	5TH	Desegregation of higher education
AZ GOV. COMM. V. NORRIS	SCT	Employment discrimination
BAHAM V. TREEN	SCT	Voting discrimination
BATTLE & U.S. V. ANDERSON	10TH	Injunctions against prison officials
BAYLOR UNIV. V. U.S.	SCT	Handicap discrimination in federally assisted education programs
BAYMAN V. SOUTH BEND	7TH	School desegregation
BAZEMORE V. FRIDAY	4TH/SCT	Employment discrimination
BENNETT V. ARRINGTON	11TH	Employment discrimination
BIRMINGHAM V. U.S.	6TH;SCT	Housing discrimination
BLEDSOE V. U.S.	SCT	Criminal
BLOCK V. RUTHERFORD	SCT	Injunctions against prison officials
BOB JONES	SCT	Tax exempt status
BOSTON FIRE V. NAACP	SCT	Employment discrimination
BOYD V. POINTE COUPEE	5TH	School desegregation
BRATTON & U.S. V. DETROIT	6TH	Employment discrimination
BRITTON V. SOUTH BEND	7TH	Employment discrimination
BROOKINS V. U.S.	SCT	School desegregation
BROOKS V. WINTER	SCT	Voting discrimination
BURTON V. HOBBIE	SCT	Apportionment
BYRD V. U.S.	SCT	Criminal
CAB V. PARALYZED VETS	DC	Handicap discrimination
CAL FED SAV V. GUERRA	9TH	Employment discrimination
CALIFORNIA V. NAACP	SCT	School desegregation
CHICAGO V. U.S.	SCT	School funding
CITY COUNCIL V. KETCHUM	SCT	Voting discrimination
CLARK & U.S. V. MARENGO	5TH	Voting discrimination
CLEBURNE V. LIVING CTR	SCT	Handicap discrimination
CONRAIL V. DARRONE	SCT	Handicap discrimination
CORLEY V. JACKSON PD	5TH	Employment discrimination
CRAWFORD V. LA	SCT	School desegregation
CROWN CORK V. PARKER	SCT	Employment discrimination
CURRIE V. U.S.	SCT	Criminal
DAVIS V. BANDEMER	SCT	Political Gerrymandering
DAVIS V. E. BATON ROUG	5TH	School desegregation
DAVIS V. MOBILE CO.	11TH	School desegregation
DEVERAUX V. GEARY	1ST	Employment discrimination
DIAZ V. SAN JOSE SCH	SCT	School discrimination
EDGE V. SUMTER CO.	11TH	Voting discrimination
EDMISTEN V. GINGLES	SCT	Voting discrimination
EEOC V. SAFEWAY	SCT	Employment discrimination
EL CAMINO CC V. U.S.	SCT	Discrimination in federally assisted programs
ESCAMBIA V. MCMILLIAN	SCT	Voting discrimination
EVANS V. JEFF D.	SCT	Attorneys' fees
FRANKLIN V. U.S.	SCT	Criminal
FRENCH V. OWENS	7TH	Prison conditions
GARC V. MCDANIEL	11TH	Handicap discrimination
GARDNER V. ARMY	8TH	Desegregation of higher education
GARRITY V. GALLEN	1ST	Institution conditions
GEIER V. ALEXANDER	6TH	Intervention; attorneys fees
GOLDSBORO CHRISTIAN SCH. V. U.S.	SCT	Tax exempt status
GOMEZ-BETHKE V. U.S. JAYCEES	SCT	Sex discrimination in public accommodations
GREENSBORO NEWS V. U.S	SCT	Criminal
GROVE CITY V. BELL	SCT	Sex discrimination in federally assisted education programs

CASE NAME	COURT	SUBJECT MATTER
GUARDIANS V. NYC CSC	SCT	Discrimination in federally assisted programs
HALD & U.S. V. PENNHURST 2	SCT;3RD	Conditions in institutions for mentally retarded
HANDLEY V. U.S.	SCT	Criminal
HANIGAN V. U.S.	SCT	Criminal
HARRIS V. U.S.	SCT	Criminal
HATHORN V. LOVORN	SCT	Voting discrimination
HECKLER V. AMA	SCT	Handicap discrimination
HILLSDALE V. DOE	SCT	Sex discrimination in federally assisted education programs
HINDS V. HECKLER	5TH	Discrimination in federally assisted programs
HISHON V. KING & SPALD	SCT	Employment discrimination
HOLLOWAY V. VALLEY & U.S.	SCT	School desegregation
HOOKS V. WAINWRIGHT	11TH	Prison conditions
HOOTS V. PENNSYLVANIA	3RD	School desegregation
HUNTER V. UNDERWOOD	11TH;SCT	Voting discrimination
IRON ARROW V. BELL	11TH;SCT	Sex discrimination in federally assisted programs
IRVING ISD V. TATRO	SCT	Handicap discrimination
JEFFERSON CO. V. U.S.	SCT	Employment discrimination
JENKINS V. MISSOURI	8TH	School desegregation
JONES & U.S. V. CADDO PARRISH	5TH	School desegregation
JORDAN V. GREENWOOD	5TH	Voting discrimination
KELLEY V. NASHVILLE	SCT	School desegregation
KETCHUM & U.S. V. CHICAGO	7TH	Voting discrimination
LEE V. MACON CO[ANNISTON]	11TH	School desegregation
LEGGETT V. LIDDELL	SCT	School desegregation
LIDDELL V. ST. LOUIS	8TH	School desegregation
LITTLE ROCK V. PULASKI	8TH	School desegregation
LOCAL 28 V. EEOC	SCT	Employment discrimination
LOCAL 93, INT'L ASS'N FIREFIGHTERS V. CITY OF CLEVELAND	6TH;SCT	Employment discrimination
LOCKHART V. U.S.	SCT	Voting discrimination
MACNAMARA V. KOREAN	EDPA	Employment discrimination
MCCAIN V. LYBRAND	SCT	Voting discrimination
MCKENZIE V. U.S.	SCT	Criminal
MEMPHIS V. STOTTS	SCT	Employment discrimination
METRO CTY BD. OF EDUC. V. KELLEY	SCT	School desegregation
MILLER-WOHL V. MONTANA	SCT	Employment discrimination
MISS. UNIV. V. HOGAN	SCT	Sex discrimination
MISS. V. SMITH	SCT	Voting discrimination
MOBILE SCH V. JAFFREE	SCT	Moment of silence in public schools
NAACP V. HAMPTON CO.	SCT	Voting discrimination
NEWMAN V. ALABAMA	11TH	Prison conditions
NEWPORT NEWS V. EEOC	SCT	Employment discrimination
ORR V. INDIANAPOLIS	SCT	School desegregation
PALMORE V. SIDOTI	SCT	Race discrimination in child custody proceeding
PARADISE & U.S. V. DEPT. OF PUBLIC SAFETY	11TH	Employment discrimination
PARALYZED VETS V. CAB	SCT;DC	Handicap discrimination
PORT ARTHUR V. U.S.	SCT	Voting discrimination
PRINCE WM. V. MALONE	4TH	School discipline
RAPIDES V. VALLEY & U.S.	SCT	School desegregation
REDWINE V. U.S.	SCT	Criminal
REICH V. LARSON	SCT	Voting discrimination
RIDDICK V. NORFOLK	4TH	School desegregation
ROGERS V. LODGE	SCT	Voting discrimination
SANTANA V. COLLAZO	1ST;SCT	Conditions in juvenile reformatory
SINGMAN V. U.S.	SCT	Criminal
SIOUX V. PRIOR LAKE	8TH	Voting discrimination
SOUTH FLORIDA CHAPTER V. METRO DADE CTY	11TH	Minority set-aside
ST. PAUL V. REYNOLDS	8TH	Housing discrimination
TENN/MEMPHIS V. GARNER	SCT	Police use of deadly force
THORNBURG V. GINGLES	SCT	Voting discrimination
TIAA-CREF V. SPIRT	SCT	Employment discrimination
UNIV. RICHMOND V. BELL	4TH	Sex discrimination in federally assisted education programs

CASE NAME	COURT	SUBJECT MATTER
U.S. V. ALLEG-LUDLUM	7TH	Employment discrimination
U.S. V. AMER FUTURE SYS	3RD	Credit discrimination
U.S. V. BAYLOR HOSPITAL	5TH	Discrimination in federally assisted programs
U.S. V. BLEDSOE	8TH	Criminal
U.S. V. BOWLING & GOMEZ	5TH	Criminal
U.S. V. BROCKWAY	5TH	Criminal
U.S. V. BRONK	7TH	Criminal
U.S. V. BUFFALO	2ND	Employment discrimination
U.S. V. BYRD	4TH	Criminal
U.S. V. CALHOUN	4TH	Criminal
U.S. V. CHARLES & MCANINC	5TH	Criminal
U.S. V. CHICAGO	7TH	Employment discrimination
U.S. V. CHICAGO BD EDUC.	7TH	School desegregation
U.S. V. CINCINNATI	6TH	Employment discrimination
U.S. V. CITY OF MIAMI	5TH	Employment discrimination
U.S. V. CONTRERAS	5TH	Criminal
U.S. V. CONYERS	4TH	Criminal
U.S. V. CRAWFORD	5TH	Criminal
U.S. V. CURRIE	6TH	Criminal
U.S. V. DALLAS COUNTY	11TH	Voting discrimination
U.S. V. DAVILA & JACQ	5TH	Criminal
U.S. V. DEAN	5TH	Criminal
U.S. V. DECOITO	9TH	Criminal
U.S. V. DISE	3RD	Criminal
U.S. V. DISTRICT OF COL.	DC	Employment discrimination
U.S. V. E. BAT RGE[SUPP]	5TH	School desegregation
U.S. V. EBENS	6TH	Criminal
U.S. V. ECTOR CO. ISD	5TH	School desegregation
U.S. V. FRANKLIN	10TH	Criminal
U.S. V. GARZA	5TH	Criminal
U.S. V. GIBSON	4TH	Criminal
U.S. V. GLISAN	10TH	Housing discrimination
U.S. V. GREGORY	4TH	Employment discrimination
U.S. V. GRIFFIN	4TH	Criminal
U.S. V. HANDLEY	11TH	Criminal
U.S. V. HANIGAN	9TH	Criminal
U.S. V. HAWAII	9TH	Conditions in institutions
U.S. V. HUFF	6TH	Criminal
U.S. V. IRVIN	11TH	Criminal
U.S. V. JURY	5TH	Criminal
U.S. V. KANSAS CITY	10TH	School desegregation
U.S. V. KOZMINSKI	6TH	Criminal
U.S. V. LEE	5TH	Criminal
U.S. V. LUBBOCK ISD	5TH	School desegregation
U.S. V. MARENGO CO.	5TH	Voting discrimination
U.S. V. MARLER	1ST	Criminal
U.S. V. MASS MARITIME	1ST	Sex discrimination
U.S. V. MATTEO	5TH	Criminal
U.S. V. MCKENZIE	5TH	Criminal
U.S. V. MCKINNY	5TH	Criminal
U.S. V. MISSISSIPPI	SCT	Voting discrimination
U.S. V. MS. DEPT. WELFARE	5TH	Employment discrimination
U.S. V. MUSSRY	9TH	Criminal
U.S. V. NEW JERSEY	3RD	Employment discrimination
U.S. V. OLIVER	11TH	Criminal
U.S. V. OTHERSON	9TH	Criminal
U.S. V. PARMA	6TH	Criminal
U.S. V. RAMSEY	11TH	Criminal
U.S. V. SFPD [POA]	9TH	Employment discrimination
U.S. V. SHERER	4TH	Criminal
U.S. V. STARRETT CITY	2ND	Housing discrimination
U.S. V. STONYBROOK	2ND	Handicap discrimination
U.S. V. TEA (PORT ARTHUR)	5TH	School desegregation
U.S. V. TEXAS	5TH	School desegregation
U.S. V. TOWN OF CICERO	7TH	Employment discrimination
U.S. V. UNIV. HOSPITAL	SCT	Handicap discrimination
U.S. V. WAGES	6TH	Criminal
U.S. V. WALKER	5TH	Criminal
U.S. V. WARREN	4TH	Criminal
U.S. V. WARREN	11TH	Criminal
U.S. V. WELLES-BOWEN	6TH	Housing discrimination
U.S. V. WHITE	6TH	Criminal

CASE NAME	COURT	SUBJECT MATTER
U.S. V. WIEMERS & KERN	5th	Criminal
U.S. V. WISCONSIN	7TH	Voting discrimination
U.S. V. WOOD	11TH	Criminal
VALENTINE V. SMITH	SCT	Employment discrimination
VALLEY CON V. MARSH	5TH	Federal contractors
VALLEY V. RAPIDES	5TH	School desegregation
VRA EXTENSION	LEG	Voting discrimination
WAGES V. U.S.	SCT	Criminal
WAINWRIGHT V. HOOKS	11TH	Prison conditions
WALKER V. U.S.	SCT	Criminal
WALLACE V. JAFFREE	SCT	Moment of silence; public schools
WAMBHEIM V. J.C. PENNEY	SCT	Employment discrimination
WARRENSVILLE V. ORS	6TH	Discrimination in federally assisted programs
WASHINGTON V. SEATTLE	SCT	School desegregation
WELCH V. MCKENZIE	5TH	Voting discrimination
WEST MICHIGAN V. FCC	DC	Broadcast licensing
WHITE V. DOUGHERTY CO.	SCT	Voting discrimination
WILLIAMS V. NEW ORLEANS	5TH	Employment discrimination
WISCONSIN V. GOULD	SCT	Preemption
WOOD V. SUNN	D HA	Institution conditions
WYGANT V. JACKSON	SCT	Employment discrimination
ZENTGRAF & U.S. V. TEXAS	5TH	Sex discrimination in federally assisted programs

CONFIRMATION HEARINGS ON: JAMES L. BUCKLEY, DAVID R. THOMPSON, BOBBY RAY BALDOCK, ROBERT E. COWEN, EDWARD R. KORMAN, WILLIAM J. ZLOCH, AND JANE R. ROTH

WEDNESDAY, OCTOBER 30, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators McConnell, Biden, and Simon.

Staff present: Duke Short, chief investigator, and Lourie A. Westley, minority counsel for Senator Paul Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met this afternoon to hold hearings on three circuit judges and four district judges. And we will take any Senators or Congressmen who want to speak in behalf of these judges, and I suggest you make your remarks brief. We have seven different judges here we have got to hear, and I believe Senator Hawkins more or less has an emergency. I told her I would take her, first.

Senator Hawkins, if you will come around. Is anybody else here from Florida? The Senator will speak on behalf of the nomination.

Senator HAWKINS. Senator Chiles asked me to say he had a conflict also.

The CHAIRMAN. Excuse me just a minute.

The able and distinguished Senator from Kentucky has to leave. Would you want to make a comment, Senator?

Senator MCCONNELL. Yes. Thank you, Mr. Chairman.

I just wanted to stop by and commend the nominees for their selection and look forward to supporting them and apologize for having to head on to two more meetings.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Hawkins, we will be glad to hear from you.

STATEMENT OF HON. PAULA HAWKINS, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator HAWKINS. Mr. Chairman, it is a great deal of pleasure today for me to introduce an outstanding member of the Florida Bar who has been nominated by President Reagan to serve on the Federal bench in Florida.

Bill Zloch is a credit to the State of Florida and to our Nation. A local success story. His father is in the audience with us today. He has been—his father has been a postmaster for 31 years, and Bill was born into a great family. His brothers are here today, and raised in Fort Lauderdale. So this is a local boy who has made good. He left Florida briefly to attend college at Notre Dame. And it was there that he gained his reputation as a quick thinker and a team player.

Bill quarterbacked the Fighting Irish in 1965, his senior year, and following graduation from Notre Dame Law School, he served a term of 3 years as a naval officer in Vietnam.

I am proud to tell you that when confirmed, Bill Zloch will be the first Vietnam veteran to serve on the Federal bench. That is an important milestone for this Nation. After his tour in Vietnam, where he was awarded a Vietnam Service Medal, Bill returned home to Fort Lauderdale and was admitted to the Florida Bar in 1974.

In 1983, he was voted outstanding lawyer by the executive committee of the Broward County Bar Association, and the following year, the Broward Bar Association asked county law firms to volunteer their services to the poor, litigating family and landlord tenant disputes. Bill Zloch handled the most cases of any lawyer in Broward County, and was given the Florida Bar's president, 17th Judicial Circuit, Paroda Service Award for his efforts.

Mr. Chairman, Bill Zloch is one of Florida's most outstanding attorneys and he is superbly qualified to handle the challenges and responsibility that come especially with a southern Florida Federal judgeship.

He is intelligent, resourceful, and energetic. The caseload of the Florida Federal court judges is one of the heaviest in the Nation, and his experience and dedication will be a definite asset in coping with the tremendous volume of cases that you so ably helped us with, Mr. Chairman, in the southern district of Florida. And I thank you, and I must leave.

The CHAIRMAN. Thank you very much, Senator, and we are glad to have you with us. I am sure your high endorsement of this nomination will be very helpful.

Now you can have a seat somewhere until we hear there Senators and then we will call you back.

Will the Senators come around, please? I believe we have Senator Moynihan, Senator D'Amato, and you are here to speak in behalf of Senator Buckley, and is there someone else?

Senator MOYNIHAN. And Mr. Korman, sir.

The CHAIRMAN. To be a district judge.

We are very pleased to have you here.

We will hear from the senior Senator from New York, the distinguished former Ambassador.

STATEMENT OF HON. PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. I thank the chairman.

Mr. Chairman, in the first place I am here to speak for your former colleague, and my friend of many years, Senator James Buckley, whose career you would know from his personal association here, in the Senate. He was a distinguished attorney before coming to the Senate and before that served for 3 years in the U.S. Navy during the Second World War.

Since leaving the Senate, he has served as Under Secretary of State for Security Assistance, a position of the highest consequence, in our Government, and is now the president of Radio Free Europe and Radio Liberty. The President has nominated him for the high office of the court of appeals here, in the District of Columbia.

And I do, with the greatest pleasure commend him to this honorable committee and to its members.

I know that my colleague, Senator D'Amato, would want to speak to the same point.

Thank you.

The CHAIRMAN. We are pleased to have you, Senator D'Amato. I think that you get more judges appointed than any other Senator.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. All excellent ones.

I thank the chairman for his guidance and his counsel, and Mr. Chairman, let me simply say that when he, Senator Buckley, is confirmed, when he becomes Judge Buckley of the Circuit Court of Appeals for the District of Columbia, he will bring to his new responsibilities an unusual body of experience, both as an attorney, corporate official, a Member of this legislative body, and as an active participant in international affairs, both in public and private matters.

I am thrilled and delighted to be able to join with Senator Moynihan in recommending Senator Buckley's confirmation and approval by this committee.

The CHAIRMAN. We are glad to have you, Senator, and you both speak highly of this nominee. I have known him, I expect about as long as you all have, and at least his father and mother, they have a home in Camden, SC, and after I left the Governor's office, in January 1951 and moved to Aiken, to practice law 22 miles from Edgefield where I was born and reared and Mr. and Mrs. Buckley came by and had lunch with us, shortly after that.

I will never forget that. They are wonderful people and people of character, people of ability and people of dedication. I think that the President has made a very fine appointment.

All right, now, do you want to speak on behalf of Mr. Korman?

Senator MOYNIHAN. Mr. Chairman, if I may, I would like to introduce to this honorable committee, Mr. Edward R. Korman of Brooklyn, NY, who also brings a happy association with a former Member of the Senate. On graduating from the New York University Law School, Mr. Korman became a law clerk to Kenneth B.

Keating, who was at that time, a member of the highest court in the State of New York, our court of appeals.

He then went into the practice of law, and very shortly he entered the office of the U.S. attorney for the eastern district of New York. He rose steadily to be assistant U.S. attorney, under a U.S. attorney appointed by President Nixon; then under President Carter, he was appointed U.S. attorney for the eastern district.

He distinguished himself in that position as he had done in his previous work. When his term was completed, he reentered the practice of law, while basically returning to Brooklyn Law School as a law professor.

He is before us as a candidate for the District Court of the Eastern District of New York State. And I can commend him to you, sir, as a man of proven ability and integrity and faithfulness to the law. It is in the context of that work that we have recommended him, my distinguished colleague and I, to this committee for the bench.

The CHAIRMAN. So you recommend him without question?

Senator MOYNIHAN. Without question, sir, most emphatically.

The CHAIRMAN. The distinguished Senator from New York, Mr. D'Amato.

Senator D'AMATO. Mr. Chairman, I am pleased to join in my distinguished colleague's recommendation of Ed Korman, a distinguished professor of law, a practitioner of law, and someone who has distinguished himself both in the private practice and the practice as assistant U.S. attorney rising through all of the levels to distinguish himself as our U.S. attorney in the eastern district.

I think he will make an outstanding district judge in my home area of eastern Long Island, and I am pleased that Senator Moynihan's committee has come forth with this very able and distinguished recommendation.

I am delighted to join in seconding the recommendation of Senator Moynihan.

The CHAIRMAN. Mr. Korman, I congratulate you on your nomination by the President and having the strong endorsement of both your Senators here; one is a Democrat and one is a Republican, but they are both for you, so that speaks highly of you.

The same with you, Senator Buckley.

Of course, I knew you in the Senate, and there should not be any question about you. Everybody who knows you has the greatest respect for you.

OK, thank you, gentlemen, very much.

Now, we have Senator Wilson here to come up.

And in the interest of David R. Thompson of California, would he come around?

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman.

And mindful of the chairman's admonition that the committee has much work this afternoon, in the form of seven separate nominations, I will honor the time of the committee and resist the temptation to give to David R. Thompson's background the lengthy presentation that I think that it deserves.

But the committee has the record, and it speaks, I think, eloquently for itself. I will digress for just a moment, Mr. Chairman, to state that with his confirmation and that of John Noonan, recently nominated by the President, California will come close to having adequate representation on the ninth circuit.

According to the most recent statistics available, cases beginning in the district courts in California, made up over 59 percent of the ninth circuit's caseload and with the confirmation of two more Californians, California's representation on the court will slightly exceed 53 percent. There is still a deficiency but we are getting there.

Now, Mr. Chairman, the nomination of David R. Thompson is one that I bring to you with my wholehearted endorsement. I think the President has made a splendid judgment, and I am aided in that by the fact that I recommended to the President that he select and nominate David R. Thompson, who is a truly outstanding lawyer.

I have been before this committee often enough, so that you are familiar with the technique that I have employed in assisting me in recommending to this committee outstanding lawyers, even though the nomination is that of the President, I have presumed to give him some advice and use that selection process consisting of a screening committee in each of the Federal districts in California. That for the southern district has given to Mr. Thompson, the highest rating that they can give, that of extremely well qualified which coincides with the highest judgment or the highest rating given by Martindale-Hubbell, that of AV. He is, simply stated, a superb lawyer.

And perhaps it may seem to disparage his own achievements in the fact that he has worked hard to earn them, but I think that perhaps there is a family or a genetic predisposition in the Thompson clan to excel in the law. He serves in a family firm, and when confirmed by the Senate, he will be the third jurist in the Thompson family.

His father, Gordon Thompson, Sr., was a judge of the Superior Court of California; his brother, Gordon Thompson, Jr., is a sitting U.S. district court judge in the southern district of California and has been since 1970.

And Mr. Thompson's experience spans the entire spectrum of private practice. He has practiced law in the old-fashioned way and in a small family firm and has had the opportunity for over a decade to represent clients whose needs were very personal, in terms of a practice that was largely devoted to criminal defense, to personal injury, to domestic relations.

In the most immediate decade, his concentration has been in corporate and real estate and in probate work, but in short, as we learned from the many who responded to our inquiries, without a single exception, giving him the highest possible rating, he is just a very fine lawyer.

This was the judgment of the bar and of the bench, in a community in which he has practiced since being admitted to the bar some 30 years ago.

I will not go further, Mr. Chairman, than to say, quite clear in all the recommendations and all the responses to our inquiries, there was in addition to the judgment that he is a superb lawyer, the equally fervent recommendation that this was a man who is possessed of a singular judicial temperament. A man who is praised by those who have been on the other side from him in many lawsuits as a man of the utmost integrity and character; someone who has practiced fair play; and someone who would give to any case, that case that he was required to review, the fairest possible interpretation.

He understands the restraints inherent in our Federal judicial system.

For these reasons and for many others, that I will not take the time to explain in detail to the committee, I commend the President for having brought to the committee a superb nomination.

David Thompson is superbly qualified to join the ranks of the Federal judiciary and to serve on the ninth circuit.

The **CHAIRMAN**. Thank you very much, Senator.

I appreciate your coming and endorsing Mr. Thompson. I congratulate him upon his appointment and having your high endorsement.

And also Senator Cranston sent a letter. He could not come, and he was approving your nomination, too.

Thank you very much, and you may stay longer if you care to, or you may leave.

Senator **WILSON**. Thank you very much, Mr. Chairman.

[Prepared statement of Senator Alan Cranston follows:]

PREPARED STATEMENT BY SENATOR ALAN CRANSTON

Mr. Chairman, I am pleased to express my support for David R. Thompson, who has been nominated to serve as a U.S. Circuit Judge for the Ninth Circuit.

Born, raised and educated in Southern California, David Thompson has been practicing law in San Diego since the late 1950's, following a stint in the U.S. Navy. He is respected in the community by Democrats and Republicans alike as a fair-minded and practical generalist with a good deal of business law experience and a case-by-case, nonideological approach to questions coming before the court. While in more recent years his practice has been largely civil, his early years involved a considerable amount of criminal defense work. (He defended indigents in both State and Federal courts.)

From what I have heard of David Thompson from friends in California familiar with the Southern California legal community and what I have read myself as background, I am confident that he will do his best to uphold equal justice under the law. He has excellent qualifications as an attorney and the potential to contribute much to the deliberations on the Ninth Circuit bench. I recommend David Thompson's confirmation by the Senate Judiciary Committee.

The **CHAIRMAN**. Our next nomination is Judge Bobby Ray Baldock of New Mexico.

Is Senator Domenici here and Senator Bingaman? And Congressman Lujan?

Senator Domenici, we will be delighted to hear from you.

STATEMENT OF HON. PETE DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator **DOMENICI**. Thank you very much, Mr. Chairman. I have come to speak in support of the nomination of Judge Bobby R. Baldock to the Tenth Circuit Court of Appeals.

I very much appreciate your accommodating us. I have to leave to go back to the conference on the debt limit and the deficit reduction bill shortly. I thank you for making time in your schedule for me.

The **CHAIRMAN**. I know how busy you are and I appreciate your coming in person and I am sure that this nominee does also.

Senator **DOMENICI**. Let me say first, Mr. Chairman, it is not very often that my State has an opportunity to be before the Judiciary Committee recommending a court of appeals judge. As you know, we are a relatively new State, as States go, and we have not had very many New Mexicans on the circuit bench and that makes it an exceptional privilege for me.

I also want to share with you an interesting story. You informed me at one of our conferences that it has been the tradition of the U.S. Senate that Senators have a lot to do with picking a U.S. district court judge. And, in fact, you reminded me that a President can hardly get a Federal district court judge appointed if the Senator from the State opposes the nomination.

But I did not know that nominations to the court of appeals have always been the prerogative of the President. Then a New Mexican retired from the tenth circuit. When I saw the vacancy, I really thought that the President had to do what I wanted.

I was mistaken. But it turns out that Judge Baldock is the man that I thought ought to have the job.

The **CHAIRMAN**. And so he did what you wanted after all?

Senator **DOMENICI**. Yes. The President did what I wanted after all. Maybe it was because my distinguished colleague, the junior Senator from New Mexico, and both Republican Congressmen, as well as the other Congressman from New Mexico, who is not of the President's party, also agreed that Judge Baldock was the right man for this position.

Nonetheless, we succeeded.

I want to say to Senator Bingaman, I am very pleased that he is here today. This makes the nomination totally bipartisan. And that should mean that this will be expedited.

There is much that I could say about Judge Baldock, but let me summarize my thoughts for you. He was a distinguished trial lawyer, and he was the chairman of the bar in his county. He served those kinds of organizations that assist our young people, as he lived his normal life in Roswell, NM, helping with activities like Boy Scouts and YMCA and the like.

We were very fortunate that a couple of years ago, he moved up to the bench and became a Federal judge. He has now had 2½ years of experience. Judge Baldock's record speaks for itself. He has a very distinguished record. There is no doubt that he is a good judge. There is no doubt that he believes strongly in the concept of Federalism and the sovereignty of States. There is no doubt that he is sensitive to the separation of powers between the branches of government. And there is no doubt that he is very tough on crime, yet he is very protective of the rights of those who are accused.

I cannot say more than to say to you, Mr. Chairman, and the members of this committee, that I am deeply honored to recommend Judge Baldock to you. I am very pleased that the President of the United States selected him.

Looking at his hair, one might think that he will not serve long because he is very gray headed, but he is indeed, prematurely gray.

The CHAIRMAN. That is the style today, is it not?

Senator DOMENICI. Perhaps the chairman is correct. Judge Baldock will be on the bench for a long time, God willing, because he is young both in age and in spirit, and he clearly wants to serve this country as a court of appeals judge.

I urge that we act on this nomination quickly and stand ready to do anything that I can to help you, Mr. Chairman, and the committee to get that done.

Mr. Chairman, the Representatives from New Mexico were all here, but they got called out for a vote. I would like you to make a part of the record the statement that Congressman Lujan and Congressman Skeen have asked me to submit to you.

I assume that Congressman Bill Richardson will return and if he can testify, he will, and if not, I am sure that he will submit a statement.

The CHAIRMAN. Thank you, very much, Mr. Chairman.

We are very honored to have you here.

Now, we will hear from Senator Bingaman, with whom I have had the pleasure of serving on the Armed Services Committee and he is the ranking member on the Military Construction Subcommittee. We work together frequently.

Senator DOMENICI. Mr. Chairman, I also have a rather detailed statement outlining Judge Baldock's background which I would like to submit.

The CHAIRMAN. Without objection, that will go into the record.

Senator DOMENICI. Thank you for allowing me the opportunity to share my views with you. I am most appreciative of the chairman's understanding.

[Statement follows:]

PREPARED STATEMENT OF SENATOR PETE V. DOMENICI

Mr. Chairman, it is my pleasure to introduce the Honorable Bobby Ray Baldock to the Judiciary Committee once again. As you recall, Judge Baldock came before the Committee two and one-half years ago as a nominee to the Federal District Court of New Mexico. He is now before you as a nominee to fill a vacancy on the United States Court of Appeals for the Tenth Circuit. I hope that once you have had an opportunity to review Judge Baldock's qualifications again you will act favorably on this nomination, just as you did previously.

In his 2½ years on the bench, Judge Baldock has demonstrated that he possesses the qualities which are hallmarks of our American judiciary. His written opinions demonstrate research, analysis, and citation of the highest caliber. They are notable especially for their clarity, and occasionally for their humor, which should surprise no one who knows him. Judge Baldock's opinions highlight that he is a practitioner of judicial restraint and an advocate of judicial economy. He is protective of the right of access of litigants to the federal courts, but dedicated to preserving federalism and the sovereignty of the States. He is sensitive to the separation of powers and the role of each of the branches of government. He is tough on crime, yet protective of the rights of criminal defendants. Judge Baldock's approach to law can best be characterized as non-dogmatic and, above all, guided by common sense.

Prior to assuming his place on the bench, Judge Baldock had a long and distinguished career as an attorney in Roswell, New Mexico. He graduated from the University of Arizona School of Law in 1960, where he was on the law review and a member of Phi Alpha Delta Law Fraternity. Upon graduation, he entered private practice in Roswell with the firm that was to become Sanders, Bruin & Baldock when he became a partner in 1965. Judge Baldock remained with the firm until he was appointed to the district court in 1983.

Over the years, Judge Baldock has been involved with many professional organizations. He is a member of the State Bars of New Mexico and Arizona, the American Bar Association, and the New Mexico Trial Lawyers Association. He is a Past President of the Chaves County Bar Association and has also served as a test grader for the New Mexico Board of Bar Examiners.

Although Judge Baldock was a distinguished trial attorney, he has taken an active role in examining and promoting alternative methods of dispute resolution. He has previously served on the New Mexico Medical-Legal Malpractice Panel and was a member of the American Arbitration Association. Currently, Judge Baldock serves as the New Mexico Federal Court Liaison to the Alternative Methods of Dispute Resolution Committee on the State Bar of New Mexico.

Judge Baldock is noted for his service to his community. He was a Charter Member and Chairman of the Board of the Valley Bank of Commerce. For 9 years, he served with the New Mexico National Guard in the judge advocate's office. He has participated in a major way—as President, as Chairman, or as Board Member—of the Roswell YMCA, the Eastern New Mexico State Fair Board, the Chaves County Cancer Crusade, the Roswell High School Booster Club, the Roswell Chapter of Rotary International, and the Roswell Chamber of Commerce. He has been an active member of his church. Judge Baldock also has taken a particular interest in the well-being of our youth. In addition to his activities with the YMCA, he was director, manager, and coach of Roswell Little League for ten years. For eighteen years, he taught Business Law at Eastern New Mexico State University.

I have known Judge Baldock for many years. He is above all a very strong family man. I would be remiss if I didn't acknowledge the role his wife, Spunky, plays in his life. They are truly a team. They have been blessed with two fine sons, Bobby and Christopher.

Let me say that the activities and achievements which I have mentioned today are just a small example of Judge Baldock's commitment and dedication to his work and his personal life. When Judge Baldock came before you in 1983, I stated that the State of New Mexico had sent this Committee a superb human being with an exemplary legal background who would make a fine judge. I can only add that what I said then is still true today. Judge Baldock is an outstanding individual, one who is well-qualified, by temperament and experience, to meet the challenges and demands of the Court of Appeals. I thank you for your consideration.

STATEMENT OF HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator **Bingaman**. Thank you very much, Mr. Chairman.

Let me start just by saying that I was never under any illusion like my colleague, Senator Domenici was that the President had to do what I wanted in this respect, but I am glad to be here, and to support and endorse this nomination. Judge Baldock has done an excellent job in the couple of years that he has been on our Federal court and he has a distinguished reputation and career in the New Mexico bar and I am sure that he will perform the duties of this new position with a great deal of conscientious effort, and distinguish himself there.

So I am glad to support the President's nomination and Judge Baldock for the position.

I also have a statement, Mr. Chairman, I would like to put into the record, if I could, which goes into some more detail about his qualifications.

The **Chairman**. Without objection, that will be done.

[Statements follow:]

Prepared Statement by Senator Jeff Bingaman

Mr. Chairman, I am pleased to join my distinguished colleague, Senator Pete Domenici, in support of the nomination of Bobby Baldock for the office of Circuit Judge for the Tenth Circuit Court of Appeals.

Since 1983 Bobby Baldock has been the United States District Judge for the District of New Mexico. Before assuming that office he practiced law with the firm of

Sanders, Bruin and Baldock in Roswell, New Mexico, joining the firm in 1960 following graduation from the University of Arizona Law School. He is admitted to practice law in New Mexico, Arizona, and before the New Mexico Federal District Court. In addition to this practice, Judge Baldock taught business law for 20 years at the Roswell campus of Eastern New Mexico University. He is a past president of the Chaves County Bar Association and is a former member of the New Mexico Medical-Legal Malpractice panel.

Despite his busy professional schedule, Judge Baldock also served as President and Board Member of the Roswell Chapter of Rotary International and as a Board Member of the Roswell Chamber of Commerce. He has been very active in community work, serving as a Little League coach for ten years; State President of the YMCA Youth and Model Legislature; Chairman of the Chaves County Cancer Crusade; and President of the Eastern New Mexico State Fair Board.

Two decades of experience in the practice of law and two years in his current position as Federal District Judge for New Mexico, have prepared him well for judicial responsibilities as Federal Judge for the Tenth Circuit Court of Appeals. It is a pleasure for me to endorse his nomination before the Committee today.

PREPARED STATEMENT OF HON. MANUEL LUJAN, JR.

Mr. Chairman and members of the committee, I am pleased to again appear before you to recommend the confirmation of Judge Bobby Ray Baldock to serve on the Tenth Circuit Court of Appeals. Judge Baldock and I have been friends for many years and he has an outstanding reputation among his peers.

The Judge has done a fine job in his present position as a Federal District Court Judge and is an excellent choice to fill the position. Judge Baldock's committment to justice combined with his fine record as an attorney make him well suited for his new assignment.

Judge Baldock has established himself as a leader in his community and his profession. He is dedicated to preserving those ideals on which this country is based and I am confident he would be an asset to the Federal Court system.

Thank you for this chance to appear before you and I hope you will give speedy confirmation to Bobby Ray. The Circuit Court will surely benefit by his presence.

PREPARED STATEMENT BY HON. JOE SKEEN OF NEW MEXICO

I would like to congratulate Judge Bobby Baldock on being nominated by President Reagan to be a United States Circuit Judge for the Tenth Circuit Court of Appeals and highlight some of his major accomplishments.

There is no question that Bobby Baldock has been a credit to the community of Rosewell and to the state of New Mexico, not only as a leader in the legal profession in New Mexico, but also as a civic leader, unselfishly giving of his time for the betterment of his community. His outstanding legal accomplishments resulted in his being appointed a United States District Judge by President Reagan in 1983 and in his being nominated to the Tenth Circuit Court of Appeals.

As a young man, Bobby Baldock entered private practice as an associate in 1960, becoming a partner in 1965, and building a successful practice. He quickly involved himself in a number of civic organizations in leadership positions.

I am proud to add my voice in support of Judge Baldock and to have Judge Bobby Baldock as a representative of the second congressional district and the State of New Mexico.

The **CHAIRMAN**. I appreciate you gentlemen taking time to come here and with both Senators endorsing you, Judge Baldock, you should have no trouble.

You have got a mighty Senator on your right there, a chairman of a committee and a very fine Senator on your left here, who is doing a good job.

Senator **DOMENICI**. Thank you very much.

The **CHAIRMAN**. Our next, Senator Bradley and Senator Lautenberg, are they here?

Why do you not come around?

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator BRADLEY. Thank you very much, Mr. Chairman for the opportunity to testify.

I am pleased to introduce an eminently qualified New Jerseyite, who has been nominated to fill a vacancy on the Federal district court for New Jersey. Robert E. Cowan currently serves as U.S. magistrate for the District of New Jersey, a post that he has held since 1978.

In his present capacity, Judge Cowan has been praised by members of the bar and our Federal district judges for his dedication and legal knowledge. He has done a remarkable job of forging settlements among disputants and has done so in a way that has earned him the respect of all of those who know him. At a time when our Federal judiciary in general, and the New Jersey district court in particular, are suffering from an explosion of cases, these talents are sorely needed.

In addition, Judge Cowan brings a breath of experience that will be invaluable to our district court. He was asked to start up and head the Office of Ethics and Professional Responsibility for the New Jersey Supreme Court. His 5-year tenure as the head of this office, brought a new standard of excellence for the judiciary and lawyers subject to the Commission's jurisdiction.

He has demonstrated his deep concern for the need to require the highest ethical standards for those involved in the enforcement of justice. Judge Cowan served as the deputy attorney general in New Jersey and as an assistant county prosecutor in Essex County, where he gained valuable experience prosecuting criminal law violations.

In his private practice before that, he gained considerable experience in civil law matters. Extensive litigation experience combined with his tenure as U.S. magistrate make him exceptionally well qualified to sit on the Federal district court.

Mr. Chairman, I am pleased to join with my colleague, Senator Lautenberg, to present Judge Cowan to you today and urge you to send his nomination to the full Senate for approval.

The CHAIRMAN. Thank you very much, Senator.

Now, we will be pleased to hear from the junior Senator, Senator Lautenberg.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman.

I am pleased to join with my colleague, Senator Bradley, in recommending to the committee the nomination of Robert E. Cowan, to sit as a district judge for New Jersey. I am pleased to welcome also to the table. Judge Clarkson Fisher, who is the chief judge of the district. He is kind enough to appear with Magistrate Cowan to register his support.

You have before you a skilled and experienced lawyer, a dedicated public servant, a respected and fairminded member of the judiciary. He was engaged in the private practice of law for 10 years in New Jersey and then, as you heard Senator Bradley say, he served in many capacities as a public servant, as a member of the county prosecutor's office, and as a deputy attorney general.

He served in the Administrative Offices of the Courts of New Jersey directing ethics and with judicial administration and since 1978, served as the U.S. magistrate.

Now, Magistrate Cowan enjoys an outstanding reputation among the practicing bar in New Jersey. He is known to be a hard-working, studious, dedicated and the bar finds him fairminded and even tempered.

Mr. Chairman, it is evident that he is a fairminded person by his reputation. I inquired of an experienced attorney in the State whether the magistrate had indicated to him any ideological bent one way or the other, and he said to me, that if he did, it was not discernable, which we admire and respect—fairmindedness.

Mr. Chairman, Magistrate Cowan would be a welcome addition to the ranks of the district court judges in New Jersey. Some 518 cases were filed last year for each judge in the district, the largest volume per judge of any district in the third circuit. And the appointment of someone who would bring to the bench such solid experience in the conduct of trials and proceedings would surely assist in enhancing in the efficient administration of justice in our State.

The appointment of someone who would bring to the bench a reputation for fairness and a reputation for solid scholarship would also enhance the quality of justice and the public's respect for the judicial system.

I am pleased to recommend Robert E. Cowan to the committee and urge prompt reporting to the full Senate.

The Chairman. Thank you very much, Senator.

Now, we would be glad to hear from Chief Judge Fisher.

STATEMENT OF CLARKSON FISHER, CHIEF JUDGE, U.S. DISTRICT COURT

Judge Fisher. Mr. Chairman, I know your time strictures here, and I will be brief. But I am authorized to say that this nomination has the enthusiastic and unanimous support of all the judges of this district and of every lawyer——

The Chairman. How many district judges do you have in New Jersey?

Judge Fisher. We now have 12, with 2 vacancies, this would fill 1 vacancy, 1 senior man.

But we enthusiastically support this. He is a fine man and we have had him for a number of years now and we do not have to wonder what he could do when he arrives, we know what he could do.

We urge your support, sir.

The Chairman. Thank you very much, Judge.

I want to congratulate you, Mr. Cowan. I believe that you are the first magistrate that has ever been appointed to be U.S. district judge, are you not?

Mr. Cowan. From the third circuit, yes, sir, that is correct.

The Chairman. And New Jersey, anyway.

Well, congratulations to you.

Mr. COWAN. Thank you, Senator.

The CHAIRMAN. Also congratulations upon your appointment by President Reagan and having high endorsement of both of your Senators here, both of whom are Democrats. That is a high tribute to you.

Mr. COWAN. Thank you.

The CHAIRMAN. And the chief judge, Judge Fisher. And his opinion is very valuable.

Mr. COWAN. And I will not disappoint any of the various parties.

The CHAIRMAN. Well, we appreciate that.

I want to thank all of you for being here in person to endorse this gentleman and you are now excused.

You are welcome to stay longer if you wish.

Senator BRADLEY. Thank you, Mr. Chairman, for your time and courtesy.

Is Senator Biden in the room?

Then we will have Ms. Roth.

Senator Biden wanted to be here, when we took up this nomination and we will wait 2 or 3 minutes to see if he comes.

Senator ROTH. Mr. Chairman, while we are waiting, my conversation with Senator Biden, Ms. Roth's problem is not with Senator Biden, it may be with the other Senator from Delaware. [Laughter.]

The CHAIRMAN. Senator Biden, we understand that you favor this nomination and it seems to be some question about where the other Senator stands on it.

Senator BIDEN. Well, Mr. Chairman, I am just delighted that it is Jane and not Bill Roth that is being nominated. That is only a joke, Bill. I appreciate, Mr. Chairman, you accommodating me like this. I got bad information. I thought that it was later.

The CHAIRMAN. Well, we are glad to accommodate you.

Now, since he is a senior Senator, I guess that we will take him first, especially since this is his wife.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Well, thank you, Mr. Chairman, and members of the panel. Today is a very proud day for the Roth family. It was last spring that the President called me and said that he wanted to nominate Jane for the Federal district court and that he would like me to step aside in that procedure.

I was delighted to do so, Mr. Chairman. Now, I think that you are aware of the fact that I have said that to avoid any perception of conflict, that I would not vote but would vote present if it came to a rollcall vote on the Senate floor.

The CHAIRMAN. I doubt if it will be that close. [Laughter.]

Senator ROTH. But in any event, I just want to make the record clear, Mr. Chairman, that I do have a constitutional right to participate in the selection of such a judgeship. I think that you are familiar with the part of the Constitution that speaks of ensuring domestic tranquility. I want to be frank, I am very proud of my wife. I think that she is an outstanding trial lawyer, and as far as I am concerned, she is preeminently qualified to any position to which she aspires.

I do think that maybe there is another story that I should correct. The New York Times in discussing my decision not to vote on Jane's confirmation, said that the reason, and I quote, "Because the new judge is to be the Senator's wife, and she is the mother of his two children."

Well, I got a call from the U.S. News & World Report and was asked, "Is Delaware such a swinging State that you can have teenage children without the blessing of marriage?"

I want the record to clearly show that we have been married for 20 years.

Let me give a very brief outline of Jane's background.

She was a graduate of Smith College in 1956. That was a vintage year, because that was when I met her. For the next 5 years she served with the Foreign Service in Iran, Rhodesia, and French Congo. Next she matriculated in Harvard Law School where she graduated with honors, in 1965. That was another vintage year, as it was the year when I married her, and I think that it is obvious that it was no hasty affair.

Since graduation, Jane has been a trial lawyer, with Richards, Layton & Finger and she was the first woman to become a partner in a major Delaware law firm.

I am very pleased to say that she has enjoyed broad bipartisan support. She has been recommended by the bipartisan Governor Judicial Nominating Committee for appointment to the State judiciary. We are also very pleased and pleasantly surprised when we received a copy of a resolution adopted by the Democratically controlled State senate, which said the following:

> Whereas Jane Roth is one of Delaware's most distinguished and competent candidates, and was recognized and applauded not only by the legal community but highly respected by all Delawareans, whereas Jane Roth's legal background, her lineage in the field of law qualifies her beyond any question for the high post of Federal District Court Judge, and whereas Jane Roth's impeccable character and credentials, particularly in the legal community, are impervious to criticism, now, therefore, be it resolved by the members of the senate of the 133d General Assembly of the State of Delaware, that gratification is hereby expressed upon learning that Jane Roth is being considered for a Federal judgeship.

In closing, let me say, Mr. Chairman, that my only regret this afternoon is that I am not a member of your Judiciary Committee. I have a lot of questions that I would like to ask this woman, and this is possibly the only time that I would get some straight answers from her.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. We are delighted to have you with us.

Senator Biden, I am sure that you have some comments.

Senator BIDEN. Yes; I do, Mr. Chairman.

Welcome, Jane, your stewardship of the law is well known in our State and for a 30-year-old woman you have a significant amount of experience. The only question that I have thus far about your judgment, is the decision you made in 1965, and I am counting on finally being in the position, if and when you are confirmed of being able to have someone I can go to who will have equal leverage in the Roth household to be able to get some things done that have not happened thus far.

But I anxiously await your answers to the chairman's questions about what your views on certain issues are, because I am anxious to hear what they are. But sincerely, welcome.

This is a historic occasion, but knowing Bill, as well as I do, and for as long as I have and you also, but working with Bill every day, I have no doubt whatsoever, that in fact, the President felt that he had to call him to ask him to stand aside.

And I think that it is wise that you stood aside, Bill, in the sense that you did not object to this nomination. Not only for your domestic tranquility, but also for the bench. And I welcome you, Jane, and I thank you, Mr. Chairman, for letting me hold the proceedings up here.

I apologize for that.

The **CHAIRMAN**. Senator Biden was intent that Delaware have a judge. It is mighty close to whether they are entitled to one. But we had it understood, Jane, that you would get the job if it was put in there.

And he went along. [Laughter.]

Senator **ROTH**. Note the chairman is laughing when he said that.

The **CHAIRMAN**. And when I heard that you were interested in this place, I did talk to the Justice Department way back before your husband probably recommended you, I think.

I was not too sure that he would favor having you come down here too.

At any rate, we are delighted to have you with us and we will now proceed.

Senator, thank you very much.

And we will call you up in a few minutes.

Now, our first nomination was Senator James L. Buckley.

If you will come around, Senator?

I might ask all of these people to stand and be sworn at one time.

Senator James L. Buckley, David R. Thompson, Judge Bobby Ray Baldock, Robert E. Cowen, Edward R. Korman, William J. Zloch, and Jane R. Roth.

You all raise your hands to be sworn.

Will the testimony that you will be giving be the truth, the whole truth and nothing but the truth, so help you, God?

Senator **BUCKLEY**. I do.

Mr. **THOMPSON**. I do.

Judge **BALDOCK**. I do.

Magistrate **COWEN**. I do.

Mr. **KORMAN**. I do.

Mr. **ZLOCH**. I do.

Mrs. **ROTH**. I do.

The **CHAIRMAN**. Thank you and have a seat.

Senator Buckley, do you have any family here or friends you would like to introduce?

Senator **BUCKLEY**. Yes; I do.

TESTIMONY OF HON. JAMES L. BUCKLEY, OF CONNECTICUT, TO BE U.S. CIRCUIT COURT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Senator BUCKLEY. I have my son David back there, a second year student at the University of Virginia Law School.

The CHAIRMAN. I believe that you went to Yale instead of Harvard.

Senator BUCKLEY. That I did, Mr. Chairman.

The CHAIRMAN. But you made it anyway.

Senator BUCKLEY. I tried.

The CHAIRMAN. I want to congratulate you on your appointment by the President and I think that he made a very worthy, fine choice.

Senator, you have been nominated to be a U.S. circuit judge for the District of Columbia Circuit. As an appellate judge you would be reviewing decisions of district court judges. What criteria do you intend to use in reviewing these decisions and trial records?

Senator BUCKLEY. Mr. Chairman, I will review the briefs as carefully as I know how, the legal reasoning advanced in support of one side or the other. I will scrutinize the references to make sure that they are pertinent and I shall do my level best, sir, to assess the argumentation with a totally open mind. And do my best to assess what the state of the law is, and what the precedent is, and to apply them to the resolution of the case.

The CHAIRMAN. Senator Buckley, have you had considerable trial experience?

Senator BUCKLEY. No, Mr. Chairman, I have not.

I was court appointed counsel in a divorce case in New Haven, CT, where I practiced for 4 years. Also, because my firm represented Yale University, a few recalcitrant Yale students were entrusted to my care, before the city court. But beyond that, no.

The CHAIRMAN. Now, to be a district judge, I think that trial experience is very, very important and maybe essential. To be a circuit or supreme court judge, though, it is a different situation and this committee has so held.

Some law professors and students, very fine research people have made excellent circuit judges.

Senator BUCKLEY. If I may say, Mr. Chairman, this question, this gap in my own experience concerned me when I was first asked if I would consider a judgeship. I made the point of consulting with sitting judges, circuit court judges and each one of them assured me that whereas trial experience is desirable, it is not essential; and they stated further that I bring different types of experience which, on balance, would suit me for this position.

The CHAIRMAN. Senator Buckley, do you feel that this lack of trial experience will in any way hinder you in the performance of your duties as a U.S. circuit judge?

Senator BUCKLEY. No, sir, I do not, for the reasons that I just mentioned.

First of all, an appellate judge does not have to have that almost instinctive command of the rules of evidence that is essential for a trial judge.

Second, of course, what is required and what is important is the ability to judge the written briefs, an ability to analyze the legal problems, an ability to ask the right questions at the hearings on a case, and I believe that I have in large part, because of my experience in this body, shown a capability of doing precisely that.

In short, I believe I can do a competent job in discharging the high responsibilities that the President has asked me to assume.

The CHAIRMAN. Senator Buckley, Thomas Jefferson remarked shortly after the ratification of the Constitution that, "Our Nation's particular security is the possession of a written Constitution."

"Let us not make it a blank paper by construction."

Senator Buckley, what do you think that he meant by that warning, let us not make it a blank paper by construction?

Senator BUCKLEY. That the Constitution should not be treated as a first principle in a sequence of precedents to be spun out in accordance with common law practice.

In other words, there should be constant reference to the written document, to the constitutional document and to the intention of those who wrote it, to determine what the principles are that are enshrined in the Constitution so that they may be applied as faithfully as possible.

The CHAIRMAN. I think that is all the questions that I have, Senator.

Knowing you as I do, a man of character and ability and experience, and for the position of circuit judge, I think that you would fill the position well.

Senator BUCKLEY. Thank you, Senator.

The CHAIRMAN. The senior Senator from Illinois?

Senator SIMON. Thank you, Mr. Chairman.

Senator, I served with you briefly on the Helsinki Committee when I was a Member of the House and I visited your headquarters in Munich although you were not in that day, when I happened to be a strong believer in Radio Free Europe and Radio Liberty.

In the process of your being selected, has anyone asked you questions that you felt were improper?

Senator BUCKLEY. No, sir.

Senator SIMON. In the matter of trial experience, that the chairman touched upon, one of the previous nominees, who has since been approved by the Senate, indicated that he felt that he would go to some other jurisdiction just to sit in on some trials to get a little more of a feel for the system.

Do you have any inclination to do that or something along that line.

Senator BUCKLEY. I have not thought of it, Senator, but it sounds like a fine idea. I would like to say that I have sat in at trials when I was working as an associate in the law firm. I have been engaged in trial preparation work; research, carrying the briefcase and so on. So that I am not a stranger to the process.

But it would be very good to refresh myself.

Senator SIMON. I just pass it along not as any kind of a requirement, but just as a suggestion that someone else volunteered to do and it seemed to me to make some sense.

We do have a letter from the Washington Council of Lawyers, indicating that they have not received an answer to their request and asking that this nomination be held up until they had received one. I ask that we enter that into the record.

Do you intend to reply to them?

Senator **Buckley**. Senator, I am not aware of any letter. I am aware of a telephone call to my office, here in Washington, when I was here last, the day that I was leaving, in fact, to return to Munich. The request was for copies of all of the papers and forms that I had filled out for the Justice Department.

I simply did not feel that that was necessarily something that I needed to do and I asked my secretary to so inform the person who telephoned but I am not aware of the letter.

Senator **Simon**. We have it here.

In the meantime, you are, like members of this committee, a person with strong views on things, and I have read your statement. One of the bad things about making speeches and writing is that things are down on the record somewhere.

I read your statement from the 1971 hearings on the Rehnquist and Powell nominations. Frankly, your statement was excellent.

If I may read just a little bit of it.

You talked about judicial impartiality, which is essential to the rule of law:

> Much debate has been heard in recent weeks on the nature and extent of the prerogatives and passing upon the qualifications of judicial nominees. Some hold that it is improper for the Senate to inquire into the personal views of nominees. Others hold that it is not only proper but necessary to undertake such an inquiry in detail.
>
> My own view, Mr. President, is that it is as unwise to err on one side as on the other. Those who would foreclose such an inquiry altogether grant too much to the President's prerogatives and too little to those of the Senate.
>
> On the other hand, those who would subject a nominee to an ordeal by ideological combat, endanger the integrity and independence of the judiciary and open themselves to the charge of personal or political motivation.

And then you quote, Mr. Rehnquist, he was a nominee at this point and not approved.

The **Chairman**. Senator, excuse me, just a moment?

Senator **Simon**. Yes.

The **Chairman**. I have got to run over to the Capitol for about 20 minutes; could you chair the hearing until I get back?

Senator **Simon**. You bet.

The **Chairman**. And you can proceed on to the next one here, when you are finished.

Senator **Simon** [presiding]. You are quoting the justice designate then:

> When you put on the robe, you are not there to force your own notions as to what is desirable public policy, you are there to construe as objectively as you possibly can, the Constitution of the United States, the Statutes of Congress and whatever relevant legal materials that maybe in the case before you.

I mention this, simply because one of my colleagues has said, I wonder if Jim Buckley can, in a case, say an abortion case, where your stand has been a very strong one, whether you can, in a sense, follow the admonition that you made in 1971?

I was just interested in your reaction.

Senator **Buckley**. I believe I can, Senator, and if I did not have that strong conviction, I would not be here today.

Senator SIMON. That is the right answer, as far as I am concerned.

The letter that we will enter into the record is from Mr. Richard Jacobson, the president of the Washington Council of Lawyers.

This is not the bar association itself, but a smaller group of attorneys. They say that they have sent you a detailed questionnaire but you have not received the questionnaire. I will enter the letter into the record.

Will someone on the staff get him a copy of this letter?

I have no further questions. And you are a man who has contributed a great deal to this country in the U.S. Senate, and the executive branch and now, I have every reason to believe that you will have the opportunity to do the same in the judiciary, and I wish you the best.

Senator BUCKLEY. Thank you very much, Senator, I shall do my best.

Senator SIMON. Thank you.

[Letter follows:]

WASHINGTON COUNCIL OF LAWYERS

October 29, 1985

BOARD OF DIRECTORS

President: Richard L. Jacobson*
Vice President: Joseph Sellers*
Secretary: Steven J. Rosenbaum*
Treasurer: Elizabeth D. DePriest*

Nan Aron
Michael L. Barrett
Roderic V.O. Boggs
Stacy DeBroff
Jan L. Flack
John Garland
Marc Gary*
Eugene Goldman*
Barry H. Gottfried
Linda Hanten*
Dennis Henigan*
Charles E. Hill
Ted Hirt*
Craig Iscoe
Sherifa Ismail
Robert S. Jacobs
Anita Johnson
Thomas R. Kane
Hester Lewis
Timothy [illegible] Lindon*
[illegible]*
Pat [illegible]
Ann Macrory
David Medine
Elizabeth S. Merritt
Elliot M. Mincberg*
Andra Oakes
Margery B. Passett
John Payton
Linda E. Perle*
Robert Plotkin
Deborah M. Royster
Leonard Rubenstein
Lawrence A. Schneider*
Alan R. Schwartz*
Allen R. Snyder
Marsha Tucker*
Thomas S. Williamson, Jr.*
Claudia Withers

* Members of the Executive Committee

BY HAND

Senator Strom Thurmond
Chair, Senate Judiciary Committee
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to express my frustration at learning that your Committee has scheduled a confirmation hearing tomorrow on the nomination of James Buckley to be a judge on the United States Court of Appeals for the D.C. Circuit. I urge you to postpone the hearing.

The Washington Council of Lawyers is a voluntary, bipartisan bar association that has sought, since its inception in 1971, to promote public service and public interest activities with the Washington, D.C. legal community. One of the many activities we engage in is to monitor appointments to the courts of the District of Columbia, both local and federal. To that end, we have requested that Mr. Buckley provide us a copy of the detailed questionnaire he submitted to both the ABA Standing Committee on the Federal Judiciary and to the Bar Association of the City of New York so that we could evaluate his qualifications for appointment to the Court of Appeals. To date, we have had no reply from Mr. Buckley. As a result, we are not yet in a position to know whether we wish to testify at his confirmation hearing. Obviously, we will not have the opportunity if the hearing is held tomorrow.

Our concern with the timing of the hearing is not that our organization will not be able to testify, but rather that no one in the District of Columbia has had the opportunity to evaluate Mr. Buckley. If confirmed, Mr. Buckley will sit, with life tenure, on one of the most important courts in this country. Yet the

1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 700 • WASHINGTON, D.C. 20036 • 202/659-5964

Senator Strom Thurmond
October 29, 1985
Page Two

practitioners who will appear before him will have never been consulted. Such consultations and evaluations are particularly essential for appointments to the courts of the District of Columbia, since the District has no representatives in the Senate to protect its interests.

According to news reports, Mr. Buckley was nominated to the D.C. Circuit only after Senator Weicker objected to Mr. Buckley's nomination for a seat on the Second Circuit. The Bar Association of the City of New York, whose members would have appeared before Mr. Buckley if he had been confirmed to the Second Circuit, found that Mr. Buckley "failed to affirmatively demonstrate that he possessed the professional background and experience required for the position he seeks." In light of the cloud already cast over this nomination, it is even more important that the members of the District of Columbia Bar have an opportunity to evaluate Mr. Buckley.

Accordingly, we urge you to postpone the hearing on Mr. Buckley's confirmation until such time as the leaders of the Bar in the District of Columbia have the opportunity to evaluate his credentials and qualifications for such an important post in our jurisdiction.

Yours truly,

Richard L. Jacobson
President

RLJ/dmg

cc: Senator Joseph Biden
308 Hart Senate Office Bldg.
Washington, D.C. 20510

BOARD OF DIRECTORS

President Richard L. Jacobson*
Vice President Joseph Sellers*
Secretary Steven J. Rosenbaum*
Treasurer Elizabeth D. DePriest*

Nan Aron
Michael L. Barrett
Roderic V.O. Boggs
Stacy DeBroff
Jan L. Flack
John Garland
Marc Gary*
Eugene Goldman*
Barry H. Gottfried
Linda Hanten*
Dennis Horrigan*
Charles E. Hill
Ted Hirt*
Craig Iscoe
Sherrie Iuman
Robert S. Jacobs
Anita Johnson
Thomas R. Kline
Hester Lewis
Timothy J. Lindon*
Susan [illegible]*
Pat M. [illegible]
Ann Macrory
David Medine
Elizabeth S. Merritt
Elliot M. Mincberg*
Andra Oakes
Margery B. Passett
John Payton
Linda E. Perle*
Robert Plotkin
Deborah M. Royster
Leonard Rubenstein
Lawrence A. Schneider*
Alan R. Schwartz*
Alan R. Snyder
Marsha Tucker*
Thomas S. Williamson Jr.*
Claudia Withers

* Members of the Executive Committee

Senator SIMON. David Thompson, from California.

TESTIMONY OF DAVID R. THOMPSON, OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Senator SIMON. The first three questions I am asking for the chairman of the committee, who I might add, is a very respected member of this body, and who has shown great courtesy even to the freshman Members of this body and I am very appreciative of those courtesies.

Senator Thurmond says, "Mr. Thompson, you have been a practicing attorney since 1957 and now you have been nominated to be a Federal circuit judge for the ninth circuit.

I wonder if you foresee any difficulty in the transition from private practice to that of appellate judge at the Federal circuit level?"

Mr. THOMPSON. No, I do not, sir.

I view it as a challenge. My background has been as a general practitioner, and with emphasis in trial and appellate practice. And I have enjoyed the combat of the trial arena, and I have enjoyed the intellectual challenge of the appellate work.

And I see that an opportunity to serve at the circuit court level would enable me to use those tools and I think effectively carry out the responsibilities of the circuit court judge.

Senator SIMON. And then a second question asked by the chairman, "Mr. Thompson, would you tell the committee what procedures you will follow in determining any potential conficts of interest and how you intend to resolve them?"

Mr. THOMPSON. Yes, sir.

I would first establish a system of monitoring to determine not only my own financial and fiduciary interests, but those of my family; that includes my wife and all members of her family and my family so that I would have an updated and current source of data to determine what conflicts might exist.

Recognizing a conflict, I would then be guided by the provisions of the United States Code, by the Judicial Code of Conduct, and by Cannons of the American Bar Association.

I would recuse myself of course, in any case of conflict.

Senator SIMON. And the final question from the chairman:

> Mr. Thompson, one of the criticisms of the judicial activism is the tendancy by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far reaching orders extending to broad classes of individuals. Do you feel that this criticism is valid, and would you please explain your answer?

Mr. THOMPSON. I believe that the office or the obligation of the court, Senator, is to decide the case before it based upon the facts of the case, the people who are involved and assuming that the case is ripe for decision that the parties have standing, then you go forward and you decide that case.

To the extent that a court would utilize either the parties or the cause to impose on society, in general, far-reaching orders not called for by the case, any criticism in that regard, I think would be well founded.

Senator SIMON. Have you been asked in the process of your nomination, any questions that you felt were improper?

Mr. THOMPSON. No, sir.

Senator SIMON. Who has asked questions of you in addition to newspaper reporters or friends casually, who else questioned you with regard to this possibility of your being a judge?

Mr. THOMPSON. Professor Reese, I spoke with him and I spoke with two or three other persons at the Department of Justice, whose names I cannot remember.

Senator SIMON. But did any organization or association ask you to come before them for any kind of screening or anything like that?

Mr. THOMPSON. No, sir.

Senator SIMON. Finally, the bar association says, I do not find it right here, but somewhere it says, as one of the duties of an attorney is to be of assistance to the less fortunate in our society. Can you tell me how you have fulfilled that obligation?

Mr. THOMPSON. Yes.

Going back to when I first became an attorney, I defended indigent persons accused of crime in both Federal and the State courts.

I did so without fee in the Federal court and in the State court, there was a very miminal level of compensation, I did it anyway.

As my practice evolved out of the criminal law area and into areas more involving business litigation, criminal defendants or persons charged with crime were really not coming to see me, so that that opportunity was not there.

But I have continued to represent anyone who came to me regardless of the consideration of ability to pay. To the chagrin, I suspect, of my wife and family, maybe the bills have not been what they should have been out of the law office, but I am currently representing a family an Iranian family that is trying to establish itself here. And I have represented them for 2½ years while they have tried to get their little restaurant going and I cannot send them a bill. I represent older people who are unable to pay and I assist them and I do not seek fees.

Senator SIMON. Thank you.

You mentioned family, do you have any family members here, you would like to introduce while you are here?

Mr. THOMPSON. Yes, sir, I sure do.

I have with me my son Dan, and he is a student out in California.

Dan, would you stand up?

And then another son Adam, just got his teaching credential out of Humboldt University in California; he is going to be a teacher, but he could not be here.

Then our third child, Carolyn Fraser, is a lawyer admitted in California where she worked with me and it broke my heart to have her leave but she went to New York because that is where her husband is. She is also admitted in New York and she is practicing there.

Carolyn and her husband, Rob Fraser, are here.

And then my lovely wife Arna, whose love and support makes all of this possible and we are going to be celebrating our 30th wedding anniversary this coming week.

That is my family.

Senator SIMON. Thank you.

Congratulations and have a good anniversary.

Mr. THOMPSON. Thank you.

Our next witness is Judge Bobby Ray Baldock of New Mexico.

TESTIMONY OF BOBBY RAY BALDOCK, OF NEW MEXICO, TO BE U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT

Senator SIMON. Again, I have three questions from the chairman here.

He asks:

> Judge Baldock, you have served as a Federal District Court Judge since 1983.
>
> Now, you have been nominated to be a U.S. Circuit Judge for the 10th Circuit. Will you tell the committee what you feel will be the most rewarding aspect of serving in this capacity?

Judge BALDOCK. Yes, Senator.

I was not sure, initially when requested to go up, whether I would become part of the appellate process. And since April, I was designated by our chief judge who sits with the tenth circuit and also to continue my duties on the trial level. I find that I have enjoyed it very much.

I think the opportunity to continue to provide service to this country is something that does not come along to very many people. I feel very fortunate and I will use the best endeavors and the legal scholarship that I do have in making any decisions I may be called upon to render.

I am looking very much forward to doing this.

Senator SIMON. And the chairman's second question:

> Judge Baldock, in the case of the *United States* v. *Benally,* 1985, Circuit Judge stated his concern over the impatience of the Court.
>
> Now, Judge, I consider judicial temperament to be a prerequisite for a Federal Judge, would you please give me your thoughts on this subject?

Judge BALDOCK. Senator, I concur that temperament is extremely important. This was one of the early cases I tried when I first went on the bench and I have no qualms with what Judge Breitenstein said in that case.

Senator SIMON. And then the final question from the chairman:

> Judge Baldock, you informed the committee and I am quoting now, "our constitutional system of government depends upon separation of delegated powers. Each of the three coordinate branches of government is entitled to respect. Judiciary must be wary of infringing the power of the legislature by issuing opinions and orders which contain judicial legislation", Judge Baldock, where, in your view, does a conscientious Judge draw the line between judicial decision making and legislative decision making? What are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a Judge as opposed to an elected legislative body?

Judge BALDOCK. Senator, I think the first place a judge has to look, if it is a legislative matter, is at the legislation and its history, to see what was the problem that Congress may have been addressing at that time. You must look there, to start with, in every instance. I think if you can glean from that what was the concern, then it points the court in the correct direction. I think the stare decisis system, the precedent, is where the court looks to, as well as the legislative history and the statute itself. Many times, I find the statute means what it says.

And that is the way that you draw the distinction, you apply the common language the Congress has used or you apply the language the court has used in facing the problem you have before you.

That is the criteria, and the only criteria, I think, Senator.

Senator SIMON. Judge Baldock, you have a fine recommendation from the Bar Association. As we review the record, I do find a Wall Street Journal article which quotes an attorney for the ACLU describing you and this is a quote, "Death on wheels for civil liberties."

Do you have any comment to that particular allegation?

Judge BALDOCK. Only, Senator, that the young man who made the comment, he was the only person that I know who made the comment.

My staff informed me, if they were correct, he has appeared before me four times and has won three out of those four times, but I definitely believe the young man is entitled to his opinion. I have no other comment.

I know I have tried civil rights cases, and there have been substantial verdicts awarded in my court for those people, so I am not quite sure I understand why the young man has that opinion, but he is entitled to it.

Senator SIMON. We have all gone through those kinds of experiences.

I also note, according to the staff report that I have, that as the trial judge, you were criticized by the tenth circuit for the impatient manner in which you conducted a criminal trial of an American Indian.

I guess it is not a fair question to say, was the criticism valid? But any comment that you would have and do you think that you have learned in the process of going through this and let me just add, all of us make mistakes in the process of this life, and whether we are judges or Senators or even the staffs of Senators occasionally make mistakes.

Any comments that you have?

Judge BALDOCK. Yes, sir.

That is the case of *U.S.* v. *Benally,* mentioned a minute ago. That was one of the early cases I tried when I first went on the bench. I have no qualms with what Judge Breitenstein said in that matter.

Had I to do it again, it would be done differently. I was principally concerned with protecting the defendant's rights, and it was one of those things that, on the record, it appears just the opposite was coming out.

Senator SIMON. Judge Baldock, we wish you the best.

Thank you very much.

Do you have members of your family?

I know that your wife was introduced earlier, and we spot her with that fine white hair. Any others that you wish to introduce here?

Judge BALDOCK. Yes, Senator.

I have Robert Singleton here, and Shirley Mantelli; there were other members who had to leave a few minutes ago, but I appreciate the opportunity to introduce these people.

Senator SIMON. We thank you very, very much, Judge Baldock.

TESTIMONY OF ROBERT E. COWEN, OF NEW JERSEY, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Magistrate COWEN. Thank you.

Senator SIMON. Again, I have three questions from the chairman here.

First, you have served as U.S. magistrate for the district of New Jersey, since 1978. Surely you have noticed an increase in the caseload before the Federal district court over the years.

I wonder, what in your opinion is needed to speed up the disposition of Federal cases?

Magistrate COWEN. Senator, there are many problems which are causing a backlog and a profusion of filing of cases in the Federal courts. Probably one of the most severe is the subject matter jurisdiction of the district court which emanates from a diversity of citizenship jurisdiction. I believe the time has arrived when this type of jurisdiction for Federal courts should no longer exist.

The State court judges of the various States, are, at least as equally able as are Federal judges to adjudicate State court controversies. I am advised by my court clerk, Allen Site, that in our district 26 percent of the cases on our docket are diversity of citizenship cases. These cases have nothing to do with Federal questions or constitutional law litigation.

We can eliminate 26 percent of the litigation by putting that litigation where it belongs, that is, in the State courts. Indeed, the time that a litigant from one State had to fear trying a case in a different State court because he or she was a foreigner, is something we can relegate to the archaic past.

We also have a profusion of habeas corpus cases, which are really reruns of State court criminal matters. There has to be some alternative resolution of these cases which they go through the entire State court process to the State supreme court, and then they start again in the Federal court. All things good and bad must come to an end, and I would suggest that the Federal courts must have some means of lessening that load.

What I have said of habeas corpus cases, can also be said of Social Security review type cases. In the Federal court we get these matters by the barrelfull.

There are many cases, which although of a Federal question jurisdiction, really are not Federal cases. I allude to most cases under 28 United States Code, sections 1981 and 1983. These overwhelmingly are State court tort type cases which are cast in constitutional dress, but when you really look at them, at bottom they are matters which should be in the State courts.

And finally, I think that many of the cases which we entertain are cases with little merit, and if the court enforced some of the sanctions for frivolous and bad faith litigation, we would have fewer of these types of matters before us.

Senator SIMON. The second question the chairman asked, Mr. Cowen, am I pronouncing that correctly?

Magistrate COWEN. That is correct, Senator.

Senator SIMON. I consider judicial temperament to be a prerequisite for a Federal judge.

Would you give me your thoughts on this subject?

Magistrate COWEN. I could not agree more. It is absolutely essential that anyone sitting in judgment, whether it is criminal or civil, have total control and be temperate regardless of the nature of the controversy. I think that it brings courts into disrepute if litigants, regardless of the merits of the litigations are not treated civilly.

I am pleased to advise you, Senator Simon, that, at an earlier time in my career, I had the high privilege and honor of being present when the New Jersey Supreme Court constituted the Advisory Committee on Judicial Conduct, of which committee, I was the executive secretary. We policed the conduct of judges as to temperment as well as the entire code of judical conduct.

Senator SIMON. And the final question from the chairman, Mr. Cowen, the phrase, judicial activism is often used to describe the tendancy of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase, judicial activism mean to you?

Magistrate COWEN. Senator Simon, the phrase, judicial activism, as defined by myself, would mean entering an order or a mandate, deciding any case or controversy, with a decision which was beyond the bounds of what was essential to adjudicate the matter.

That is to say, that I do not believe it appropriate for the court to enter decision in any matter, which resolves anything beyond the immediate case or controversy. The court should not engage in problem solving or use the vehicle of a case which is before it, in order to make problem solving pronouncements beyond the very pale of what is necessary to adjudicate the case which is before the court.

Senator SIMON. Has anyone asked you any questions that you would consider improper?

Magistrate COWEN. No.

Senator SIMON. Have you been interviewed by any organization, other than the representatives of the Justice Department in the process of getting interviewed?

Magistrate COWEN. No, I have been interviewed by a number of people in the Justice Department, but I have been interviewed by no organizations.

Senator SIMON. Well, the bar association gives you an excellent recommendation here and we congratulate you.

Do you have members of your family that you would like to introduce here?

Magistrate COWEN. Yes, Senator, if I may introduce my wife, Toby, who is here at this hearing. She is bashful and will not stand. I would also like to state that I am unable to have my two lovely daughters, Shulie and Bootsy, in attendance, since they feel that their educational requirements are more important than my judicial aspirations.

Senator SIMON. I will not make a judgment on that. [Laughter.] We congratulate you and wish you the very best.

Magistrate COWEN. Thank you, sir.

TESTIMONY OF EDWARD R. KORMAN, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Mr. KORMAN. Thank you, Senator.

Senator SIMON. And again, I have three questions from the chairman, Mr. Korman.

You are presently associated with a law firm in New York as well as a professor of law at the Brooklyn Law School.

From 1978 to 1982 you served as U.S. attorney for the eastern district of New York. Do you feel that this experience will be beneficial to you as a Federal district court judge, and if so, how?

Mr. KORMAN. Yes, I think the experience in each of those jobs will be beneficial to me. As a law school professor, I teach evidence, and criminal procedure which would constitute almost a refresher course that should be required of every Federal judge.

In my practice of law, which I have done for 3 years, I have had a picture that I did not previously have of what it is like to practice law on the civil side, having spent 12 years with the Department of Justice, mainly doing prosecutorial work.

I now know and appreciate the problems that civil lawyers face, and I think that perspective will be useful to me as a district court judge.

I think the 12 years that I spent with the Department of Justice, left me with a feeling of respect for, and an understanding of, the problems of law enforcement but also, removed any romantic notions that I might have had about those who participate in the process. Like a member of the family, I know the good and the bad, and I think that that perspective, as well, will be useful to me, as a Federal judge.

Senator SIMON. Mr. Korman, do you feel—this is again a question from the chairman, do you feel that a district court judge should assume direct control over complex issues in cases, in order to avoid delays and to effectively manage such cases?

Mr. KORMAN. I think that if I could change the word, direct control, to say, to use every reasonable effort, I would answer the question, yes.

The word, direct control, implies to me, a role of the judge that may be a little perhaps, too high handed. I think that he should do everything possible in the confines of the rules to clarify the issues and to avoid delay, keeping in mind, always, that his obligation is to ensure to the parties a fair and just result.

Senator SIMON. And then the final question from the chairman, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than the one where the intent of the framers of the legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Mr. KORMAN. No.

Senator SIMON. Have you been asked anything, you heard me ask the question of others, have you been asked anything that you consider at all improper?

Mr. KORMAN. No, I have not.

Senator SIMON. The bar association says, under cannon 2, their Code of Professional Responsibility, every lawyer regardless of professional prominence, or professional workload should find time to participate in serving the disadvantaged.

Can you tell me how you have complied with that?

Mr. KORMAN. Well, let me say that initially, of the 19 years that I have been a member of the bar, approximately 15 of them have been in public service. To answer your question more specifically, as early as law school, I did volunteer work at the Legal Aid Society of the Family Court in Brooklyn. In the 2 years that I was in private practice after my clerkship, I handled several appeals for indigent defendants, at nominal fees, and after completing the appellate work that I was assigned by the court, I continued to represent them and file additional papers seeking collateral relief on their behalf without any compensation.

Only last year, I was appointed by the New York County surrogate to act as the guardian for a juvenile who had been left some money and who had found himself charged with serious criminal activity. I took on the assignment of assuring that the money was well spent in his defense and waived any fee to which I would have othewise been entitled so that all of the moneys that were left to him were to be used in his defense.

Senator SIMON. You are well recommended by the bar association and we wish you the best.

You have members of your family here?

Mr. KORMAN. Yes, my wife Diane.

Senator SIMON. We thank you very much and wish you the best.

Mr. KORMAN. Thank you, Senator.

TESTIMONY OF WILLIAM J. ZLOCH, OF FLORIDA, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Senator SIMON. William J. Zloch of Florida.

Again, I have three questions, Mr. Zloch, from the chairman.

In reviewing your file, I noted that on March 13, 1985, you received the Florida Bar President's Pro Bono Service Award for the 17th judicial circuit.

Would you please tell the committee, what advice you would give young attorneys concerning their responsibility in rendering this type of legal service?

Mr. ZLOCH. Senator, first of all, that was a program that the Broward County Bar Association put together when they asked law firms, within the Broward County area, to sign up with the bar association to provide services in any given area, for people who otherwise could not afford legal representation. And my law firm signed up for that program and we represented indigent clients in the areas of family law and landlord/tenant areas, and it was an opportunity for me to give back to my community, where I was born and raised, something that I felt was very valuable.

Senator SIMON. The second question from the chairman, would you give us your own perspective on the recent trend in the Supreme Court toward stricter standards of standing?

Mr. ZLOCH. Senator, certainly that is an area at the Federal level that deserves consideration and I am glad to see that the Supreme Court is giving consideration to that problem with respect to the Federal court caseload.

Senator SIMON. And the third question from the chairman, what is the proper application of stare decisis in the constitutional law?

Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. **Zloch**. Senator, first of all, the Constitution says what it means and means what it says. It is the Federal judge's oath is to uphold the Constitution. However, it is also the duty of the Federal Judge to apply existing case law.

Senator **Simon**. You have heard the question that I have asked the others about improper questions.

Mr. **Zloch**. Yes, I have, and I have not been asked any improper questions.

Senator **Simon**. No one asked you how you would rule on such and such a case, if it came before you?

Mr. **Zloch**. Absolutely not, Senator.

Senator **Simon**. Do you have members of your family that you wish to introduce?

Mr. **Zloch**. Yes, I do, Senator.

I have got my wife Nancy, who is from Illinois.

Senator **Simon**. She is from Illinois, you are a good nominee.

Mr. **Zloch**. Formerly Nancy Fitzhugh.

Senator **Simon**. And you are from?

Mrs. **Zloch**. Waverly originally and then Arlington Heights.

Senator **Simon**. Well, I know some Fitzhughes so that I may very well know your family.

Mr. **Zloch**. And this is my daughter Christie, and my son Bill.

A good friend of ours who came up from Florida, Ann Fee, and this is my brother Chuck, and a good friend of ours from Fort Lauderdale, Joe Pasatore. And my brother Jim, and a good friend of ours from Fort Lauderdale, David Fee; and I am proud to introduce my father Fred.

Senator **Simon**. You ought to be a proud father today.

I do have one final question.

If I had been from Kansas, would you have introduced your wife from Kansas? [Laughter.]

We wish you the very best, Mr. Zloch.

Mr. **Zloch**. Thank you.

TESTIMONY OF JANE R. ROTH, OF DELAWARE, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE

Senator **Simon**. Welcome, Mrs. Roth.

Mrs. **Roth**. Thank you, Senator.

Senator **Simon**. You are not a stranger to these halls.

I have four questions for you the chairman is being a little tougher on you than the other nominees here.

First of all, Mrs. Roth, you stated in your questionnaire that your practice has generally been devoted to civil litigation.

Do you feel that your lack of criminal experience will, in any way, hinder you in the performance of your duties as a Federal judge?

Mrs. **Roth**. No, I do not, Senator Simon.

I believe, through the seminars provided for new judges, through the materials provided by the Judicial Center, through my own study and through discussions with other members of the bench in the district of Delaware, that I will very quickly be able to familiarize myself with the experience and knowledge that I will need in the trial of criminal cases.

Senator SIMON. The second question from the chairman, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court, was obviously not a skilled litigator, was not prepared to adequately represent the interests of his or her client?

Mrs. ROTH. Well, Senator, I think that in the pretrial proceedings in a case, that it would become evident if that were to be the situation.

I know, from my experience in Delaware, that the suggestion has on a rare occasion, been made to counsel to get assistance, and this advice has been followed.

Senator SIMON. The third question from the chairman, are there ever any circumstances where you would consider it appropriate to decide a case on some basis, other than one where the intent of the framers of legislation or constitutional provisions can be detected, either through the text or provision or its surrounding legislative history?

Mrs. ROTH. Senator, I think that the answer to that question is that it is a role of a judge to interpret the law.

And I would follow those precepts in deciding any case.

Senator SIMON. And the final question, from the chairman, today we will hear testimony from Dr. Ronald Connolly, who alleges misconduct on your part regarding your representation of Dr. Russell Labowitz.

Mrs. Roth, would you tell the committee the facts surrounding your representation of Dr. Labowitz, and the reasons that you feel that Dr. Connolly questions your actions in this case?

Mrs. ROTH. Senator, Dr. Connolly has brought suit in superior court in the State of Delaware against Dr. Labowitz, alleging defamation, interference with economic relationships, and an attempt to monopolize the practice of rheumotology in Delaware.

I represent Dr. Labowitz, the defendant, in this action and the action is presently pending before the superior court and will ultimately be decided on its merits.

In my representation of Dr. Labowitz, I have, at all times, conformed to the code of professional ethics required of all attorneys, in the Delaware Bar.

Dr. Connolly has submitted his complaints similar to the complaints that he submits here, to the board on professional responsibility, of the Delaware Supreme Court. Those complaints were dismissed as being without merit.

Senator SIMON. And as you do look back on the handling of that case, and I realize that it is still under appeal——

Mrs. ROTH. No, it is still pending. It has not gone to trial.

Senator SIMON. Oh, I see.

Mrs. ROTH. There is a motion for summary judgment pending, at the present time.

Senator SIMON. At the one point, in a letter from court trial and maybe this is—and obviously things can get taken out of context, but I do not see it right now, but it was, there was a reference to—oh, here it is.

"I am perfectly entitled to annoy, embarrass, and oppress him, am I not?"

You are referring to—I am not sure to whom that refers.

Do you want to explain the context of that?

Mrs. ROTH. I will be glad to, Senator.

This occurred during a deposition when I had asked a question of Dr. Connolly, whether he had ever been reprimanded for abandoning a patient?

The attorney representing Dr. Connolly directed him not to answer the question. I asked for the grounds of the objection and they were listed as, it was depriving the doctor of his constitutional rights, of his religious freedom, and I said, that the question was directed to the claim that he made that his medical practice had been injured and that I thought it was a question relevant to his medical practice, if he had been found to have abandoned a patient, it would have bearing upon his reputation in the community.

This went back and forth a number of times. I was asking a question which I thought was clearly pertinent, and Dr. Connolly's attorney was raising objections which I felt were not even relevant to the question.

Finally, Dr. Connolly's attorney said to me, you are asking this question to annoy, harass—the language used there.

And I, at that point, in exasperation said, I have every right to do that, because in my view, the question was so relevant and so appropriate, that if that description were given to a question of that nature, then any question asked by an attorney would be in that same category, designed to harass, annoy, and irritate.

This particular question was raised to the board on professional responsibility and after investigation, it was found again, to have been exasperation and not such a question.

Senator SIMON. And Mr. Newberger, I see here, was the counsel for the other side?

Mrs. ROTH. That is correct.

Senator SIMON. You heard me ask the questions about any improper questions.

In your case, I think that we ought to ask whether the senior Senator from Delaware has asked you any improper questions in the course of this process?

Mrs. ROTH. In the course of our courtship, I would not care to comment, Senator Simon, and in the course of this process, neither the senior Senator, nor anyone else has asked me any improper questions.

Senator SIMON. All right, do you have members of your family that you wish to introduce?

Mrs. ROTH. Yes, I do indeed.

I have my son Bud, and I have my husband, with whom, perhaps you are acquainted.

And I have my sister-in-law, Lucille Roth, and I have Catherine Donahoe, who is an old friend of the family.

I have also two of my mother's sisters, Ruth Moser and Katharine Hardy.

Senator SIMON. We are pleased to have them.

Mrs. ROTH. I have my secretary down from Wilmington, but I guess that she may have gone out into the hall.

Senator **Simon**. Well, we are pleased to have you all here.

I hope that the senior Senator from Delaware will take you out for dinner tonight.

Mrs. **Roth**. He has inferred that he would, thank you, Senator.

The **Chairman**. We want to congratulate you, Mrs. Roth, and wish you well on the bench.

I feel confident that you will make an outstanding judge, and we are very proud of you.

Mrs. **Roth**. Thank you, Mr. Chairman.

The **Chairman**. Thank you.

[Material follows:]

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF DELAWARE

PLEASE ADDRESS REPLY TO
Richard E. Poole, Esquire
BOARD MEMBER
P.O. Box 951, Wilm., DE 19899
ADDRESS

BY HAND

PERSONAL & CONFIDENTIAL

May 17, 1985

L. Susan Faw, Esquire
Office of Disciplinary Counsel
Board on Professional Responsibility
2nd Floor
200 West Ninth Street
Wilmington, Delaware 19801

Re: Informal Docket No. 47
Jane R. Roth, Esquire
Complainant: Ronald G. Connolly, M.D.

Dear Ms. Faw:

On March 6, 1985 you referred the above-captioned matter to me pursuant to Rule 9(b) of the Rules of the Board on Professional Responsibility of the Supreme Court of Delaware to conduct a preliminary investigation in my capacity as an assistant disciplinary counsel. I have completed my investigation and I conclude that there is not a sufficient basis upon which to initiate formal disciplinary action against Mrs. Roth.

My investigation has consisted of a review of Dr. Connolly's letter to you dated March 5, 1985, Mrs. Roth's letter to me dated March 15, 1985, together with Exhibits A-O, Dr. Connolly's letter to me dated April 8, 1985, together with the Omnibus Motion Briefs and Exhibits 1-50, and Mrs. Roth's letter to me dated May 14, 1985, together with enclosures. I also spoke in person for over two hours with Dr. Connolly and in person for about two hours with Mrs. Roth and Mr. Herndon, all on May 9, 1985. Both Dr. Connolly and Mrs. Roth appeared satisfied that I had reviewed all materials relevant to Dr. Connolly's complaints and that there was no need for me to speak with anyone else about the matter.

Dr. Connolly's complaints against Mrs. Roth relate to her conduct as attorney for Russell J. Labowitz, M.D. in Connolly v. Labowitz, Del. Super. Civil Action No. 83C-AU-1. Most of the pertinent facts recited hereafter are undisputed. If disputed, I have assumed the facts to be true pursuant to Rules 3(b)(2) and 9(a).

Canon 7 of The Delaware Laywer's Code of Professional Responsibility provides that "a lawyer should represent a client zealously within the bounds of the law." In the absence of a violation of some other ethical obligation, Mrs. Roth has had the duty as an attorney to represent Dr. Labowitz to the best of her ability, regardless of the merits of her client's cause. It is for the fact finder and the Court in Civil Action No. 83C-AU-1, not for the Board on Professional Responsibility, to resolve the factual and legal issues in the underlying dispute between Dr. Connolly and Dr. Labowitz. Dr. Connolly acknowledges that "... the Court will decide the merits of these complaints." Connolly to Poole letter, April 8, 1985, Page 8.

Dr. Connolly's complaints against Mrs. Roth may be summarized in six headings that roughly correspond to his own assertions:

(1) Breach of Confidence. Mrs. Roth undertook the representation of Dr. Labowitz after being consulted by Dr. Connolly several weeks earlier. While Dr. Connolly and Mrs. Roth disagree as to many aspects of their conversation, it is undisputed that no attorney-client relationship arose between Mrs. Roth and Dr. Connolly. Nor is there any evidence of specific confidences disclosed by Dr. Connolly to Mrs. Roth. Canon 4 and DR 4-101 have not been violated based on the undisputed and assumed facts. Moreover, Dr. Connolly through his counsel raised this issue in the Connolly v. Labowitz litigation in October of 1983, but the matter has not since been pursued.

(2) Harassment. In the Connolly v. Labowitz case, Mrs. Roth on behalf of the defendant has sought a mental examination of the plaintiff, Dr. Connolly, in support of the third affirmative defense of plaintiff's alleged lack of capacity to

institute the suit. This matter has been extensively litigated in the lawsuit. My review construing the facts most favorably to Dr. Connolly with regard to Mrs. Roth's allegations as to his mental capacity indicates that there has been no violation of DR 7-102(A)(1); the facts do not support a determination that "...it is obvious that such action would serve merely to harass or maliciously injure another" (emphasis supplied).

Another issue in the underlying lawsuit concerns alleged "patient abandonment" by Dr. Connolly. Mrs. Roth stated during the deposition of Dr. Connolly that she was "entitled to annoy, embarrass and oppress him!" I am satisfied that Mrs. Roth did not in fact conduct the deposition and other aspects of the defense "to annoy, embarrass and oppress" Dr. Connolly, and that her statement was merely one of exasperation.

(3) Publicity. The Connolly v. Labowitz litigation has engendered some coverage in the news media. There is no evidence, however, that Mrs. Roth has violated DR 7-107(G). She has declined to comment to the news media, and recently she suggested that the court records in the case be sealed.

(4) Role of Witness. Mrs. Roth has expressed her personal opinion of Dr. Connolly's mental condition. It has already been noted in paragraph (1), *supra*, that no breaches of confidence have occurred. Nor has Mrs. Roth violated DR 5-101 and 5-102 because it is unlikely that she would ever be called as a witness on this matter. If Dr. Connolly deems it necessary or appropriate, he can pursue prior to trial the assertion of his counsel in this regard apparently first raised in the underlying litigation in December of 1984.

(5) Delay. DR 7-102(A)(1) provides that in the representation of a client a lawyer shall not delay a trial merely to harass or maliciously injure another. Mrs. Roth's delay in the filing of a brief does not constitute a violation of this provision of the Code.

(6) Conflict of Interest. Mrs. Roth's law firm, Richards, Layton & Finger, represents the Wilmington Medical Center. While the allegations of the parties in *Connolly v. Labowitz* involve the Wilmington Medical Center, that entity is not a party. It is of course possible that in the future the interests of Dr. Labowitz and/or the Wilmington Medical Center may diverge in such a way that Richards, Layton & Finger could no longer properly continue the dual representation. In the

meantime, there is no evidence that formerly or now Mrs. Roth's position as a member of Richards, Layton & Finger creates any risk of disclosure of the confidences and secrets of either Dr. Labowitz or the Wilmington Medical Center in violation of Canon 4.

Pursuant to Rule 9(b), I recommend dismissal of all complaints against Mrs. Roth by Dr. Connolly.

Respectfully submitted,

Richard E. Poole

REP/scd

cc: O. Francis Biondi, Esquire
Ronald G. Connolly, M.D.
Jane R. Roth, Esquire
James S. Green, Esquire
Henry N. Herndon, Jr., Esquire

The CHAIRMAN. Now, we have two witnesses, I believe, who desire to testify concerning Mrs. Roth.

Dr. Ronald G. Connolly of Wilmington, DE.

TESTIMONY OF RONALD G. CONNOLLY, OF WILMINGTON, DE

Dr. CONNOLLY. I am a physician specializing in rheumatology which is a branch of internal medicine. Mrs. Roth's professional——

The CHAIRMAN. Just a minute, I forgot, you have to stand up and be sworn. Will the testimony given today, be the truth, the whole truth and nothing but the truth, so help you, God?

Dr. CONNOLLY. I do.

Mrs. Roth's professional conduct and ethics are of great concern to me. My concern is documented in the proceedings of a current Delaware Superior Court lawsuit, that I filed more than 2 years ago, against her client, Dr. Russell Labowitz.

I charged Mrs. Roth's client with acts of professional misconduct, including unfair competition and defamation. The first day that Mrs. Roth made an appearance in this lawsuit, September 16, 1983, she filed a psychiatric motion against me, urging the court to subject me to a psychiatric evaluation. And Mrs. Roth submitted an affidavit stating that my complaints against her client were without merit and the manifestation of a psychiatric illness.

Mrs. Roth filed this motion in spite of the fact, that I have never had a psychiatric illness in my life.

Senator Roth, for several years, has been investigating fraud and waste in the Defense Department. I hope that Mrs. Roth will answer one question—how can Mrs. Roth state to the court that my complaints of her client improperly billing Medicaid are without justification, and a manifestation of a mental condition, when her client, under oath, and in Mrs. Roth's presence, admitted that he billed for services not rendered over a 2-year period and two of Dr. Labowitz's exsecretaries signed sworn affidavits documenting this.

Many months after Mrs. Roth's client made this admission, the Delaware attorney general's Office exonerated Mrs. Roth's client and the attorney general's Office was quoted as saying, that their investigation had "found no instance where he billed the State when he didn't see the patient."

In my opinion, this is an incredible investigation. In Mrs. Roth's statement to the court, she is not simply relating the attorney general's exoneration. She is saying, her concern is that Dr. Connolly's complaints are without justification. She further states that she is concerned on the basis of her own observations that this complaint is a manifestation of a mental condition.

These facts, these statements by Dr. Labowitz, his secretaries and by the attorney, Mrs. Roth, are documented in tab F, tab B, and tab C.

Mrs. Roth submitted testimony that I was psychiatrically ill when, for religious reasons, I refused to participate in an abortion of a 5-month's pregnant woman.

Her client, Dr. Labowitz, participated in the abortion and then, in spite of Delaware statute #1791, which gives me the legal right not to participate in abortion, he accused me of patient abandonment and Mrs. Roth supported this charge.

Unfortunately the patient died shortly after the abortion. At the time of the abortion, a doctor consulting on this patient, wrote in the hospital records that the patient's underlying disease my be reactivated or exacerbated by the abortion. Within a week of the abortion, the patient developed a severe worsening of her underlying disease and died a few months later.

I do not understand Mrs. Roth's justification in submitting testimony that my refusal to participate in this abortion is a manifestation of a psychiatric illness.

When Mrs. Roth deposed me on this abortion issue, she tried to attribute my failed medical practice to charges that I had abandoned this abortion patient. My attorney objected, saying that this was harassment, since plaintiff had a legal right not to participate in the abortion.

Mrs. Roth replied and I quote, "I think I am perfectly entitled to annoy, embarrass, and oppress him."

Mrs. Roth acted as a witness before the court, rather than being content to act as an attorney for her client.

Mrs. Roth, on several occasions, has given her medical opinion, concerning my mental status. She did this on the basis of a private telephone conversation between the two of us, prior to the filing of this lawsuit.

Mrs. Roth filed her motion to have me psychiatrically examined and to dismiss my case because of mental illness, even though I have never, as I have mentioned, had any psychiatric illness in my life. After briefing and argument, the Delaware Superior Court said, that such a motion must be supported by good grounds and filed in good faith. The court found that there were not good grounds, struck Mrs. Roth's defense of mental illness and awarded me attorney's fees. In character, Mrs. Roth has ignored these orders and has filed still another psychiatric motion.

Mrs. Roth also deceived the court in her psychiatric motion by demanding that I be examined by a psychiatrist, Dr. David Raskin, who was being presented to the court as an unbiased expert to resolve this question of psychiatric illness. Nineteen months after Mrs. Roth submitted this supposedly unbiased expert, my attorney and I learned, that Dr. Raskin had been contacted 6 months prior to her psychiatric motion and had agreed to support Dr. Labowitz' position, even though the psychiatrist had never met me.

And Mrs. Roth states that she has filed this psychiatric motion in good faith and her psychiatric motion——

Senator SIMON. I do not mean to interrupt you, Doctor, but we would like, if you can kind of summarize the balance of your statement, we will enter the full statement in the record.

Dr. CONNOLLY. Thank you.

My concern is that Mrs. Roth's legal conduct reflects a consistent mentality, month after month for more than 2 years that raises serious questions concerning her professional ethics and qualifications. It is not an isolated instance, it is not a slip of the tongue. Mrs. Roth says that my complaints have been addressed by the Board of Professional Responsibility of the Delaware Bar, yet when I presented my complaints, the board did not hear my complaints.

The board assigned an assistant investigating attorney, one attorney, to review my complaints and he terminated the investigation.

She states that I was accused of patient abandonment. And this was in direct violation of my constitutional rights of freedom of religion as I understand it, as well as a direct violation of Delaware Code 1791 that states that a doctor is not required to participate in an abortion.

I hope that the committee will put a hold on Mrs. Roth's nomination and confirmation until my complaints can be further evaluated.

As I say, my complaints were addressed by only one attorney, a well known associate of Mrs. Roth's and I would hope that the committee would put a hold on this confirmation vote.

Thank you.

Senator BIDEN. I apologize for being late and I had hoped to be here. I was at another meeting, when Mrs. Roth also testified.

Let me say for the record, Mr. Chairman, that I have the closest thing to a conflict here, that I have had in this committee.

And I want to, before I ask any questions, put on the record, my situation.

Dr. Connolly is a good friend. Dr. Connolly's younger brother, Tom, was one of my most valued employees, and in fact, the most trusted, in that, he was my nominee to the very important and highly classified Intelligence Committee.

Dr. Connolly's older brother, or younger second brother, nominated me for the U.S. Senate the first time that I ran for the U.S. Senate.

Dr. Connolly's father, who is probably the dean of all lawyers in the State of Delaware, is a contributor of mine and a friend.

And Dr. Connolly's mother, acts as my surrogate mother on occasion, including writing notes telling me that I should not bend out of my car to pick up the newspaper, for fear that, at the end of my driveway, for fear that I may be hurt.

And I do not say that facetiously, I say that to express the relationship and the affection that I have for the Connolly family.

And in my view, Dr. Connolly is one of the finest physicians in the State of Delaware. And so, I want that known before I begin.

Obviously, you all know my potential theoretic, at least, confict, as it relates to having been a friend of Jane Roth's for years, and a very—I do not want to hurt his reputation but I think that it is fair to say, close friend of Bill Roth's.

So that it is in that spirit that I undertake—with that knowledge, I would like to undertake a few of the questions which are the hardest for me, it is the toughest hearing on a judgeship that I have ever participated in for the reasons that I have just stated and they are all personal.

And I thank the Chair for indulging me in that part, and now let me get on with my role as a United States Senator, on this committee.

And I should say one more thing, just so that it is all out in front.

Dr. Connolly's second daughter is my babysitter.

And he is my neighbor, he lives four doors from me.

Doctor, I have read, as you might expect, your letter and my staff has assembled for me the relevant portions of the testimony to which you refer, and to even make matters more complicated, in terms of whether or not, I have a conflict, I even had spoken to—you had asked to speak to me well before there was anything having to do with a confirmation, about advice as to what you should or should not do, unrelated to Mrs. Roth being appointed as a judge.

But one of the questions that I think that should be asked for the record, is that apparently the Delaware Bar Association and the appropriate committees of the Delaware Bar Association, have looked into your allegations and to the best of my knowledge, they have concluded, the Board of Professional Responsibility concluded that Mrs. Roth did not act improperly.

Would you, if you have not already, comment on that in the following context: lawyers are required to represent their clients within the limits of the law and of professional ethics, And although some of what Mrs. Roth may have said, for example, your quote in your letter, "Mrs. Roth, in deposing me, said, I think that I am perfectly entitled to annoy, embarrass, and oppress Dr. Connolly."

There are a number of tactics that lawyers traditionally use that are accepted by the legal practice. Let me stop there.

Do you believe that the Board of Professional Ethics was biased in their judgment or that they did not get all the facts, or that there is just a—is there an area for reasonable men to disagree on this issue?

Dr. **Connolly**. The Board of Professional Responsibility never addressed my complaints. The complaints were fielded by one attorney, who terminated the study. In addition, as far as Mrs. Roth acting as an advocate, my complaints are that this goes far beyond advocacy, where, in my opinion, Mrs. Roth is repeatedly deceiving the court. Her client admitted that he had billed for Medicaid services not rendered over 2 years.

He admitted this in Mrs. Roth's presence under oath. Mrs. Roth presented to the court, that my charges of Medicaid improprieties were without justification and the manifestation of a psychiatric illness. There are millions of elderly and poor people depending on Medicaid. Their funds are being reduced. This was a misrepresentation to the court, this was not advocacy. She went beyond advocacy and said that my complaints were without merit, and were the manifestation of a pyschiatric illness. She knows that that was false and she knows that that was false because her client was sitting beside here, under oath, stating in the public record, that he was billed for services not rendered.

In addition, two secretaries from Dr. Labowitz' office, said that throughout their employment, they recall many instances of Medicaid abuse. One employee was for 6 years billing Medicaid.

Senator **Biden**. Well, let me ask you this question, doctor.

Is it the practice at all, in medicine, among other of your colleagues, other than Dr. Labowitz, that if an appointment is made and not kept that there be a billing for the appointment?

Dr. CONNOLLY. That is totally inappropriate for a doctor to bill the Federal and State government for services not rendered. That is well known.

As a matter of fact, when the secretary was deposed on this issue, she said that they had a code, a checkmark was pushed after the ledger card showed a billing to Medicaid in which the service was not rendered.

Evidently, clearly, the doctor knew that this was improper. The secretary said that he knew that it was improper.

Senator BIDEN. Well, doctor, I will ask you one more question on this, and then I will yield to the Chair.

I know that my dentist bills me when at the last minute, my son has to cancel. The rationale being that it cost that doctor money—I do not like it very much, but I pay—that that doctor, in fact, would have had another patient there, and it cost him or her money.

Have you ever heard of that practice with others?

Dr. CONNOLLY. Certainly with private patients, Senator Biden, that is true. The Federal Government does not permit that.

Senator BIDEN. Thank you, Mr. Chairman, and thank you, doctor.

I have no further questions.

The CHAIRMAN. We will pass that responsibility to the Supreme Court of Delaware. We will hold that for our files and for our reference.

Doctor, I have no questions. Thank you very much for your appearance.

Dr. CONNOLLY. Thank you.

[Information follows:]

DIPLOMATE OF THE AMERICAN
BOARD OF INTERNAL MEDICINE

DIPLOMATE OF THE AMERICAN
BOARD OF RHEUMATOLOGY

RONALD G. CONNOLLY, M.D.
2300 PENNSYLVANIA AVENUE
WILMINGTON, DELAWARE 19806
(302) 655-6087

October 21, 1985

Honorable Strom Thurmond
Chairman, Judiciary Committee
United States Senate
Washington, DC 20510

Re: Jane R. Roth, Judiciary Nominee,
U.S. District Court-Delaware

Dear Senator Thurmond:

Before Jane Roth is confirmed as a federal judge by the United States Senate, facts should be reviewed which are documented in a current Delaware Superior Court case that I filed against her client, Dr. Russell Labowitz. He is charged with many acts of professional misconduct but his lawyer, Ms. Roth, has continually diverted attention from his misconduct and delayed the trial by filing and widely publicizing several motions urging the court to subject me to a psychiatric evaluation (Tab M,N).

To support these motions she has engaged in consistent conduct which, in my opinion, raise serious questions concerning Ms. Roth's professional ethics and qualifications. Ms. Roth's conduct over the past two years include:

A. Submitting testimony that I was psychiatrically ill when, for religious reasons, I refused to participate in an abortion of a five months pregnant woman. Her client, Dr. Labowitz, participated in the abortion and then, in spite of Delaware Statute #1791 which gives me the legal right not to participate in abortion, he accused me of patient abandonment and Ms. Roth supported this charge (Tab J,L).

B. She acted as a witness before the court, rather than a lawyer, by repeatedly expressing her medical opinion concerning my mental status! (Tab N,O,P,F).

C. Ms. Roth filed her motion to have me psychiatrically examined and to dismiss my case because of mental illness even though I have never had any psychiatric illness in my life. After briefing and argument, the Delaware Superior Court said that such a motion must be supported by good grounds and filed in good faith. The court found there were not good grounds, struck Ms. Roth's defense of mental illness and awarded me attorney fees (Tab M,R). In character, Ms. Roth has ignored these orders and has filed still another psychiatric motion (Tab P).

D. She also tried to deceive the court in her psychiatric motion by demanding that I be examined by a psychiatrist, Dr. David Raskin, who had been contacted, unknown to me and my attorney, six months prior to her psychiatric motion and had agreed to support Dr. Labowitz's position even though the psychiatrist had never met me! (Tab M,X,Y)

E. Ms. Roth in deposing me, has said "I think I am perfectly entitled to annoy, embarrass and oppress [Dr. Connolly]!". (Tab L-Connolly deposition Pg. 149).

F. During depositions Ms. Roth has represented the defendant and the witness, often objecting to my attorney's questions; telling the witness when to answer and obtaining affidavits from these witnesses on behalf of her client (Tab Mc,Q,L-Levinson deposition).

G. Ms. Roth's client sues indigent, crippled patients for non-payment. He has admitted under oath in her presence that he billed Medicaid for patients who did not show up for their appointments. Yet Ms. Roth, after more than two years of documentation, still publicly asserts that Dr. Labowitz is blameless and my charges of misconduct require psychiatric evaluation! (Tab I,B,M,P).

Clearly, the above issues of patient care, health care costs, Medicaid, abortion and judicial conduct --- are of major public importance.

On a personal basis, I filed the lawsuit against Dr. Labowitz only after several years during which time he severely damaged my practise and reputation. When I returned to my home-state of Delaware in 1978 to open a rheumatology practise, I was the first board certified rheumatologist in Delaware. Ms. Roth's client, who was the only full-time rheumatologist in Delaware at that time, was not board certified. Dr. Labowitz offered me a position in his office, but I preferred to open my own office. Since opening my office in January of 1979, the defendant took virtually every opportunity to malign me in every area of importance to my professional reputation and advancement. Finally, in January 1983, I asked the medical community to address and resolve my complaints against Dr. Labowitz. Only after the medical community refused to resolve these complaints, (Tab S,U, V,T) was the lawsuit filed (August 1, 1983). Since September, 1983, Ms. Roth has represented the defendant and, in the course of her vigorous "advocacy", has completed the devastation of my practise, my reputation and my family.

I graduated from medical school in 1966 and volunteered for active duty with the Marine Corps in Vietnam. I served in Vietnam, as a doctor, during the Tet offensive. After military service, I finished my specialty training and with my wife and five children, moved to Delaware where I have been practising medicine. Delaware is my home state and is where most of my family live. At this point, primarily as a result of the actions of the defendant and the vigorous "advocacy" of Ms. Roth, my medical practice and reputation have been destroyed, I am unable to meet office expenses, I have no salary --- my personal and professional future has been devastated. At this time I cannot conceive of a future for me in American medicine.

As a citizen, a Vietnam veteran, a physician concerned about patient care and health care costs, and as an American, I vehemently oppose confirmation of Jane Roth for the federal judiciary.

The conduct of Ms. Roth is summarized (Tab A) and supporting facts are indexed (Tab B-Z). My curriculum vitae follows the Table of Contents.

I am also sending this data to President Reagan in order to provide more facts relevant to his nomination of Ms. Roth.

Thank you for reviewing this additional information in considering whether Jane Roth meets the qualifications for the United States District Court in Delaware.

Sincerely,

Ronald G. Connolly

Ronald G. Connolly, M.D.

RGC/fp
cc: Members, Senate Judiciary Committee
Ms. Nellie Gray, President, March for Life
Mr. Cyril Brickfield, Executive Director, American Association of Retired Persons
Mr. Jerry Berman, Chief Legislative Counsel, American Civil Liberties Union
Mr. Robert Muller, President, Vietnam Veterans of America

The **Chairman**. Mr. Charles Crompton, president of the Delaware Bar Association.

You will stand up and be sworn, please.

The evidence that you will give us here, will be the truth, the whole truth and nothing but the truth, so help you, God?

Mr. **Crompton**. I do.

TESTIMONY OF CHARLES CROMPTON, PRESIDENT, DELAWARE BAR ASSOCIATION, WILMINGTON, DE

Mr. **Crompton**. Thank you, Mr. Chairman.

The **Chairman**. Mr. Crompton, do you want to make a statement?

Mr. **Crompton**. Mr. Chairman, I have a brief statement, that I will read, if you will indulge me, I appreciate being here, and I am delighted and honored to be here today, to offer my testimony to this committee in the support of the nomination of Jane Roth as a judge for the U.S. District Court for the District of Delaware.

The bar of Delaware is small, about 1,320 members, currently. Almost all of the practicing lawyers in Delaware know one another well. Certainly, if you have specialized, as Jane Roth has, in a high visibility specialty like medical malpractice, there is an even broader and deeper knowledge among the other members of the bar of her professional abilities.

As the president of the Delaware State Bar Association, I believe that I can safely say that Mrs. Roth's colleagues overwhelmingly support her nomination and confirmation in this post.

In addition to the enthusiastic support of her peers at the bar, it is my belief that Mrs. Roth has three additional assets which should convince this body that her nomination should be confirmed.

Let me review those three factors just briefly. First, her educational background has already been reviewed by Senatcr Roth, a cum laude graduate of Harvard Law School, 6 years as an employee of the Foreign Service Division in Iran, Rhodesia, and the Republic of the Congo, and then in 1965, she returned to her native Wilmington, DE, to begin her professional career.

Since that time, she has been an active trial lawyer with one of Delaware's foremost firms, Richards, Layton, & Finger, and has had 20 years of the most valuable training for a trial judge, the acid test of the courtroom.

In virtually every type of civil litigation, she has passed this test with flying colors. I know personally that Jane Roth has made her mark on everything from complex commercial litigation to hard-fought and tension ridden-domestic relations battles.

In each of these areas, she has demonstrated her complete professional competence. In more recent years, she has tended to specialize in one type of litigation, medical malpractice claims.

Such litigation involving intricate medical issues with expert battling expert in the most difficult scientific language always presents a formidable challenge for any trial lawyer.

I think it is fair to say also that such cases often involve a highly charged emotional atmosphere particularly on the part of the doctors or other medical professionals concerned in the litigation.

Again, Jane Roth has demonstrated a calm and professional competence in dealing with the most difficult of these cases.

The final factor I want to offer for the committee's consideration is the intangible factor of character or background, a subjective judgment which must be made about someone's innate ability or instinct for the judicial role.

Jane Roth has this attribute in spades. If family heritage means anything about this character trait, there can be no doubt about her qualifications for her family has been producing eminent Delaware lawyers for at least four generations, and it shows no signs of letting up.

I can count nine of our most illustrious Delaware lawyers who are members of her immediate family, and I have probably missed someone.

Finally, on the subjective level, I can say that Mrs. Roth just acts and looks like a good trial judge. She knows how and when to listen. She knows how and when to speak. She makes a calm and reasoned approach to each matter, and she regularly displays the ability to reach a balanced and practical judgment.

I submit the evidence is overwhelming in favor of Mrs. Roth in each of these important factors and I urge your prompt confirmation of her nomination.

The CHAIRMAN. Thank you very much. You have known Mrs. Roth for how many years?

Mr. CROMPTON. I have known her since she began practice in 1965.

The CHAIRMAN. How long have you practiced?

Mr. CROMPTON. I began in 1961.

The CHAIRMAN. So you have known her ever since she has been practicing law?

Mr. CROMPTON. Yes; sir.

The CHAIRMAN. Do you consider her a lady of integrity, of ability and dedication to clients?

Mr. CROMPTON. I do, indeed, sir.

The CHAIRMAN. Do you have any questions?

Senator BIDEN. Welcome, Charlie.

As Mr. Crompton indicated, Mr. Chairman, the Delaware Bar is, in fact, small, although large compared to when I left it. There were only 520 lawyers when I was elected to the U.S. Senate, I believe, at least in the phone book, but it is also an illustration of how small our State is, and everyone knowing everyone.

Do you have any firsthand knowledge, Mr. Crompton, of the case that was bought before the committee that was referred to earlier?

Mr. CROMPTON. I do not, Mr. Senator.

I do not know anything about the civil litigation, itself. I do know something about the Board on Professional Responsibility.

Senator BIDEN. Could you tell the committee about how that board functions, if you do?

Mr. CROMPTON. I can.

I was formerly the chairman of that committee and a member of it for more than 12 years. It is not a committee of the Delaware Bar Association. It is a committee appointed by the Supreme Court of Delaware, and it is a committee, I think, of laymen and lawyers all appointed by the court to study and review complaints of misconduct on the part of members of the bar.

The practice of that committee until a year or two ago, was to assign any complaint for investigation to one member of the committee or one of the associate members, and to have that member investigate the complaint and report back to the full committee with the recommendation as to whether a hearing should be held or not.

If there was no reasonable basis for any finding of unethical conduct, the investigating member would recommend dismissal and that would or would not be approved by the full board.

Several years ago, that process was modified somewhat and a full-time attorney, a disciplinary counsel, was hired by the committee and that disciplinary counsel is now the person who handles the investigation and preliminary reports on complaints.

I am not sure whether this matter came before the board under the old procedure or under the new, but I am confident of two things—first that it was thoroughly investigated and that the report of the investigating member, whoever it was, was fully considered by the full board.

And second, I might have misunderstood some of the earlier testimony, but I thought that somebody said that the study or report had been made by an associate of Mrs. Roth's. And I am certain that no associate in her law firm, partner or employee, who happened to be on the committee would have participated in any matter concerning her conduct.

Senator BIDEN. So, if in fact, let me understand this correctly and, does the chairman want to say something?

The CHAIRMAN. The letter here, from the Board on Professional Responsibility, of the Supreme Court of Delaware, it is addressed to L. Susan Faw, Esq., Office of Disciplinary Council, Board of Professional Responsibility, Wilmington, DE, dated May 17, 1985. And it is signed by Richard E. Poole.

And the last sentence in the letter says, "Pursuant to Rule 9(b), I recommend dismissal of all complaints against Mrs. Roth by Dr. Connolly."

Respectfully submitted, Richard E. Poole.

Senator BIDEN. Mr. Chairman, if I may——

The CHAIRMAN. I think in view of the charges here, I think that this letter ought to be put into the record.

Senator BIDEN. That is what I was going to suggest, Mr. Chairman, and I would like to ask Mr. Crompton another question.

In light of the fact, when the decision was made, that would mean that it was under the new system?

Mr. CROMPTON. Yes, sir.

Senator BIDEN. Now, does in this case, Mr. Poole speak for the committee when he makes that judgment?

Mr. CROMPTON. I cannot be sure when that letter was written in the process, Senator, whether it is after the full committee has heard——

Senator BIDEN. Well, let me put it another way, in the event that there is a judgment made by the investigating counsel, whomever that would be and the recommendation is one of dismissal of the charges, and then a letter is written pursuant to rule 9, I believe was stated, is it implicit in that, that somebody took, that investigating counsel took, that to the full committee to either sign off, they might not have gone into the facts, but did they sign off or not sign off on the recommendations?

Mr. CROMPTON. Yes, sir, under the rules of the board that recommendation would have to be approved by a majority of a quorum of the board.

Senator BIDEN. All right, I thank you.

I just thank you for coming down. And to just show you how small the State is, Mr. Chairman, Mr. Crompton is also a friend and I should state for the record so that no one later says something, he has also contributed to my campaigns in the past, both of which I appreciate, and the friendship I appreciate even more.

Mr. CROMPTON. One more conflict for you.

Senator BIDEN. Right, that is right.

The CHAIRMAN. I want to thank you very much for your appearance here, and you are now excused.

Mr. CROMPTON. Thank you.

The CHAIRMAN. We have one more witness here.

And that is concerning Mr. Buckley, Marna S. Tucker, past president of the District of Columbia Bar, Washington, DC.

The testimony that is given here today, will be the truth, the whole truth and nothing but the truth, so help you, God?

Ms. TUCKER. Yes, sir.

TESTIMONY OF MARNA S. TUCKER, PAST PRESIDENT OF THE DISTRICT OF COLUMBIA BAR, WASHINGTON, DC

Ms. TUCKER. Thank you, Senator.

Mr. Chairman, my name is Marna Tucker and I am an attorney in private practice in the District of Columbia and I am the immediate past president of the District of Columbia Bar.

I appear before you on behalf of the District of Columbia Bar to ask that action be delayed on the nomination of Senator James Buckley to the U.S. Court of Appeals for the District of Columbia Circuit.

The District of Columbia Bar has 44,000 attorneys, many of whom appear before local and Federal courts. And it is——

Senator BIDEN. I beg your pardon, excuse me for interrupting, 44,000 attorneys?

Ms. TUCKER. Yes, sir.

As I say when you stated the size of the Delaware Bar, I did a——

Senator BIDEN. Wow, that is almost as big as Delaware.

The CHAIRMAN. Is that the number of all of those who practice here or are they members of the bar?

Ms. TUCKER. These are members of the District of Columbia Bar. Those who practice here number in excess of 25,000.

The CHAIRMAN. You may proceed.

Senator BIDEN. God.

Ms. TUCKER. It is the third largest State bar association in the Nation.

Mr. Buckley was nominated just days ago for the District of Columbia circuit. Confirmation of a nomination to any Federal circuit is an extremely important and serious decision. But in the case of the District of Columbia's circuit, a nomination has even greater significance. The U.S. Court of Appeals, in Washington, DC, is the court which deals primarily in governmental, administrative and constitutional questions.

Except for the U.S. Supreme Court, this Federal circuit is the last and most important voice on matters which affect the rights of and powers of all American citizens, and of their government.

Thus, the Senate and the country must be assured that nominees to this court are the best qualified for such a critical position and be given the closest scrutiny before they are affirmed by the Senate.

And this screening process for appointments to the D.C. circuit demands even extra care, because unlike other regional courts, senatorial privilege does not operate for nominations to this court.

The District of Columbia has no Senator, and this essential screen is not present. In Mr. Buckley's case, the need for scrupulous care is especially necessary. As the Senators are, of course, aware, Mr. Buckley's name originally surfaced as a nominee for the second circuit. Some controversy apparently developed and it has been reported that his nomination was opposed by a Senator in his own party from a second circuit State.

A major bar association, the Association of the Bar of the City of New York rated him not qualified for reasons that may or may not be relevant to his nomination to the District of Columbia circuit.

Senator BIDEN. Excuse me, let me interrupt you there.

As I understand it, I do not know whether you can confirm this or not, they rated him as not qualified because he did not show up. It had nothing to do with anything else.

He refused to show for the screening process, ergo they said, he is not qualified.

Is that your information?

Ms. TUCKER. My information is that he was rated not qualified and that he did not appear before them and that there is an affirmative obligation on a candidate to prove his qualifications, Senator.

Senator BIDEN. That is right, so that if you do not come to prove it, you could be Roscoe Pound, and if you did not show up they would rate you not qualified.

Ms. TUCKER. That could be correct, Senator.

Senator BIDEN. All right, I am not quibbling with you but I just want to make sure that my understanding is correct.

The CHAIRMAN. Now, let me ask you this.

Senator BIDEN. I am sorry, I did not let her finish her testimony.

The CHAIRMAN. Oh, excuse me.

I just had a note here, why should he have submitted for an interview?

Ms. TUCKER. We are not asking that Senator Buckley submit for an interview to the bar, Senator.

The CHAIRMAN. Mr. Buckley was not a member of the New York Bar and he was not nominated for a New York, for the second circuit position.

Ms. TUCKER. I did not understand your question, sir.

The **Chairman**. Well, I dare say that I understand that he is not a member of the New York Bar and he was not nominated for a New York second circuit position.

Ms. **Tucker**. He was being considered for nomination and it has been reported that he was being considered for the second circuit.

The **Chairman**. Well, you can report anything though, but he was not nominated for the New York Bar.

Ms. **Tucker**. Well, Senator at this point, I have nothing to say about what the Association of the Bar reports, I would like to report the position of the District of Columbia Bar.

The **Chairman**. From what you said here, what I understand is that you said, that although Mr. Buckley has supplied to the request of the biographical information, he has refused to submit to an interview as to provide the committee an opportunity to explore and so forth.

And as a matter of fact, he was not a member of your bar and was not nominated for a New York second circuit so that I guess he felt that he did not have to report.

He did not have to be under their scrutiny.

Senator **Biden**. Mr. Chairman, if I may speak to that for a second, I may have caused a little confusion here.

The point that you make is accurate, but I think that originally the thought was that he was going to be nominated for that circuit.

But, in fact, the difference is that we are not talking about the New York Bar. Although, all New Yorkers, New York City residents think that the world begins and ends at 7th Avenue, in fact, we are talking about the New York City Bar here, which other than the District of Columbia, which is more than a city, other than the District of Columbia, I understand it, is the only city bar in the world, that thinks that they, in fact, have a right to act on nominees.

The New York State Bar, in fact, did not rate Mr. Buckley one way or the other, so that what we are talking about here, is a New York City Bar, who thought that he was going to be nominated for the second circuit, who made a judgment that when Buckley made the judgment that he would not go before them, because there was no need to, although that has been practiced in New York to go before the New York City Bar, when he refused to do it, they engaged in the practice that they continue to engage in, which is their right, to say that they do not believe that he is qualified.

The only thing that I wanted to make clear in the record is that it was not a State bar that said that he was not qualified, and that the city bar disqualified him based on my information, as a consequence of his failure to appear and that the New York City Bar is the most unique bar in America, in that that is the only city that I am aware of that insists upon the right to review nominees in addition to their State bar reviewing the nominee.

That in no way goes to your case as to whether or not you should have the right to review him. I am not arguing against that.

I am confusing things here but I just did not want it left in the record that he had been, in fact, categorized as not qualified by a "competent State bar association" that in fact, had heard him and reviewed his testimony, I mean, his record.

That was the only point that I was trying to make.

The CHAIRMAN. And the city bar association I believe hailed him as not qualified simply because he refused to submit to an interview, and it was based on that.

Excuse me, you may go ahead.

Ms. TUCKER. Thank you, Senator.

I do think that those facts are pertinent because of the position that we have today, because the announcement of Mr. Buckley's nomination to the D.C. circuit came so quickly that it prevented members of the District of Columbia Bar from fairly evaluating him and providing this committee any information as to his qualifications.

Now, it is true that the American Bar Association Standing Committee on the Federal Judiciary has reviewed Mr. Buckley and found him qualified.

But I would like to bring to your attention that committee reviewed him as a potential nominee for the second circuit. It is the practice of that ABA committee to concentrate its review on members of the bar in those particular areas.

And in their course of their review, they did contact some Washington lawyers, who had dealings with Mr. Buckley. But what they did not do and what they would have done had he been a nominee for the District of Columbia circuit and had there been time for this nomination, they would have contacted the bar leadership of the District of Columbia, and the circuit judges of this court. Those things were not done.

The CHAIRMAN. Now, I think at this point, I want to state this for the record, Mr. Robert Fiske, chairman of the standing committee on Federal Judiciary American Bar Association was contacted concerning Senator Buckley's ABA investigation.

Mr. Fiske stated that the ABA standing committee looks at the qualifications of the individual for the position to which they are nominated, the individual circuit for which the individual is nominated has no effect on the committee's deliberations.

The ABA committee was aware that Senator Buckley had been nominated for the D.C. Circuit, and found him qualified for that position.

You may proceed.

Ms. TUCKER. Senator, the fact of the matter is that in every single evaluation of every judge that sits on the District of Columbia circuit, the bar leadership as a matter of course has been contacted by the American Bar Association. The D.C. Bar has come to depend on that American Bar Association evaluation as its primary means for input. Now we had no means for input because the leadership of the bar was not contacted as it has been in the case of all of the other judges that are currently sitting on this court of appeals.

What is happening here is that not only do we not have a Senator to express our concerns; that screen is missing. Now the screen of the ABA Evaluation Committee is missing.

What we are asking the Senators to do is to give us time to allow the Senate committee or the ABA committee to have time to contact the members of the District of Columbia Bar to let the comments on his nomination surface. Whatever the outcome is, it must be reviewed as a part of the regular procedure.

And in closing, although many of you Senators know Senator Buckley personally, I think that very fact that he is a former colleague argues that the Senate should not appear to be showing favoritism. All we ask for is the time so that the regular procedures can be followed so that the complete views of his legal peers in the District of Columbia will assure the committee that he should be confirmed.

I thank you.

The CHAIRMAN. I might say that this committee does not contact State bar associations or city bar associations. We depend upon the American Bar Association making a recommendation, and they have recommended favorably in this case.

Ms. TUCKER. And we would feel comfortable with that ABA recommendation if the usual course of contacting our bar leadership and the judiciary had been conformed to. It was not in this case.

The CHAIRMAN. I do not know how they handled it. We presume the American Bar Association does its duty unless there is some evidence to the contrary.

Ms. TUCKER. I would like to hope so, Senator, but because we feel that in this particular instance, it has not, we would like to bring it to the committee's attention.

Senator BIDEN. Ms. Tucker, with your permission, Mr. Chairman, I want to make sure I understand what the normal practice is here, and you correct me if I have misunderstood what you are saying. And the best way for me to know what you are saying is for me to repeat it to you and you correct me if I am wrong.

As I understand your point, Mr. Buckley was originally thought to be a nominee for the second circuit. The ABA, the normal apparatus of the ABA, was put in gear to look into Mr. Buckley's qualifications. As a consequence of that, the primary person whom they look to, to make the judgment, to do that investigation, was someone from, and people were extensively interviewed in, the second circuit.

Ms. TUCKER. That is correct.

Senator BIDEN. And as to that circuit, the chairman of the American Bar Association ultimately wrote a letter to the committee, to the chairman, Senator Thurmond, saying the substantial majority of our committee is of the opinion that Senator Buckley is qualified for this appointment and the minority found him not qualified.

Now, your point is if another person tomorrow were nominated for the circuit court in D.C, the routine practice of the American Bar Association would be to focus on seeking information from the members of the D.C. Bar in order to get opinions about the nominee, the prospective judge.

Ms. TUCKER. Whether they would focus on the D.C. Bar is in question, but they would certainly include D.C. Bar leadership.

Senator BIDEN. Now, is there just one group of people who conduct the investigation for the ABA or do they pick people from the circuit in question to participate in that screening process? Can you tell me what the practice is there?

Ms. TUCKER. It is my understanding, and I hope I am correct on this, that the members of the ABA Standing Committee on the Federal Judiciary are representatives of the various circuits.

Senator BIDEN. Right.

Ms. Tucker. And the normal procedure is that the representative of that circuit is the responsible person for conducting the evaluation.

And in this case the representative on that committee for the District of Columbia has been John Lane. Mr. Fiske is from the second circuit, and he has been the primary person. It is my understanding—

Senator Biden. As I look at the bar association's standing committee and the Federal judiciary, chairmanship and members at large, the chairman is Mr. Fiske who is from New York, the second circuit. And then there is someone from every circuit in addition to the District of Columbia, Board of Governors Liaison, and a staff director and a staff assistant. They make up the total committee.

Now, a gentleman named John D. Lane is the District of Columbia circuit and Federal court representative on the standing committee.

Is it your understanding that not Mr. Lane but Mr. McCarty was the one who was from the second circuit, who is the one who was primarily responsible for the Buckley investigation?

Ms. Tucker. Senator, the deliberations and the conducting of those evaluations are confidential.

Senator Biden. I see

Ms. Tucker. I really do not know who was responsible, but I do know that in the normal course Mr. Lane contacts many people in the District of Columbia that were not contacted this time.

Senator Biden. Let me ask you a question which is very, very blunt, and although I had strong disagreements with Senator Buckley on a number of issues when he was a Senator, I have no doubt about his intellectual capability, his educational background and his judicial temperament, his ability to have a judicial temperament that is appropriate for the bench.

Now, what I would like to ask you very bluntly is your concern to have an opportunity to look at Mr. Buckley born out of a desire to maintain the process, because you are concerned that the District bar may get short shrift now and in the future? in other words, a jurisdictional, if you will, issue? Or is it because of the view of you and/or members of the bar that Mr Buckley may not be "correct" on some of the issues or not have sufficient trial practice?

I mean, can you tell me what is the motivation here? I am not questioning you. You have a right to be motivated either way. I just want to have a sense of what we are talking about.

Ms. Tucker. I have said in the testimony, and I repeat again, we have absolutely no position on Mr. Buckley's qualifications. What we would like to do is preserve the integrity of the process. That is our sole motivation.

And, indeed, at this point, if we had any other motivation, I would not properly be here before you.

Senator Biden. I appreciate that. I thank you for your candor. I personally think your testimony was helpful, and I, for one, will consider your request to the extent that I have anything to do with it. Thank you very much.

Ms. Tucker. Thank you, Senator.

The CHAIRMAN. Now, I want to ask you this. When the American Bar is called upon to make a recommendation, they are not concerned where the man is going to serve as a judge. They just consider, as I understand, his qualifications.

Ms. TUCKER. I think that is true, Senator.

The CHAIRMAN. Well, they did that in this case, did they not?

Ms. TUCKER. But they did not consider and talk to the peers with whom he associated and the leadership of the bar that might provide valuable information one way or the other to people in the District of Columbia.

The CHAIRMAN. Well, as a matter of fact, he is from the New York area, is he not? Would not the people there know him better than the people here maybe?

Ms. TUCKER. They may well have, but, in fact, why should the Senate be denied the information from the people here who may have some information.

The CHAIRMAN. Well, they are welcome if they want to volunteer anything, but the committee, in other words, they investigate a man evidently where he is from and see if he is qualified for that position. That position could be in Florida or California or anywhere else.

Ms. TUCKER. That is true, Senator, but I think it is unusual when someone is being considered by the committee for one circuit for lawyers in another circuit who may have had a casual acquaintance with him to volunteer.

The CHAIRMAN. The bar does not go by circuits as I understand. That is what I am trying to get straightened out. As I understand it, they do not go by circuits. If somebody is nominated and we call upon them for a recommendation, they do not care where he is from or where he is going to serve.

They just investigate him and his qualifications and make a recommendation.

Ms. TUCKER. But the investigation, sir, is supposed to include the people in the area where the judge will sit.

The CHAIRMAN. Usually the investigator comes from the circuit where he resides in that area, do you not know? And he resides in that area up there. Mr. Buckley is from the New York area.

Ms. TUCKER. Senator, my point is that the lawyers of the District of Columbia have not had a chance to speak on this nomination.

The CHAIRMAN. I understand your point, but the point I was getting at is, was that necessary? Under the policy of the American Bar Association, my understanding is that when they make a recommendation, they are not concerned with where he is from. They are not concerned with where he is going to serve. They make a recommendation whether he is qualified. That is what I was trying to get straightened out.

Senator BIDEN. Mr. Chairman, if I could put it in a slightly different context, and as I said, I am, at this point, for Senator Buckley, it is a little bit like if they took a Delaware boy and appointed him to the circuit within which South Carolina is involved, and the South Carolina Bar did not get a chance to speak to him, and they said he is qualified.

The CHAIRMAN. Yes, I agree with that illustration. [Laughter.]

Senator BIDEN. That is kind of what she is saying, and we both understand that. I do not know whether we have gone beyond that point now.

Ms. TUCKER. I appreciate that, but I would like to say that——

Senator BIDEN. It is even more important? Do not say it is more important than South Carolina or you will be in deep trouble. [Laugher.]

Ms. TUCKER. I was going to say that South Carolina has the Senator from South Carolina to make sure its interests are well protected.

The CHAIRMAN. I agree that the bar of South Carolina would prefer that, to have their preference or have their say-so, but they would not have to. In other words, the American Bar does not care where they are from or where they are going to sit.

Senator BIDEN. I think in this case you are both right, and the only trouble is I do not plan on cutting Senator Buckley in half, but at any rate, seriously thank you.

The CHAIRMAN. Well, the point I was trying to get at is the American Bar, I think, just followed their usual policy.

Ms. TUCKER. Senator, if they had, we would have no complaint. The problem is they did not follow their usual policy for this circuit.

The CHAIRMAN. Have you written to them and objected to it?

Ms. TUCKER. Because of the rapidity of the nomination going from what we thought was the second circuit to the District of Columbia circuit, the nomination was already here, Senator, so we wrote you directly.

The CHAIRMAN. Well, as I said, they did not have to call on people here. In fact, they would probably call on people where he lived and knew him best. Do you not think? Would you want to be judged by the people who know you best? That is what they probably thought they were doing.

Anyway, I understand your position and you understand ours. Thank you very much. Have a nice evening.

Ms. TUCKER. Thank you, Mr. Chairman.

[Statement follows:]

STATEMENT OF MARNA S. TUCKER
PAST-PRESIDENT
DISTRICT OF COLUMBIA BAR
ON THE
NOMINATION OF JAMES BUCKLEY
TO THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Mr. Chairman:

My name is Marna S. Tucker. I am an attorney in the private practice of law in the District of Columbia, and immediate past-President of the District of Columbia Bar. I appear before you on behalf of the District of Columbia Bar to ask that action be delayed on the nomination of James Buckley to the U.S. Court of Appeals for the District of Columbia.

The District of Columbia Bar has 44,000 attorneys, many of whom appear before both local and federal courts. It is the third largest state bar association in the nation.

Mr. Buckley was nominated just a few days ago for the D.C. Circuit. Confirmation of a nomination to any federal circuit court is an extremely important and serious decision. In the case of the D.C. Circuit, a nomination has even greater significance. The U.S. Court of Appeals in Washington, D.C. is the court which deals primarily in governmental, administrative, and constitutional questions. Decisions in cases such as these assume an importance which transcends the boundaries of the four square miles of this city. Except for the United States Supreme Court, this federal circuit is the last and most important voice on matters which effect the rights and powers of all American citizens and of their government.

Thus the Senate and the country must be assured that nominees to this court are the best qualified for such a critical position, and be given the closest scrutiny before they are confirmed by the Senate. The screening process for appointments to the D.C. Circuit demands even extra care because, unlike other regional courts, senatorial privilege does not operate for nominations to this court. This essential screen is not present.

In Mr. Buckley's case, the need for scrupulous care is especially necessary. As the Senators are of course aware, Mr.

Buckley's name originally surfaced as a nominee for the Second Circuit. Some controversy apparently developed. It has been reported that his nomination was opposed by a Senator in his own party from a Second Circuit state. A major bar in that circuit -- the Association of the Bar of the City of New York -- rated him not qualified for reasons that may or may not be relevant to his nomination to this Circuit. He is not a member of the Bar of the District of Columbia.

It is for the Committee to decide whether these facts are reason enough to give it pause. What is more pertinent and why the District of Columbia Bar is here today, is the fact that Mr. Buckley's nomination and confirmation hearing has come too quickly for him to be fairly evaluated by the Bar which will appear before him.

It is true that the American Bar Association Standing Committee on the Federal Judiciary has reviewed Mr. Buckley and found him qualified. But that Committee reviewed him as a nominee for the Second Circuit. It is the practice of the ABA Committee to concentrate its review among those in the circuit for which a nominee is being considered, although its reach may extend beyond the boundaries of the circuit. In Mr. Buckley's case, the ABA Committee naturally concentrated its investigation on the New York - Connecticut area. The views it sought were of his qualification for that bench, a court dealing primarily in business, finance and commerce. Although the Committee in conducting its thorough evaluation contacted members of the District of Columbia Bar who knew Mr. Buckley, it did not conduct the evaluation it usually conducts for a nominee to the D.C. Circuit. It did not contact the Bar leadership and members of the judiciary that are normally contacted for scrutiny of a nominee to the D.C. Circuit.

The District of Columbia Bar has come to depend on the ABA evaluation of judicial candidates as its primary means of input on a nomination. By denying the Bar this input in the haste of this nomination, the lawyers of the District of Columbia are denied still another essential screen to a nomination.

The District of Columbia Bar believes that the normal screening for a nominee to the U.S. Court of Appeals for the

District of Columbia should not be short-circuited. We do not take this position because we oppose Mr. Buckley's nomination, but because we respect the integrity of the process.

Whatever the possible outcome, what is essential is that Mr. Buckley's nomination be reviewed in a regular and thorough manner. This means that the Committee should keep these hearings open for a respectable period of time so that the legal profession which practices here can make its views known.

I urge the Committee not to bypass the normal screening process. Although many members of the Senate may know Mr. Buckley personally, the very fact that he is a former colleague argues that the Senate should not appear to be showing favoritism. However well-liked and personable he may be, the fact that he may have been an able U.S. Senator does not necessarily mean he will be an able appellate judge for this circuit. Only the complete views of his legal peers can assure the Committee that he should be confirmed.

THANK YOU

The CHAIRMAN. The committee will stand in recess.

[Whereupon, at 4:32 p.m., the committee adjourned at the call of the Chair.]

BIOGRAPHIES

JAMES L. BUCKLEY

NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT

Birth: March 9, 1923, New York, NY.
Legal Residence: Connecticut.
Marital Status: Married to Ann Frances Cooley Buckley, 6 children.
Education: 1940-1943—Yale College, B.A. degree. 1947—Columbia Law School. 1947-1949—Yale Law School, LL.B. degree.
Bar: 1950—Connecticut. 1953—District of Columbia.
Military Service: 1943-1946—U.S. Naval Reserve.
Experience: 1949-1953—Wiggin & Dana Associate. 1953-1958—Reasoner & Davis, Associate. 1958-1970—The Catawba Corp., Officer & Director. 1971-1977—U.S. Senator. 1977-1978—Donaldson, Lufkin & Jenrette, Inc., Director and Member of Executive Committee. 1978-1980—The Catawba Corp., Consultant. 1981-1982—U.S. Department of State, Under Secretary for Security Assistance (2/81-9/82), Counsellor (9/82-11/82). 1982-present—Radio Free Europe/Radio Liberty, President.

DAVID R. THOMPSON

NOMINEE U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: December 26, 1930, San Diego, CA
Legal Residence: California.

Marital Status: Married to Arna Loree Thompson, 3 children.

Education: 1948-1952—University of Southern California, B.S. degree. 1952-1955—University of Southern California, Law School, LL.B. degree.

Bar: 1956—California.

Military Service: 1955-1957—U.S. Navy.

Experience: 1957-1960—Colton & Thompson 1960-1965—Colton, Thompson & Thompson. 1965-1970—Thompson & Thompson. 1970-1972—Thompson & Crawford. 1972-1974—Thompson & Crawford & Kellers. 1974-1976—Sole practitoner. 1976-present—Thompson & Thompson.

BOBBY RAY BALDOCK

NOMINEE, U.S. CIRCUIT JUDGE, TENTH CIRCUIT

Birth: January 24, 1936, Rocky, OK.

Legal Residence: New Mexico.

Marital Status: Married to Mary Jane Holt Baldock, 2 children.

Education: 1954-1956—New Mexico Military Institute, Junior College Diploma. 1956-1960—University of Arizona, J.D. degree.

Bar: 1960—Arizona. 1961—New Mexico.

Experience: 1960-1983—Sanders, Bruin & Baldock, Roswell, NM, Associate and then Partner. 1962-1981—Eastern New Mexico University, Roswell Campus, Adjunct Professor. 1983-present—U.S. District Judge, District of New Mexico.

ROBERT E. COWEN

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Birth: September 4, 1930, Newark, NJ.

Legal Residence: New Jersey.

Marital Status: Married to Toby C. Cowen, 2 children.

Education: 1948-1952—Drake University, B.S. degree. 1952—Columbia Law School. 1955-1958—Rutgers Law School, LL.B. degree.

Bar: 1958—New Jersey.

Military Service: 1953-1954—U.S. Army.

Experience: 1958-1959—Law Clerk to Hon. Walter Conklin, Superior Court of New Jersey. 1959-1961—Schreiber, Lancaster & Demos, Associate. 1961-1969—Sole practitioner. 1969-1970—Essex County Prosecutor's Office, Assistant County Prosecutor. 1970-1973—Office of the Attorney General State of New Jersey, Deputy Attorney General. 1973-1978—Administrative Office of the Courts, State of New Jersey, Director, Ethics and Judicial Administration. 1978-present—U.S. Magistrate, District of New Jersey.

EDWARD R. KORMAN

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

Birth: October 25, 1942, Brooklyn, NY.

Legal Residence: New York.

Marital Status: Married to Diane Robin Eisner Korman, 2 children.

Education: 1960-1963—Brooklyn College, B.A. degree. 1963-1966—Brooklyn Law School, LL.B. degree. 1966-1971—New York University Law School, LL.M. degree.

Bar: 1966—New York.

Experience: 1966-1968—Law Clerk to Hon. Kenneth B. Keating, Associate Judge, New York Court of Appeals. 1968-1970—Paul, Weiss, Rifkind, Wharton & Garrison, Associate. 1970-1972—Assistant U.S. Attorney, Eastern District of New York. 1972-1974—Assistant to the Solicitor General of the United States, U.S. Department of Justice 1974-1978—Chief Assistant U.S. Attorney, Eastern District of New York. 1978-1982—U.S. Attorney, Eastern District of New York. 1982-1984—Stroock & Stroock & Lavan, Partner. 1984-present—Of Counsel. 1983-present—Commissioner, Temporary Commission of Investigation of the State of New York. 1984-present—Professor of Law, Brooklyn Law School.

William J. Zloch

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF FLORIDA

Birth: September 16, 1944, Fort Lauderdale, FL.

Legal Residence: Florida.

Marital Status: Married to Nancy Fitzhugh Zloch, 2 children.

Education: 1962-1966—University of Nortre Dame, B.A. degree. 1971-1974—University of Notre Dame School of Law. J.D. degree.

Bar: 1974—Florida.

Military Service: 1966-1969—U.S. Navy.

Experience: 1974-1975—Saunders, Curtis, Ginestra & Gore Associate. 1975-1977—Kelley, Tompkins, Frazier & Kelley. Associate. 1977—Moraitis & Cofar, Associate. 1977-191—Kelley, Tompkins, Frazier & Kelley, Partner. 1981-present—Patterson & Maloney, Associate (1981), Partner (1982-present).

Jane R. Roth

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF DELAWARE

Birth: June 16, 1935, Philadelphia, PA.

Legal Residence: Delaware.

Marital Status: Married to William V. Roth, Jr., 2 children.

Education: 1952-1956—Smith College, B.A. degree. 1962-1965—Harvard Law School, LL.B. degree.

Bar: 1965—Delaware.

Experience: 1965-present—Richards, Layton & Finger, Associate (1965-1973), Partner (1973-present). 1956-1962—U.S. Department of State, Clerk-typist and Administrative Assistant, U.S. Embassy, Tehran, Iran, U.S. Consulate General, Salisbury, Rhodesia, U.S. Embassy, Brazzaville, Republic of Congo.

CONFIRMATION HEARING ON ALEX KOZINSKI

FRIDAY, NOVEMBER 1, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch, McConnell, Mathias, Specter, Grassley, Metzenbaum, Heflin, DeConcini, Simon, and Levin.

Staff present: Duke Short, chief investigator; Laurie Westley, chief counsel to Senator Simon.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

The hearing this morning is at the request of my distinguished colleagues, Senators Metzenbaum and Levin. Both Senators had expressed concerns regarding the nomination of Judge Alex Kozinski for the Ninth Circuit Court of Appeals.

Judge Kozinski was nominated by the President on June 5, 1985. A hearing on his nomination was held on July 17, 1985. All who requested to testify were heard. The committee scheduled a vote on this nomination on July 18. However, in accordance with committee results, the nomination was laid over by someone. A vote was again scheduled for July 23 and July 25. The nomination was laid over on both of those occasions as well. On September 12, 1985, with 15 Senators present, Judge Kozinski was voted out of the committee without objection and was reported to the floor at that time.

The Kozinski nomination has now been before the Senate almost 5 months—I repeat, 5 months, without final action being taken. If there are objections to the nominee, then I urge my colleagues to vote against Judge Kozinski, but at least allow the Senate to work its will and vote one way or the other.

I am hopeful that today's hearing will end the debate on the Kozinski nomination and we can get on this matter at the earliest possible date.

Judge Kozinski's nomination is presently pending on the Senate Executive Calendar. And today's hearing will not affect his status before the full Senate.

I might say that I saw in the Washington Post this morning that his nomination had been taken off and sent back; it has not been sent back; it is still on the calendar. The committee is through with it. This hearing is held purely out of courtesy to my good friends, the Senator from Ohio, Senator Metzenbaum, and the distinguished Senator from Michigan, Senator Levin. We are just doing this because they desire to ask some more questions.

Now I want to say this is an unprecedented procedure to follow, but I try to go as far as I can to accommodate my colleagues.

Now, also, I want to say too that it is unprecedented to allow Senators who are not members of this committee to ask questions, but we are going to invite Senator Levin, if he cares to, to propound some questions to Judge Kozinski.

Now we are going to hear certain witnesses and then we are going to end up with Judge Kozinski to give him a chance to answer any of these charges that may be made.

I hope we do not unduly delay this matter. We ought to finish in a reasonable time. And if questions are asked, I see no need then for Senators or anyone to come along and duplicate the same questions. I am not trying to restrict any Senator but I would just be hopeful that we would not take undue time and duplicate.

Now, does anyone have a statement he wants to make on this matter at this time?

The distinguished Senator from Ohio, Senator Metzenbaum.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. Well, Mr. Chairman, I want to express publicly my appreciation to you for your understanding in setting up this hearing. As a matter of fact, when Mr. Kozinski was previously before our committee, he was voted out without dissent. After that period, some actions he had taken prior to the hearing, as well as some actions he took after the hearing, bore further scrutiny.

Mr. Kozinski's position of advocacy of his own nomination, if not inappropriate, is at the very minimum highly unusual. And I think Mr. Kozinski has—Judge Kozinski, pardon me—has described himself as an advocate. And in that connection, it would appear, and I am not certain that this is the fact, that some information that should have been forthcoming at an earlier point was not forthcoming and, as I understand it, and I am not certain of my facts, but that is one of the reasons for this hearing is that Judge Kozinski has said, that, as an advocate, he did not feel it obligatory to come forth with all of the information, he was trying to sell his own case.

There are some other questions concerning Judge Kozinski. And I think that you have followed the appropriate procedure in giving us an opportunity to question Judge Kozinski directly; otherwise, I think we would have found ourselves debating the man, his actions, his temperament and other issues and cause some unnecessary waste of time on the floor. I think by holding this hearing in this manner, we made it possible for us to inquire of the individual himself as pertains to the facts. If he can explain them, fine. If he cannot, I think we would have the right to consider the question further.

It is a fact that this is an unusual procedure in holding an additional hearing after a nominee has been sent to the floor, but I think it is the appropriate procedure and I commend you for doing it.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from Utah.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Mr. Chairman, I do have a few things I would like to say. I would just like to mention that Alex Kozinski came to this country as a child of 12, having been born in Romania. His parents were survivors of the Holocaust, they arrived here penniless. At first, the family was supported by the generosity of other friends and other concerned Jewish Americans who wanted to help them as new immigrants to get a new start, a decent start.

I might add that the Kozinskis—Judge Kozinski and his wife—are both here, his wife having formerly worked for this committee.

The CHAIRMAN. A very competent lady and a fine lawyer.

Senator HATCH. I would have to say they both entered American life on the lower rungs of the economic ladder. And Judge Kozinski has really applied himself, and climbed that ladder on his own effort, achieved an impressive scholastic record, graduating first in his class from the UCLA Law School, went on to clerk for Judge Kennedy of the ninth circuit, and Warren Burger, Chief Justice of the United States, and then, of course, has been serving as the first chief judge of the new U.S. Claims Court.

And I would just like to mention some comments made by some of his colleagues. To give an example, Judge Harry Wood, who has served as trial judge with the old Court of Claims since 1952, wrote that at first he was uncertain whether so young a man was really qualified to serve as chief judge of the U.S. Claims Court. However, after working with Judge Kozinski, he had this to say: My doubts were totally unfounded. As a judge, administrator and man, he rates very high in my book. Judge Kozinski is possessed of high intellect and is an outstanding legal scholar. He analyzes legal problems carefully and thoroughly, thinks them through and resolves them with opinions which are models of clarity, precision and style. He is most diligent in performance of his judicial duties. His personal characteristics are also impressive. He is tactful in his dealings with bench and bar and with the employees of the court and considerate of the opinions, values and feelings of others. He is scrupulously fair. And he has shown me that he is patient and judicious. He has worked hard and with imagination to promote and enhance morale and unity of the court. And he has done an outstanding job in this area as well. He is a fine leader and a fine human being. Finally, his technological and organizational knowledge and skills have been of incalculable value to the court and its judges in the discharge of their duties. Without the procedures he has instituted, the Claims Court would not have accomplished nearly as much as it has. Throughout his entire service with this court, Judge Kozinski has, to my certain knowledge, displayed to those appearing before him as litigants or counsel, to the public and the bar generally, and especially to his colleagues unfailing courtesy, patience and tact, tolerance of the different views of others, a willingness to listen and be persuaded by sound reasoning, high intellect, legal acumen, great energy and, above all, integrity. He has been fair, understanding and judicious. Even under circumstances where being so must have been hard. And he has shown me that he has a deep and abiding love and respect for the law. It is a pleasure and privilege to commend to you and your committee, et cetera.

Judge Christine Cook gives similar laudatory comments. Judge Lawrence Margules wrote that Chief Judge Kozinski has a keen intellect and a voracious appetite for work. No one on the court has worked as long and as hard as he has. He has carried a full caseload in addition to his numerous chief judge responsibilities.

But if I can say this finally, Mr. Chairman, Judge Kozinski is a young judge. But he has, I think, shown high quality and high standards in the tenure that he has had. And I look forward to this hearing and will look forward to seeing what is raised, and I am sure he will be able to answer any questions that are posed to him.

The CHAIRMAN. Senator Metzenbaum wants to add another word.

Senator METZENBAUM. Yes.

I failed to mention in my opening statement I too sense a concern and chagrin at Judge Kozinski having seen fit to send out an editorial from radio station WEEI. It disturbs me because it comes as close to red-baiting as I have seen in my experience in the U.S. Senate. And for a member of the judiciary who aspires to a higher position in the judiciary to send out this radio editorial puts him in the position of identifying with it. And although he can say, well, I just was sending it out, the fact is we do those things when we want somebody else to make the point that we really want to make. It bothers me, and it bothers me because it strikes directly at the heart of the question of the nominee's integrity, his standards of character, his fairness and sense of balance.

The CHAIRMAN. I just wondered if you want to ask questions when we reach him later in the day, what is the purpose of this now?

Senator METZENBAUM. Well, I do intend to ask questions, but I think that I ought to share with the Chair and others and Judge Kozinski some concerns that are bothering me. Since I am about ready to conclude, Mr. Chairman, I think you may as well let me just wind up my sentence or so and we can move on to the question period.

The CHAIRMAN. OK.

Senator METZENBAUM. I just felt I ought to let it be known that the use of this editorial by a judicial nominee is very, very upsetting to me.

Thank you, Mr. Chairman. I appreciate it.

The CHAIRMAN. I believe we have a vote on the floor. We will take a recess. We will take a 10 minute recess to vote and come right back.

[Short recess].

Senator MCCONNELL. The rest of the Senators are not back yet but I wanted to reconvene the hearing for the purpose of making a brief opening statement myself because I have to go on to another committee.

I just wanted to indicate that I have reviewed Judge Kozinski's record. I find it outstanding in almost every respect and I intend to support the nominee.

With that brief opening statement, I am going to go on to another committee meeting, and this hearing will reconvene as soon as the chairman returns.

Thank you.

The CHAIRMAN. The committee will come to order.

The Senator from Michigan wants to make a little statement.

Senator LEVIN. Mr. Chairman, I do have an opening statement. First, let me thank you for your willingness to have this hearing and your invitation to me to share with the committee why I reached the conclusion that I did, that Judge Kozinski was not qualified to be confirmed as an appellate court judge.

Considerable evidence, including affidavits provided by his former employees at the Office of Special Counsel of the Merit System's Protection Board, and correspondence between yourself, Senator Biden, me and Judge Kozinski, all of which was developed after the nomination was ordered reported by this committee, show that Judge Kozinski has acted intemperately, unfairly, erratically, and with a lack of compassion in the official positions that he occupied since coming to Washington.

In my opinion, he has misled in a number of instances this committee and thereby the Senate, and that together led me to the conclusion that he lacks the judicial temperament required for this position.

For example, Judge Kozinski testified at his confirmation hearing that he had "an excellent working relationship with his staff" at OSC, the Office of Special Counsel.

The affidavits of his former employees, which I will submit for the record, tell a very different story. They say that morale during his tenure declined to an all time low, the resignations were higher than they had ever been and that, in fact, Judge Kozinski "devastated the morale of the office," in the words of one of those affidavits.

Jesse James' affidavit says the following——

The CHAIRMAN. Senator, is Mr. James going to be here?

Senator LEVIN. He is not.

The CHAIRMAN. Do you want to put that in the record is what I am wondering now? There is no use to go over all the evidence now because you are going to have the witnesses here, and if there are any witnesses that can't come, we can put their affidavits in the record. Is that adequate? We want to extend to you every consideration.

Senator LEVIN. I would prefer to proceed. This may take 10 minutes, but it is important, and it does outline the position that I have taken. If the chairman wishes that I not do it, I——

The CHAIRMAN. No, no. You go ahead if you want to. I was just trying to save time. I did not want to keep these reporters around here from the news media all day today if we can avoid it.

All right, go ahead.

Senator HATCH. Mr. Chairman, if I could just make a point.

You know, you stated in your recent "Dear Colleague letter" that Judge Kozinski "misled the Senate when he testified at his confirmation that he had an excellent working relationship with his staff."

It does seem to me that Judge Kozinski was stating merely an opinion that he enjoyed a good relationship with his staff. We can all differ with that opinion, but he could hardly have misled the Senate by stating his own opinion. But under libel law, as you know, opinions in and of themselves cannot be held libelous. In a similar sense, honestly held opinions cannot be considered lies.

So I am concerned about some of these allegations.

The CHAIRMAN. There is one thing that I——

Senator LEVIN. I am not talking about libel. I am talking about a statement.

Senator MCCONNELL. You are suggesting he misled the Senate.

Senator LEVIN. When he said he had an excellent working relationship with staff, and there are six affidavits saying that he had a disastrous relationship with the key members of his staff, I think that is misleading to the Senate when he does not say that he——

Senator HATCH. Not if he did not know they were going to send affidavits.

The CHAIRMAN. Well, Senator, I might quote from the official record here that says, and this is quoting Judge Kozinski, that "I had a very fine working relationship with most of the employees" is what he said. He did not say all of them. He said most of them.

The thing that concerns me about this case, if people are coming up testifying now that had relations with Judge Kozinski previously, why didn't they come up when he was first nominated to the Claims Court? They had worked under him before that or worked with him. And you did not hear anything about it.

Now he is going on to the Claims Court and made a very conceptive judge, now you go back and get people who never thought about testifying against him want to come up now and raise complaints about him.

Senator METZENBAUM. Well, Mr. Chairman, I just want to suggest as a matter of comity that I think my colleague from Michigan is in the midst of his opening statement, and we normally do not take issue with an individual who is making an opening statement. I wonder if we could permit the Senator——

The CHAIRMAN. Senator, go ahead and finish your statement.

Senator MATHIAS. Since the Senator from Michigan has been interrupted, I wonder if he would yield to me just for a moment.

Senator LEVIN. I would be happy to.

Senator MATHIAS. Mr. Chairman, I think you have shown great fairness in reopening this hearing. I think it is a useful thing from the point of view of those who have concern about the qualifications of the nominee and I think it's useful for the nominee to resolve the questions that have been raised.

With regard to the point that Senator Levin has raised, I would like to ask unanimous consent to place in the record the article which appeared in today's Washington Post. I think it would be a useful addition to the record because it summarizes the issues we will be addressing today.

I would ask unanimous consent that it appear at a point so it does not interrupt Senator Levin's opening statement.

The CHAIRMAN. I don't know why the Washington Post published all the statements against this man and it did not publish anything for him. Why did they not present the evidence presented by other witnesses who are for him? And why did they not give his side of it?

Without objection, the material will be placed in the record.

[Information follows:]

[The Washington Post Nov. 1, 1985]

SENATE COMMITTEE TO RECONSIDER JUDICIAL NOMINEE

UNUSUAL MOVE PROMPTED BY EX-EMPLOYES' ALLEGATIONS ABOUT KOZINSKI

(By Howard Kurtz)

The nomination of Alex Kozinski to be a federal appeals court judge has been yanked from the Senate floor and sent to an unusual second confirmation hearing to deal with allegations that Kozinski is unsuited for the job.

The Senate Judiciary Committee hearing, scheduled for today, will focus on affidavits by several of Kozinski's former employes, who describe him as an abusive boss who frequently mistreated his staff. The hearing will also examine allegations that Kozinski misled the panel in earlier testimony about his record as director of the Merit Systems Protection Board's Office of Special Counsel (OSC).

Kozinski, 35, chief judge of the U.S. Claims Court, is described as a bright and ambitious conservative who hopes to ascend to the 9th U.S. Circuit Court of Appeals in California. An immigrant from Romania who came here as a child, he clerked for Chief Justice Warren E. Burger and worked as a campaign aide and White House lawyer for President Reagan.

Kozinski's confirmation seemed assured until Sen. Carl Levin (D-Mich.) notified the Republican leadership that the nomination would be debated extensively if brought up yesterday. Judiciary Committee Chairman Strom Thurmond (R-S.C.) quickly agreed to hold a second hearing on Kozinski, even though the panel has approved him.

In a letter to his colleagues, Levin said Kozinski "lacks the judicial temperament required for the position . . . Judge Kozinski has acted intemperately, unfairly, erratically and with a lack of compassion."

Kozinski said yesterday that he stands by his testimony and made no misstatements about his record. "I don't think anything in the affidavits really contradicts what I've said," he said. "There's absolutely nothing to hide. . . . I'd just as soon clear the air."

Kozinski said that "the bulk of people who have worked for me think highly of me. I'm sorry some don't."

Tom Devine of the Government Accountability Project (GAP), a private watchdog group, said Kozinski was hostile to government whistle-blowers while running OSC in 1981 and 1982. Although Kozinski was charged with protecting the rights of federal employees, Devine called him "the most effective opponent of the First Amendment in the federal system in the last five years."

Kozinski replied that he considers himself "a First Amendment liberal" and had a strong record of protecting employe rights. But some of his former employes sharply critized that record in their affidavits.

Former OSC lawyer Horace G. Clark said Kozinski ignored the staff's repeated warnings by filing "the weakest case at the office," a Hatch Act complaint against an employe for allegedly endorsing President Jimmy Carter, Clark said Kozinski misled the Judiciary Committee by saying he had followed the staff's recommendation in bringing the case, which was thrown out of court.

John F. Hollingworth, OSC's former administrative director, said: "I cannot recall a more callous disregard for people than Mr. Kozinski exhibited." He cited such incidents as "demanding that a messenger be fired when one piece of correspondence could not be located" and "issuing a notice of farewell to an employe who had cancer and had not yet finalized plans to leave the office."

Hollingworth said Kozinski humiliated him by ordering him to repair office furniture.

Former OSC attorney Mary Eastwood said Kozinski used multicolored pens to make "numerous cruel and intemperate comments" about staff reports and that six of the eight most senior lawyers there quit during his tenure.

Kozinski's former press spokesman at OSC, Laura Chin, accused him of "sadistic behavior." Kozinski once chided Chin for failing to change the date for an office picnic, saying in a memo: "You should note that I do not take lightly such footdragging in carrying out my instructions."

In a draft memo, Kozinski accused Chin of spreading false rumors and ordered her not to talk to OSC field employes "unless you have specifically cleared the communication with the relevant field office chief." Chin quit the next day.

The committee also plans to examine why Kozinski distributed a radio editorial by right-wing Boston commentator Avi Nelson that defended his nomination. The editorial said GAP "is sponsored by the Institute for Policy Studies . . . a revolutionary group hostile to the U.S. and with ties to terrorist groups such as the PLO. Kozinski said yesterday he wasn't endorsing everything that was in the editorial."

But GAP's Devine said the incident shows that Kozinski lacks the "minimum level of decency" required to be a judge. He said the Institute for Policy Studies has held seminars opposing terrorism and that GAP split off from the group last year.

Kozinski declined to respond to the specifics of the employes' complaints, saying he would answer questions at today's hearing.

The CHAIRMAN. Senator Levin, go ahead.

Senator LEVIN. Mr. Chairman, I think what I will do is complete my opening statement at a later point. There are a number of Senators here that may want to hear these other witnesses.

I would like to complete my opening statement, but in light of the fact that there are some Senators here that probably——

The CHAIRMAN. We approve of that. Go ahead.

Senator LEVIN. Judge Kozinski testified during his confirmation hearing that he had "* * * an excellent working relationship with his staff." I am not suggesting that that is libelous to answer Senator Hatch's point at all.

I am suggesting that that is very different from the story which is obtained from these affidavits which were also obtained following that confirmation hearing: very different, indeed.

Senator HATCH. Senator Levin if you would yield, liable wasn't my point. My point was he is merely stating an opinion——

Senator LEVIN. Well, that was the word that you used.

Senator HATCH. No. I was making the point he was merely stating an opinion. You can't be found libelous for stating an opinion.

Senator LEVIN. That is a fact that he is stating and it is very different from the statements of the staff which I am trying to put in the record.

Senator HATCH. Sure. I will quit interrupting.

Senator Levin. When he says he had an excellent working relationship with his staff, and six members of his staff say it was a devastating relationship with key members of his staff, you'd think that disclosure to the Senate would include a statement that, "I had problems with some of my staff; here's what they were."

Indeed, there were massive problems with the staff.

The CHAIRMAN. Well, Senator, didn't he say that most of them——

Senator LEVIN. There were massive problems with the staff, as a matter of fact. There was a large resignation rate. There was a press conference called by Members of the Congress because of a refusal of Judge Kozinski to proceed with cases.

The staff, in many cases, resigned because of the refusal of the special counsel to act on recommendations of staff. There were massive morale problems there.

The CHAIRMAN. Well, why didn't they testify against him when he was appointed——

Senator LEVIN. They are here to testify.

The CHAIRMAN [continuing]. To the Claims Court? Why didn't they come up then and testify?

Senator LEVIN. They are here to testify.

The CHAIRMAN. Why do they want to wait until years later?

Senator LEVIN. I think there is a normal reluctance on the part of employees who are under the supervision of somebody to come forward, but I don't know the reason. I am simply saying that when——

The CHAIRMAN. Well, go ahead with your statement.

Senator LEVIN. I am not judging why they did or did not come forward at a particular time. I am just asking whether or not that is a misleading statement when a candidate for a judgeship says he has an excellent working relationship with his staff when he——

The CHAIRMAN. He said with most of them.

Senator LEVIN. Well, I am going to get you the quote that is——

The CHAIRMAN. He has the quote right here.

Senator LEVIN. I know at one point he said most of the staff.

Senator DECONCINI. Mr. Chairman. Mr. Chairman, point of order, please.

The CHAIRMAN. Well, let him finish his statement. That is what I want him to do. [Laughter.]

Senator DECONCINI. Mr. Chairman. Point of order, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. My understanding is when one is making an opening statement one is permitted to make that statement. If a Senator wants to yield, of course that is up to the individual Senator.

Now, what is in his statement, I don't know.

The CHAIRMAN. Senator, I have just told him to finish. Let him go ahead and finish.

Senator DECONCINI. I think that would be a good idea, Mr. Chairman.

The CHAIRMAN. Well, that is exactly what we have told him.

Senator DECONCINI. Fine. Thank you, sir.

Senator LEVIN. Jesse James, in his affidavit, says that he had the responsibility for day-to-day supervision of the staff of the Prosecuting Division, that he resigned:

> * * * because I could not become a participant in what I believed were prohibited personnel practices carried out in our office and I disagreed with the management style of Mr. Kozinski.
>
> "Increasingly I saw what I believe were prohibited personnel practices taken against staff members almost daily. In spite of Mr. Kozinski's statements to the contrary during his confirmation hearings, staff morale was at an all time low. Resignations from the office were higher than they had ever been and they were linked closely to the employee abuses made by Mr. Kozinski or under his direction."

We have the affidavit of Mary Eastwood, who will testify here today. I want to read just one line from her affidavit because I am highlighting here the——

The CHAIRMAN. Well, Senator, again, wait a minute. If she is here, why don't you wait and ask her the questions, and not go over a statement by her and then question her again today.

Now, if they are not here and you want to put them in, OK.

Senator **Metzenbaum**. Mr. Chairman, you are not your usual courteous self in this instance. Here is a man making a——

The **Chairman**. Well, that is your opinion.

Senator **Metzenbaum**. I know, but here is a man making an opening statement——

[Laughter.]

No, you mean that you are not usually courteous?

The **Chairman**. No. The point I am making to him, why should he make statements by a witness who is going to be here in person to testify.

Senator **Levin**. Because I am making a point in my opening statement as to why I have reached the conclusion that this candidate is not qualified to be an appellate Federal judge. It is a very serious conclusion that I have reached.

I am trying to give the committee the benefit of my conclusion. I am happy not to do it if the Chair prefers me not to.

I don't want to abuse the courtesy of this committee. I am not a member and the last thing I would do——

The **Chairman**. Well, I would suggest that any witness that is going to be testify here today, it is unnecessary for any of us to tell what they are going to say.

Senator **Levin**. I'm not saying what the witness is going to say.

The **Chairman**. They are here to answer. Now, if they are not here, then you go ahead and present it.

Senator **Mathias**. Would the Chairman yield?

Senator **Levin**. Mr. Chairman, I am not saying what this witness is going to say. I am quoting from an affidavit which this person filed following the confirmation hearing you already——

Senator **Mathias**. Would the Senator yield for a question?

Senator **Levin**. I would be happy to yield.

Senator **Mathias**. Is the Senator following the old and traditional political practice that you tell them what you are going to tell them, and then you tell them, and then you tell them what you have told them?

Senator **Levin**. I hope not. [Laughter.]

Senator **DeConcini**. Well, would the distinguished Senator from——

The **Chairman**. Well, let's tell him to go ahead. We will just let him go ahead.

Go ahead, Senator.

Senator **DeConcini**. Would the distinguished Senator from Michigan yield for a question?

Senator **Levin**. Sure.

Senator **DeConcini**. Now, Senator Levin, my understanding is that you are in the midst of your opening prepared statement. Is that correct? [Laughter.]

Senator **DeConcini**. Is that correct that you are in the midst of it?

Senator **Levin**. You say in the middle?

Senator **DeConcini**. Middle, or you are in the midst of your opening statement.

Senator **Hatch**. Senator, read it in a hurry, if you would, please.

Senator DECONCINI. And my understanding is that in that statement you are laying out why you object to this nomination and laying out your particular reason in coming to that conclusion.

Is that accurate?

Senator LEVIN. It is.

Senator DECONCINI. Mr. Chairman, I think we ought to let the man finish without interrupting——

The CHAIRMAN. He can finish——

Senator DECONCINI [continuing]. And that includes myself.

The CHAIRMAN. Senator, I am trying to save time.

Why should he quote a witness who is here in person, can speak for themselves——

Senator DECONCINI. Mr. Chairman——

The CHAIRMAN. Wait, let me get through.

Can speak for themselves. Now, he is quoting a witness that is here in this room today. They can speak for themselves.

I was suggesting, and I was trying to shorten it, if he wants to bring out those who are not here, to give that; those who are here, then let them speak for themselves.

Senator DECONCINI. Well, if the Chairman would yield, he is only doing what any other Senator has the right to do in an opening statement: quote from an affidavit——

The CHAIRMAN. He has the right to do it. I am just suggesting that he not do it to save time since the witness is here. If he wants to do it, he can do it.

Senator DECONCINI. Good.

The CHAIRMAN. We have approved it.

Senator METZENBAUM. Go ahead and proceed uninterrupted.

Senator LEVIN. Mr. Chairman, the affidavit of Mary Eastwood says the following, in paragraph 4, that:

> As a result of Mr. Kozinski's harsh and demeaning treatment of OSC staff, many professionals sought employment elsewhere. Six of the eight most senior attorneys in the central office resigned or retired during Mr. Kozinski's first year in office.

On page 7 of that affidavit, she says that:

> Mr. Kozinski testified that he "had an excellent working relationship with his staff at OSC". I believe this is untrue. My observation was that despite his personal charm, Mr. Kozinski had an extremely poor working relationship with most of the OSC staff, especially those in the central office with whom he had more frequent direct contact.
>
> His style as a manager was oppressive. His harsh and insulting treatment of OSC employees was unnecessary and destructive.

The affidavit of John Hollingsworth states that:

> Mr. Kozinski took a number of adverse actions and humiliating actions towards many employees, myself included. I cannot help but question Mr. Kozinski's sense of fair play, evenhandedness, and sensitivity or judgment in dealing with people.
>
> After 20 years of Federal personnel management experience, I cannot recall a more callous disregard for people than Mr. Kozinski exhibited.

He goes on to say that "Mr. Kozinski," in his own case, "displayed an uneven and sometimes ill temperament toward me. For example, he marked with great criticism a certain directive enclosed as attachment 1 in blue, yellow, green, and red colors."

Mr. Chairman, another example. Judge Kozinski represented to the Senate, in his answers to written questions from the Judiciary Committee, that authorization by him to issue a complaint in a

Hatch Act violation case, entitled *Saldanna*, "* * * was on the basis of a routine staff recommendation."

But the affidavit of Horace Clark, who served as prosecuting attorney for the office in the *Saldanna* case, shows that it was anything but routine and was contrary to three front line staff recommendations.

Clark says, on page 6 of his affidavit—and I understand that he could not be with us today although he was invited to be here yesterday—that "This matter was reviewed by the prosecuting staff, it was reviewed by the supervisors. They recommended that the *Saldanna* case not be prosecuted and that," to his knowledge, "*Saldanna* is the only case where an investigator and supervisor's recommendation to close a case were overruled and it was filed anyway."

Now, according to that affidavit, in other words, the decision in that matter was anything but routine: it was unusual. And rather than following the recommendation of the staff, it was contrary to that staff recommendation.

Another example of where I believe Judge Kozinski has misled us. He said to the Judiciary Committee that he initiated a program of monitoring the Merit System. Protection Board appeals for possible intervention by the special counsel's office, but two former employees' affidavits specifically dispute the accuracy of that statement and affirm that such a review process had been in effect prior to Judge Kozinski's appointment.

He represented to the Senate Judiciary Committee that, while at the OSC, he "* * * wanted to make sure that there were no sexual harassment cases that somehow fell through the cracks." He said to the committee "I can only represent to you that we brought every case that we had. I did not want to bring bad cases.

"I did not want to bring cases that would be burdensome to the employee, the agency, and would make bad law. Every case that I thought could be brought was brought. Not one has suggested different."

"No one has suggested different" is what he told the Judiciary Committee.

Well, then you read the affidavit of Beth Don who suggests very, very different. She says that:

> In the spring of 1981 I was the attorney assigned to work with the investigator on this sexual harassment case. My review of it at the point I entered the case concurred with the views of my supervisor, the investigator and the acting special counsel.
>
> The investigator had documentary evidence in affidavits and had discovered a pattern and practice of prior behavior on the part of the supervisor. Together we worked to fine tune the case and draft the complaint.
>
> The investigator's second line supervisor, however, made it clear that he had no use for sexual harassment cases and that the standard to be applied was that of the virtuous woman. The second line supervisor also admitted to me in the context of this case that he was a male chauvinist.

Now, this is Beth Don's affidavit:

> At the meeting held by Mr. Kozinski, which was to decide the fate of the case, every attorney present and the investigator strongly supported the investigation and spoke of the exceptional strength of the case for prosecution purposes.
>
> The only opposition to going forward was expressed by the investigator's second line supervisor, a non-lawyer. Mr. Kozinski then bypassed my recommendation as

> the attorney in charge of the case and also ignored the advice of both my supervisor and the former acting special counsel.
>
> Instead, he delegated the decisionmaking authority not to the prosecution division, which would have been the normal and logical procedure, but told the investigator's second line supervisor that the decision was his to make.

And she continued:

> Every person in attendance at that meeting and nearly all if not all the investigators and attorneys knew that Mr. Kozinski's delegation amounted to his killing this sexual harassment case without personally having his name connected to the deed.
>
> In recent conversations with the investigator and the complainant, I have been told that, A, the case was settled and, B, the person complained of still works in the same agency and same building as the complainant. She is forced to pass him in the hallways and she is terribly bothered that no action was taken against him as the result of her complaint.
>
> Mr. Kozinski's decision not to prosecute in this instance was not just a decision involving one case, but was rather seen in the office as a statement of his view on sexual harassment cases in general: that is, that he would not prosecute them in response to employees 'complaints while he was special counsel.
>
> This decision made clear to the office staff that if this case was closed without action, indeed, no Federal employee's sexual harassment case would ever stand a snowball's chance of being prosecuted by Special Counsel Kozinski.

Nobody ever suggested otherwise? No one ever suggested? An affidavit like that was a very powerful suggestion otherwise, that indeed he did not bring cases which could have been brought.

We are not arguing whether he should have brought the case or should not have brought the case. The point is he represents to the committee, "No one ever suggested otherwise."

[Information follows:]

EXHIBIT 1

AFFIDAVIT OF BETH L. DON

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

I, BETH L. DON, being duly sworn, hereby depose and state:

1. I am 38 years of age and reside at 1127 Hawlings Road, Brookeville, Maryland 20833.

2. I served as a GS-15 attorney in the Office of the Special Counsel during 1980 to 1982.

3. While I was serving at the Office, in 1980 or 1981, a female federal employee filed a complaint of sexual harassment against her male supervisor.

4. After normal review, an indepth investigation of the complaint was undertaken by one of the Office's most experienced and highly thought of investigators.

5. The investigator interviewed dozens of people and obtained a large number of affidavits. It was the investigator's opinion that the complainant had been sexually harassed by her supervisor.

6. At the point in time when the investigator became convinced that the sexual harassment alleged had in fact occurred, the Acting Special Counsel decided to pair the investigator with an attorney since it seemed probable that the Office would file an action with the Merit Systems Protection Board (MSPB) to remedy the employee's complaint. The Acting Special Counsel believed that by teaming an attorney with the investigator the Office would achieve a very thorough investigation and a fully supportable complaint to initiate the action at the MSPB.

7. In the Spring of 1981, I was the attorney assigned to work with the investigator on this sexual harassment case. My review of it at the point I entered the case concurred with the views of my supervisor, the investigator and the Acting Special Counsel: The case was an excellent

one to prosecute. The investigator had documentary evidence and affidavits and had discovered a pattern and practice of prior behavior on the part of the supervisor. Together we worked to fine tune the case and draft the complaint.

8. The investigator's second-line supervisor however made it very clear that he had no use for sexual harassment cases, and that the standard to be applied was that of "the virtuous woman." The second-line supervisor also admitted to me in the context of this case that he was a "male chauvinist."

9. As it became known in the Office that the Prosecution division was getting ready to file and litigate this case at the MSPB, the newly confirmed Special Counsel, Alex Kozinski, interjected himself into the decision-making process.

10. While Mr. Kozinski professed to have a strong commitment to prosecute persons accused of sexual harassment, his actions were the direct opposite. First, he propounded a set of 46 questions to the investigator. To the best of my recollection, the questions served no useful purpose in terms of either strengthening an already strong case or pointing out areas of possible weakness. They served only to usurp hours and hours of the investigator's time, both professional and private. In the end, the questions were never all answered because she was ordered to stop work on the case by her second-line supervisor.

11. At the meeting held by Mr. Kozinski which was to decide the fate of the case, every attorney present and the investigator strongly supported the investigation and spoke of the exceptional strength of the case for prosecution purposes. The only opposition to going forward was expressed by the investigator's second-line supervisor, a non-lawyer. Mr. Kozinski then bypassed my recommendation as the attorney in charge of the case and also ignored the advice of both my supervisor and the former Acting Special Counsel. Instead, he delegated the decision-making authority not to the Prosecution division which would have

been the normal and logical procedure, but told the investigator's second-line supervisor that the decision was his to make.

12. Every person in attendance at that meeting, and later nearly all, if not all the investigators and attorneys, knew that Mr. Kozinski's delegation amounted to his killing this sexual harassment case without personally having his name connected to the deed.

13. In recent conversations with the investigator and the complainant (to both of whom I have promised confidentiality), I have been told that (a) the case was "settled," and (b) the person complained of still works in the same agency and same building as the complainant; she is forced to pass him in the hallways; and she is terribly bothered that no action was taken against him as a result of her complaint.

14. Mr. Kozinski's decision not to prosecute in this instance was not just a decision involving one case but was rather seen in the Office as a statement of his view on sexual harassment cases in general -- i.e., that he would not prosecute them in response to employees' complaints while he was Special Counsel. This decision made clear to the Office staff that if this case was closed without action, indeed no federal employee's sexual harassment case would ever stand a snowball's chance of being prosecuted by Special Counsel Kozinski.

15. I have read relevant portions of Alex Kozinski's testimony before the Senate Judiciary Committee regarding his efforts to combat sexual harassment in the federal work

place. Any memo issued in May 1982 came, not shortly after Mr. Kozinski's confirmation as Special Counsel but rather more than halfway through the time he served in that office and nine months after the decision to close the case dicussed above was made.

16. To my knowledge, the Office filed no sexual harassment cases for corrective or disciplinary action with the MSPB while Mr. Kozinski served as Special Counsel.

The above statements are true and accurate to the best of my knowledge and belief.

Beth L Don
BETH L. DON

Subscribed and sworn to before me this 6th day of September, 1985.

Jacky Karnchanaphat
Notary

My Commission Expires July 31, 1986

Senator LEVIN. What about Congresswoman Schroeder's suggestion? Pat Schroeder writes the chairman, September 5, 1985, about a press conference that she held in 1982 complaining about his failure to bring cases.

Has she ever suggested otherwise? Did she count?

Here is what she writes in September 1985 to the chairman of this committee:

> The fact that the Office of Special Counsel under the leadership of Mr. Kozinski had failed to utilize its statutory powers together with the enormous number of complaints which I received from employees who tried to make use of the office convinced me to introduce legislation to abolish the Office of Special Counsel.
>
> The data provided by Mr. Kozinski indicated that no legitimate whistle-blowers existed in the Federal Government. If this was the case, I reasoned, we ought to write off the Office as an expensive mistake.
>
> In fact, I believe that there are legitimate whistle-blowers in the Federal Government. My experience as Chairwoman of the House Subcommittee on Civil Service has convinced me that a substantial number of prohibited personnel practices are committed each week in the Government.
>
> I have witnessed separations and reassignments of employees because their supervisors believed they blew the whistle or could not be trusted due to their work for the previous Administration. As a result, I joined in the May 17.

That's 1982, May 17, 1982—

> Press conference with the American Federation of Government Employees, the Fund for Constitutional Government, and the Government Accountability Project.
>
> The data provided by Mr. Kozinski was the basis for my disappointment with the Office of Special Counsel.

Has no one suggested otherwise—that he didn't bring cases which could have been brought? Again, we are not arguing: Should he have brought a particular case? Should he not have brought a particular case?

We are questioning whether Judge Kozinski was fair and square with this committee when he said no one ever suggested otherwise when Congresswoman Schroeder surely had suggested otherwise.

Mr. Chairman, I am going to withhold the balance of my statement at this point. I would like to present it at a later point in the hearing, but because of the number of Senators that are here I think you should now hear from the witnesses.

[Prepared statement follows:]

STATEMENT OF SENATOR CARL LEVIN (D-MICH)
OPPOSING THE NOMINATION OF ALEX KOZINSKI
TO THE NINTH CIRCUIT COURT OF APPEALS

November 1, 1985
10:00 A.M.

Mr. Chairman, Mr. Ranking Minority Member, and distinguished members of the Senate Judiciary Committee, I am here today in opposition to the nomination of Alex Kozinski to the Ninth Circuit Court of Appeals. I have analyzed his record and come to the conclusion that he is not qualified to serve as a federal appellate judge. I will be discussing my reasons at some length in a few moments, but I want to preface the substantive discussion of Judge Kozinski's qualifications with a few comments.

First, I take no pleasure or satisfaction in opposing Alex Kozinski. When we participate in the "advise and consent" process established by the Constitution, we deal directly with individual human lives, and we, as a body or as individual members, should act only with great care.

But it is this very "advise and consent" responsibility that leads me to my second point. We do have an important, constitutionally established responsibility to participate actively in the selection of appointees to the federal bench. The Constitution does not say "go along" — it says "advise and consent" -- those are active words, requiring an active participation in the process by Senate members. I am concerned that our view of our role in this process has been narrowed over the years, so that our standards for arriving at a decision have been minimized. It has been suggested that it requires, today, actual criminality or serious unethical conduct, explicitly proved, in order to deny the Senate's consent. If that is in fact the case, then we urgently need to revisit those standards and reevaluate our role in this process. Our standards should be higher than that. It is our responsibility to ensure that truly qualified individuals serve on the federal bench. I don't need to remind my colleagues that these are lifetime appointments with removal only by impeachment, and the power of these individuals over the document most sacred to our form of government and way of life -- the Constitution — and the statutes and executive actions that flow therefrom -- is enormous.

This brings me to my third point. I believe Judge Kozinski is a very intelligent — probably exceptionally so — academically superior, hard-working person. He has always, he said, wanted to be a federal judge. He was born in 1950 which makes him perhaps the youngest person who would ever serve as a federal appellate judge. He graduated cum laude from UCLA in 1972, was first in his class at UCLA law school, graduating in 1975. While at UCLA he served as the managing editor of the Law Review. He clerked for Judge Anthony Kennedy of the Ninth Circuit Court of Appeals and for Chief Justice Warren Burger of the U.S. Supreme Court. No one can argue that he is lacking academic excellence and achievement.

But there are two equally important parts to being a judge -- intellectual ability and academic training are important, of course. But judicial temperament is an equally important consideration, and this is where Judge Kozinski comes up unacceptably short. That is a matter I will discuss in a moment at length. But let me interject one more thought.

The American Bar Association assesses the qualifications of nominees to federal judgeships and places them in one of four categories — "exceptionally well qualified", "well qualified", "qualified" and "not qualified". Not one member of the ABA's Standing Committee on the Federal Judiciary rated Judge Kozinski as "exceptionally well qualified". Not one member of the Committee rated Judge Kozinski as "well qualified". A majority of the Committee rated Judge Kozinski as only "qualified" and a minority rated him as "not qualified". According to the ABA, the three factors it considers in assessing the qualifications of a judicial nominee are: competence, integrity and judicial temperament.

This minimal level of approval by the ABA makes a thorough review of Judge Kozinski's qualifications all the more compelling, and I turn to those issues now.

I oppose the nomination of Alex Kozinski because he lacks the consistent judicial temperament required for the position. The affidavits that we have obtained, since this nomination was reported by the Senate Judiciary Committee, and the correspondence that has been exchanged among Senators Thurmond, Biden and myself and Judge Kozinski, show that:

1) Alex Kozinski has misled the Senate, its committees and its members;

2) Alex Kozinski is at times intemperate, prone to anger, and lacking in compassion and sensitivity;

3) Alex Kozinski has on occasion engaged in erratic behavior.

4) Alex Kozinski has unfairly attacked an organization that has opposed his nomination because of his treatment of federal employees (and utilized official Claims Court stationery in the process); The affidavits I referred to were submitted to me and members of the Senate Judiciary Committee by six former employees of Judge Kozinski at the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB). Judge Kozinski served as Special Counsel for a little over one year, from June, 1981, to August, 1982.

According to a GAO report on the OSC and the MSPB:

> "OSC, headed by a presidentially appointed Special Counsel, is an independent office which shares with MSPB the responsibility of insuring that personnel practices in the Federal Government are consistent with merit system principles...OSC is headquartered in Washington, D.C. and has field offices in six locations. As of February 1983, OSC had a staff of 95.
>
> "The Special Counsel is required to receive and investigate allegations or initiate, in the absence of an allegation, investigations of
> --prohibited personnel practices, including reprisals against "whistleblowers" (Federal employees who report improper or illegal Government activities);
> —activities prohibited by other civil service laws, rules, or regulations;
> —arbitrary or capricious withholding of information under the Freedom of Information Act; and
> --prohibited political activity by Federal employees and certain State and local government employees.
>
> "The Special Counsel forwards allegations of mismanagement, gross waste of funds, and abuse of authority or substantial and specific danger to the public health or safety to the head of the agency involved. The agency head reports to OSC on actions taken.
>
> "The Special Counsel may request MSPB to order a stay (a temporary halt) of any personnel action if there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. MSPB can order the withholding of pay from employees who knowingly and willfully refuse or fail to comply with an MSPB order. Disciplinary action can also be taken against employees who have engaged in prohibited personnel practices. Also, the Special Counsel may request MSPB to order an agency to take appropriate corrective action whenever the agency does not take action recommended by the Special Counsel."

The former OSC employees who prepared affidavits are:

*Mary Eastwood, an attorney who served for 18 years in the Office of Legal Counsel of the Justice Department, served as Acting Special Counsel from January, 1980 to June, 1981, when Judge Kozinski assumed his post, and remained closely involved with the operations of the Office of Special Counsel and Judge Kozinski for at least the first half of his tenure there;

*Jesse James, Jr., an attorney who worked in the Office of Special Counsel in November, 1979, and served as Assistant Special Counsel for Prosecution from approximately June, 1980, until he left in January, 1982, during which time he served under and worked closely with Judge Kozinski;

*Laura Chin, the Public Information Specialist for the Office of Special Counsel from June, 1980, until September, 1981, including the first four months of Judge Kozinski's term;

*Horace Clark, an attorney at the Office of Special Counsel from May, 1981, through September, 1984, and currently employed as an attorney at the Department of Interior;

*John Hollingsworth, former Director of Administration and Program for the Office of Special Counsel where he was employed from September 2, 1979, until December 11, 1982.

*Beth Don, an attorney who served in the Office of Special Counsel from 1980 to 1982 as a GS-15.

Judge Kozinski Has Misled the Senate

Let me turn to my first of the four points I mentioned earlier -- that Alex Kozinski has misled the Senate, its committees and its members.

First, in Judge Kozinski's testimony before the Senate Judiciary Committee, he gave the following description of his working relationship with his OSC staff:

> "Well, Mr. Chairman, I believe that during my tenure, I had a very fine working relationship with most of the employees in the Agency...Now there were problem employees and I believe that we solved those problems and for the most part, I believe that I had an excellent working relationship with my staff."

The affidavits of the former employees tell a very different story. Ms. Eastwood had this to say:

> "As a result of Mr. Kozinski's harsh and demeaning treatment of OSC staff, many professional employees sought employment elsewhere. Six of the most senior attorneys (Grade 14 and above) in the Central Office resigned or retired during Kozinski's first year in office...Eight of the 15 investigators in the Central Office resigned, transferred or retired."

She added:

> "My observation was that despite his personal charm, Mr. Kozinski has an extremely poor working relationship with most of the OSC staff, especially those in the Central office with whom he had more frequent, direct contact. His style as a manager was oppressive. His harsh and insulting treatment of OSC employees was unnecessary and destructive".

Mr. James made a similar assertion:

> "In spite of Mr. Kozinski's statements to the contrary during his confirmation hearing, staff morale was at an all-time low. Resignations from the office were higher than they had ever been and they were linked closely to the employee abuses made by Mr. Kozinski or under his direction."

And Ms. Chin had this to say:

> "Overall, the effect of Mr. Kozinski's behavior was to devastate the morale of the OSC staff and to cause severe depression among the individual employees."

Yet Judge Kozinski testified that his working relationship with the staff was "excellent".

A second instance which calls into question Judge Kozinski's truthfulness with the Senate concerns the prosecution of Hatch Act cases by the OSC during Judge Kozinski's tenure there. Judge Kozinski testified as follows:

> "As to (Hatch Act) prosecutions also made largely on staff recommendations and for the most part, for the greatest part, I defer to staff. A few occasions I said no, let us let this person go, it was inadvertent or what not. But every time there was a prosecution it was on the basis of

> staff recommendations. There was certainly never any implication that party affiliation or anything of that sort played a role in the decisionmaking process."

I repeat, here, the important sentence: "But every time there was a prosecution, it was on the basis of staff recommendations."

Let's look at the affidavit of Horace Clark. He served as the prosecuting attorney for OSC in a Hatch Act complaint entitled Saldana brought against an employee for allegedly endorsing President Carter for re-election. According to Mr. Clark, the ALJ in that case dismissed the complaint for lack of any evidence. It was, according to Mr. Clark, "the weakest case in the Office and in (his) professional experience of over four years at OSC." He describes just how the decision was made to bring the case in the first place, in spite of, and contrary to, staff recommendations. Mr. Clark has this to say:

> "Mr. Kozinski further testified that he authorized filing a complaint based on a staff recommendation. He failed to point out, however, that the original staff recommendation was to close the case. On October 9, 1981 Ms. Dorothy Springfield, the investigator assigned to Saldana, recommended that 'this office take no further action on the allegations raised.' Ms. Springfield's recommendation was concurred in by her supervisor, Elliot Davis. Her memorandum is enclosed as Exhibit 3.
>
> "In December 1981 Mr. Jesse James assigned me to review the case again. After reviewing the file, which contained no direct evidence of illegality, I recommended keeping the case closed. Ms. Springfield, who also had participated in the renewed investigation, agreed with this conclusion. Mr. James concurred as well. Nevertheless, in January, 1982 Mr. Lynn Collins assigned me to prepare a draft complaint. Shortly before, I had started to brief John Erck on the lack of persuasive evidence, but after approximately one minute into the briefing he interrupted to reassure me that 'we've got enough.' I responded that I wanted to explain that we had serious weaknesses with the case, but Mr. Erck did not appear to listen and repeated that there was "enough". I was to hear that word used frequently and without explanation in connection with this case over the next 6 months..."

In response to written questions from the Judiciary Committee on the Saldana case, Judge Kozinski had this to say:

> "The investigation was undertaken routinely by office staff. While I have no specific recollection, it is my impression that the inquiry was prompted by newspaper reports suggesting that Mr. Saldana had violated the Hatch Act. To the best of my recollection, my only involvement with the case was to authorize a complaint to be filed. This authorization was issued on the basis of a routine staff recommendation which indicated (as best I can recall) that there were newspaper reports, as well as the confirming affidavit of an eyewitness, that the violation had occurred."

Judge Kozinski leads the Judiciary Committee to believe that the case was brought routinely and that his only role was to authorize the filing of the complaint. But Mr. Clark's affidavit contains overwhelming evidence of the fact that the Saldana complaint was quite the opposite of a routine matter. He also provides evidence that Judge Kozinski knew of negative staff recommendations about filing the complaint. Mr. Clark says:

> "Mr. Kozinski testified that his only involvement with Saldana was to authorize filing the complaint. That statement, in my opinion, also is inaccurate. There is no way that it can be seriously contended that Mr. Kozinski was unaware of the weaknesses in Saldana. There was absolutely no support for filing this case, except from staff members who functioned as the mouthpieces for Mr. Kozinski's policies. Although I did not discuss the case directly with Mr. Kozinski, the policy in the Prosecution Division at the

> time, as it had always been, was for the chief of the division (Collins) to brief the Special Counsel, and for the Special Counsel to approve the filing of any complaint, be it for disciplinary or corrective action. Unlike other cases, Mr. Collins was unwilling to discuss this one with me freely. It was clear to me that he was a buffer, not a decisionmaker on the matter. Similarly, it appeared obvious that the decision already had been made for Mr. Erck in January when I tried to brief him about the lack of persuasive evidence, because he did not wait for me to get to the facts before interjecting that there was 'enough.'
>
> "In early February 1983 I received more direct confirmation of the obvious -- that Mr. Kozinski had kept the case alive for a prolonged period and made the decision to file the complaint in spite of the staff's opposition. I discussed Saldana with Mr. Collins, because I had heard that Mr. O'Connor reportedly was upset with the results of the case, and gradually I was losing my responsibilities at the office. I asked Collins if it were due to Saldana. Mr. Collins responded, 'No, I took responsibility for that and got my ass chewed out by Mr. O'Connor.' I added, 'Lynn, I told you on two occasions that case should never have been filed.' He responded, 'Yeah, and I so advised Alex.'

In a third example of misleading the Judiciary Committee, Judge Kozinski stated:

> "While I was Special Counsel, I initiated a program of monitoring Merit Systems Protection Board appeals for possible intervention by the Special Counsel's office."

Ms. Eastwood, however, states that during her 17-month term as acting Special Counsel, prior to Judge Kozinski's arrival, OSC intervened in 20 employee appeals pending before the MSPB, while OSC intervened in only 3 under Judge Kozinski, and that is proof that an intervener program was already in place at the time Judge Kozinski arrived at OSC.

Mr. Clark also states that Judge Kozinski's statement on this subject is inaccurate. In his affidavit he stated:

> "Mr. Kozinski also testified that he 'initiated' a program to monitor MSPB appeals for possible intervention by the Special Counsel. He added that this step was taken 'to make sure that if intervention by the Special Counsel was required, that we would be there to serve.' Those statements were inaccurate on two grounds. First, this had been done by his predecessor Ms. Eastwood. Second, we did not follow through to actually conduct the interventions, even when we again had 'good' cases. An example from my own experience is enclosed as Exhibit 6. In this decision, Lacy B. Ward and Renee A. Webb v. U.S. Consumer Product Safety Commission, the MSPB Presiding Official clearly erred by holding that the requirement that job references must be based on personal knowledge only applied to references from Members of Congress. The holding flatly contradicted the legislative history and would have created a huge loophole, by exempting all members of the Executive branch from one of the prohibited personnel practices. 5 U.S.C. 2302(b) (2). On May 17, 1982 I submitted my analysis on the holding to Collins. I never heard anything more about the case, in which the Special Counsel did not intervene."

A fourth example of misleading the Judiciary Committee is Judge Kozinski's statement on the extent to which OSC under Judge Kozinski's leadership pursued sexual harassment cases. Judge Kozinski stated the following at his nomination hearing:

> "We engaged in a new policy of combating sexual harassment in the workplace. On January 22, 1982 I circulated a memo to all investigators stating that sexual harassment was a very serious problem in the workplace, and it is one that we took incredibly seriously in the central office of the Special Counsel and requesting that no cases, making allega-

> tions for sexual harassment be closed, unless and until special approval was received by the Assistant Special Counsel for investigation or by somebody designated within. We wanted to make sure there were no sexual harassment cases that somehow fell through the cracks and not being handled by our staff. That was in a November or January 22, 1982 memorandum."

The affidavit of Beth Don, by describing in detail the history of an "excellent" case for prosecution, refutes by specific example this statement by Judge Kozinski. I will read the entire affidavit at this time, because it is such a clear and succinct description of Judge Kozinski's handling of this sexual harassment issue.
(See Don affidavit attached as Exhibit 1.)

How could Judge Kozinski in good conscience state that he "wanted to make sure there were no sexual harassment cases that somehow fell through the cracks", in light of Ms. Don's affidavit?

A fifth example of misleading the Judiciary Committee is the following, in a general comment on his commitment and actions to uphold the responsibilities of the OSC:

> "I can only represent to you that we brought every case that we had. I did not want to bring bad cases. I did not want to bring cases that would be burdensome to the employee, the agency, and would make bad law. Every case that I thought could be brought, was brought. No one has suggested different."

No one has suggested differently? How misleading that representation to the committee is. It's certainly not true that no one has suggested differently. The affidavits which I have discussed here suggest exactly that — that Judge Kozinski failed to bring strong cases that otherwise should have been brought. I refer my colleagues back to the sexual harassment case discussed by Ms. Don in her affidavit and to a case described by Jesse James in his affidavit involving a mine safety expert. The name of that case was Spadero. Essentially, in this case, Mr. James alleges that Judge Kozinski attempted to counsel the agency to provide a lawful explanation for the firing of a mine safety expert who had talked with the press about his actions to protect the safety of miners. According to Mr. James' affidavit, what appeared to be a strong case of a retaliatory-type firing for contact with the press was never prosecuted.

Finally, among the examples of Judge Kozinski misleading the Judiciary Committee, there is the case described by Mr. Clark in his affidavit. The statement by Judge Kozinski, according to Mr. Clark, that he "brought everything (he) had" is, according to Mr. Clark, "inaccurate" as demonstrated by his (Mr. Clark's) own experience in the case of Sandy Padilla. Here is Mr. Clark's description of the handling of that case:

> "An example from my own experience was the case of Sandy Padilla. Ms. Padilla was a federal employee removed from her career position, reassigned to a Schedule C job and then dismissed. After the investigation was completed, I prepared a corrective action letter to the head of the agency under 5 U.S.C. 1206(c)(1), at the direction of Mr. Shigeki Sugiyama. A copy of the letter is enclosed as Exhibit 4, along with Mr. Sugiyama's pointed comments about the delays in our action and the benefits that we could achieve. Although Sugiyama told me that the corrective action request should be sent and that he had informed Kozinski, to my knowledge nothing ever happened. See Mr. Sugiyama's comments on my June 15, 1983 performance appraisal, attached as Exhibit 5. The case simply died. Although I was the lead attorney to handle the work, I have no idea why we did not follow through. I received no explanation. This was true of many promising cases and assignments that were begun during Mr. Kozinski's tenure."

In addition to his misleading testimony and responses to written questions, Judge Kozinski has misled the Committee in his response to my letter to Senators Thurmond and Biden in which I discussed various aspects of his record. His discussion of numerous issues colors the truth and ends up painting quite a different picture from what really happened. Let me give you the more significant examples.

In Judge Kozinski's letter of October 17, 1985, to Senators Thurmond and Biden, he discusses the settlement in Mary Eastwood's termination case. Mary Eastwood was terminated by Judge Kozinski on May 3, 1982, for failure to accept a directed reassignment to the San Francisco office. Judge Kozinski had asked her to head the San Francisco region office. Ms. Eastwood filed a complaint claiming that the termination violated the law because termination was based on political considerations as well as the views she expressed in the office. Judge Kozinski points out that the statements made by Ms. Eastwood in her affidavit are not new, and he notes that her appeal of her termination was publicized in 1982. He goes on to say, and I am quoting now from his letter:

> "In September 1982, on the eve of trial, Ms. Eastwood dropped her appeal and 'abjure[d] her allegations that the Office of the Special Counsel, the Special Counsel or any employee of the Office of the Special Counsel engaged in any wrongdoing. . .' By repudiating her charges, Ms. Eastwood bypassed the opportunity to make her case fully and fairly in open court and, if successful, to permanently get her job back.
>
> "The facts of Ms. Eastwood's case are simple. When a vacancy occurred, I placed her in charge of our largest regional office in San Francisco, by any measure hardly a hardship assignment. In light of Ms. Eastwood's experience and familiarity with the office, I felt strongly that she could help bring our largest and most distant regional office "closer" to Washington... For reasons never fully explained, Ms. Eastwood chose not to go to San Francisco, abandoning the responsibilities entrusted to her."

Judge Kozinski then attached a copy of what appears to be the Settlement Agreement. Judge Kozinski is implying, to the average person reading this letter, that Ms. Eastwood essentially lost her case. He says she "bypassed the opportunity" to be "successful." The interpretation placed on the act of settlement is that Ms. Eastwood lost — she didn't have the evidence necessary to succeed in her case.

Well, let's look at what Judge Kozinski didn't tell us in his letter and what he didn't attach in his appendix. In his letter he didn't tell us that Ms. Eastwood was provided with reinstatement and back pay from the date of her termination to the date of the settlement. And, in the appendix he failed to include a copy of the Settlement agreement pertaining to attorney's fees. In that agreement, Mary Eastwood was awarded $10,000 in attorneys fees--an award that was upheld by the Administrative Law Judge assigned to the case. The American Rule is that individuals bear the burden of their own litigation expenses, except in certain cases in which it is fair and just to award attorneys fees to the prevailing party — the prevailing party — that means the winning party. And that is just what the Administrative Law Judge did and the basis upon which he did it. In his decision on the issue of attorneys fees the Administrative Law Judge in this case said the following:

> "The administrative law judge finds that Appellant prevailed to the extent that she achieved the amendment of the effective date of her removal and resulting benefits."

Judge Kozinski omitted that important fact and he omitted in his attachments a copy of the second settlement agreement in which the attorneys fees were discussed. In short, Judge Kozinski told the Judiciary Committee only half the true story — that half which benefitted his position.

In that same excerpt, Judge Kozinski says he did not know of the reasons for Ms. Eastwood's refusal to accept the San Francisco post — she chose not to go to San Francisco "for reasons never fully explained" he says. Well, Judge Kozinski is not being straight with that representation, either. The memo sent to him by Ms. Eastwood at the time she declined the transfer explicitly stated that she would not accept the transfer because she had lived in the Washington D.C. area for some 27 years and her friends and family were here. When I discussed this with Judge Kozinski, he admitted that he did know the reasons for her refusal. Why did he suggest something different in his letter to Senators Thurmond and Biden?

On another matter in the letter Judge Kozinski is also misleading. This has to do with my criticism of his decision in a judicial misconduct case he considered while at the Claims Court. For background, the case is entitled *In Re Judicial Misconduct*, 2 Cl. Ct. 255 (1983).

A 1980 statute governs the handling of judicial misconduct complaints. 28 U.S.C. 372 requires, in complaints involving U.S. Claims Court judges, that the Chief Judge of the U.S. Claims Court review these complaints. If the Chief Judge finds a complaint to be improperly filed, "directly related to the merits of a decision or procedural ruling," or frivolous, or if appropriate corrective action has already been taken, the Chief Judge is required to dismiss the complaint. If the Chief Judge does not dismiss the complaint, he is required to convene a special committee to investigate the charges. The statute on its face anticipates the filing of frivolous complaints and establishes a screening process for the prompt dismissal of them.

In March, 1983, Judge Kozinski received a complaint against a U.S. Claims Court judge, signed by Attorney Norman E. Hay. Named as "Of Counsel" was Attorney Charles S. Gleason, whose signature did not appear on the complaint. Judge Kozinski, in a biting opinion, dismissed the complaint on the basis that it was frivolous and directly related to the merits of a pending case and fined attorneys Hay and Gleason $500 each for filing it. I will go into the details of this case later in my statement. The issue I want to discuss here, in this context of truthfulness, is how Judge Kozinski colored the facts in order to justify the action he took in that case. My criticism of his decision centers largely on his failure to provide notice or a hearing to these two attorneys before he fined them. In his letter to Senators Thurmond and Biden, Judge Kozinski cites some 27 Federal Circuit cases to support the proposition that such a fine can be summarily imposed. What he fails to disclose is that each and every one of those cases he cites is based on and refers to the case of *Asberry v. U.S. Postal Service*, 692 F. 2d 1378. That case — and all the cases cited by Judge Kozinski — involve the filing of frivolous *appeals* with the Federal Circuit *Court of Appeals*, not complaints, *much the less judicial misconduct complaints, in the trial court.* And the authority for the imposition of the sanction, according to *Asberry* (at 1382), is Rule 38 of the Federal Rules of Appellate Procedure — pertaining solely to *courts of appeals* and filing therein of frivolous *appeals*, not lower court activities.

Even more important is the action the court in *Asberry* took and the concerns it stated. One of the issues before the court in *Asberry* was whether the subject appeal was frivolous. The court found it to be so. It then considered a sanction and decided that pursuant to Rule 38, it could impose a sanction on the appellant, and it did so in the amount of $500. BUT, it then rescinded the sanction, because the appellant did not have notice that such a sanction could be imposed. The court's language here is self-explanatory:

> "Before the creation of this court on October 1, 1982, neither of its predecessor courts has adopted Rule 38 of the Federal Rules of Appellate Procedure or other rule providing for award of damages or costs in appeals determined by the court to have been frivolous. Nor had either court entered such an award. In light of those facts, appellants and counsel in cases originally filed in those courts may not have fully realized that the injury inflicted on the administration of justice by frivolous appeals was recognized in the Rules of Appellate Procedure or that those Rules would govern proceedings in this court. Though the present appeal would be for that reason no less frivolous, we consider it appropriate under all the circumstances to remit the costs and attorneys fees imposed in this case."

The cases that Judge Kozinski cites flow from this decision. Notice of the possibility of an imposition of a sanction is deemed to be so critical, in fact, by the Federal Circuit Court of Appeals, that the clerk of the court is required to routinely issue a letter of warning to each person filing an appeal.

Clearly, Judge Kozinski was less than candid in citing those cases to Senators Thurmond and Biden in support of his position.

What is the sense that we get from this kind of record as to Judge Kozinski's commitment to the truth? The answer is simple and obvious — and I stated it earlier. Judge Kozinski has misled the Senate, its committees and its members. Judge Kozinski distorts the truth for his own purposes and that quality alone, in my book, makes Judge Kozinski unfit to serve on the federal bench. An absolute commitment to the truth is the essential foundation to a competent and qualified federal judge.

Judge Kozinski Has Unfairly Attacked An Organization Opposed to His Nomination

The organization in question is the Government Accountability Project (GAP), an independent organization whose principal purpose is to protect whistle-blowers. Judge Kozinski's attack on GAP took place in letters he wrote on official Claims Court stationery soliciting help on his confirmation, in which he enclosed an editorial from a radio station in Boston saying that GAP is "sponsored by" the Institute for Policy Studies (IPS) which is a "revolutionary group hostile to the United States with ties to terrorist groups." In fact, GAP disassociated itself from IPS a year and a half ago. GAP is described by The Economist, in its July 5, 1985 issue, as follows:

> "The main support for whistleblowers, apart from Congress and the press, comes from an independent organization, the Government Accountability Project (Gap). During the 1984 fiscal year, Gap represented more than 60 business and government whistleblowers plus some 14 public-interest groups in 10 states. It advises prospective whistleblowers of the pressures and perils of the vocation and sometimes redirects the less hardy to 'third-party whistleblowing' otherwise known as an anonymous leak."

GAP is listed by Good Housekeeping magazine in the April, 1985 issue as the place to contact if you are contemplating whistleblowing. And the American Banker, in its July 30, 1984, edition lists in its Washington Whistleblowers Directory for persons in the banking industry the Government Accountability Project in addition to various Congressional Committees, investigatory units within executive branch and independent agencies and the American Banker Washington Bureau.

The circulation of such inaccurate and inflammatory materials by Judge Kozinski demonstrates the poorest possible judgment in the matter, and conduct unbefitting a federal appeals court judge. (A copy of the editorial is attached as Exhibit 2).

Judge Kozinski Is Intemperate and Lacks Compassion and Sensitivity.

The former employees who submitted affidavits challenging Judge Kozinski's fitness to serve as a federal judge, describe a man who was - and these are their words - "intemperate", "harsh", "cruel", "demeaning", "sadistic", "disingenous" and "without compassion". The accounts by them of Judge Kozinski's actions while Special Counsel portray an unusual degree of hostility displayed by Judge Kozinski at times and an almost complete disregard for the human consequences of many of his actions.

Let me quote their words at greater length here.

John Hollingsworth in his affidavit concluded, "After 20 years of Federal personnel management experience, I cannot recall a more callous disregard for people than Mr. Kozinski exhibited." Mr. Hollingsworth's affidavit contains more material on this subject of abusive treatment. (See Exhibit 3, Attached.)

Laura Chin stated:

> "Overall I perceived Mr. Kozinski as a man without compassion. I believed that he engaged in sadistic behavior,

> because at the time he appeared to enjoy mistreating individuals. He simply did not treat the human beings at the Office with dignity and respect. He did not exhibit a sense of fairness, of proportion, or of the rational implications of his actions. Most fundamentally, his behavior displayed no sign that he realized the law deals with people."

I have reviewed closely two of the examples referred to in the affidavits of actions taken by Judge Kozinski which demonstrate his insensitivity to human concerns. One is the case of an OSC attorney who was a 25 year veteran of federal employment with critically high blood pressure who, while on sick leave, was terminated by Judge Kozinski.

Since that employee, Phillippe Neff, brought a successful suit in U.S. Distri Court for reinstatement and use of his sick leave, I was curious to see what the judge in the case, as an impartial observer, had decided. The judge was William B. Bryant. Since the hearing had not been transcribed, I had to order a transcript. On page 33, Judge Bryant says:

> "If the government is small enough to, you know, just line itself in this type of situation and stake out a war against this gentlemen -- if they wanted to do it, let them do it. I think it is absolutely incredible to do something that way."

And on page 34 Judge Bryant concludes:

> "(T)here is no discernible, valid, legitimate, acceptable, governmental interest in doing anybody this way. A man with 235-over-130, he's almost prima facie mentally incapacitated."

The other example is that of Dessie Proctor, a long-time clerk typist who had contracted cancer. In that case, Judge Kozinski announced her departure one month before her retirement and without her knowledge. It was so offensive and unsettling to her that she immediately turned in her employee badge and left the office.

Both of these examples are described by Mr. James at some length in his affidavit (See Exhibit 4, attached.)

In response to allegations that Laura Chin, the Public Information Officer for OSC, had been derogating Judge Kozinski's performance in her discussions with OSC field staff, Judge Kozinski drafted a memo which, while it remained in draft form, apparently was used to explain to Ms. Chin just what she was and was not allowed to do. (See Exhibit 5, attached.) According to Ms. Chin's affidavit her "do nots" extended to contact with the Congress and the press. I cite this as an example of the consequences that flowed from Judge Kozinski's anger with employee conduct. Clearly the tone and directive of this memo is something with which a normal employee cannot live. Either Judge Kozinski knew that, and it was a first step in his effort to terminate Ms. Chin, or he was insensitive to what motivates an employee. On top of that, if in fact Ms. Chin was directed to stop her contacts with the Congress and the press, if indeed she had any, Judge Kozinski's anger would have resulted in his ordering what is well known as a prohibited personnel practice — limiting the First Amendment rights of a Federal employee.

An opinion he issued while at the U.S. Claims Court shows the same intolerance and intemperate behavior.

I mentioned this case earlier. It is a highly questionable opinion issued by Judge Kozinski in a case involving the filing of a judicial misconduct complaint. I have described the basic facts and mentioned the concern I had over the issue of due process.

As I indicated, I have no quarrel with Judge Kozinski's decision to dismiss the complaint. The complaint seems indeed to be frivolous and lacking in merit. But Judge Kozinski, in his wrath over the filing of this complaint and, apparently, conduct by these two attorneys in cases pending before the Claims Court, ignores the basic concerns for and requirements of due process, and the sensitive nature of the judicial misconduct process. His anger got in the way of his judgment and fairness.

Judicial misconduct cases are not the same as ordinary civil litigation. These cases are matters in which the judiciary is policing itself, and the appearance of the fairness of the process is critically important, so that no one can claim that judges are unwilling to police their own colleagues. In fact, the Second Circuit Court of Appeals highlighted the importance of providing complete access to the judicial misconduct process. In that case In Re Martin-Trigona, 737 F.2d, 1254 (1984), the district court had issued an order prohibiting Anthony Martin-Trigona from filing any case in any court in the country, unless he was granted leave to file by the court. This was because Martin-Trigona had abused his access to federal court by filing over 250 civil actions and appeals throughout the United States. While the Court of Appeals upheld the concept of what the district court did, it created two exceptions to the order -- one for state courts, over which it determined it did not have jurisdiction, and two, with regard to judicial misconduct cases brought under 28 U.S.C. 372. On the second point, the court said (at page 1263):

> We believe the injunction should explicitly exempt complaints by Martin-Trigona or anyone acting in his behalf under 28 U.S.C. 372(c). This provision related to the complaints of judicial misconduct and, absent a finding that Martin-Trigona has abused such proceedings so as to impair the administration ofjustice, we believe access to this avenue of redress should not be limited at this time. Other litigants are not affected by such a proceeding and, since its purpose is to impose a form of monitoring upon the judiciary itself, we believe that enjoining resort to it can be justified only by a finding of abuse impairing the administration of justice. Moreover, consideration of whether the process established under Section 372(c) is being abused and, if so, what remedies are appropriate may best lay with the judicial council of the circuit.

Judge Kozinski simply ignores this distinction. He not only fined the attorneys without notice or a hearing, for the filing of the complaint, but he writes a scathing opinion, orders it sent to their clients, and publishes the opinion, with the names of the attorneys disclosed. Let me discuss here why those actions are so offensive to due process.

Neither I nor the American Law Division of the Congressional Research Service could find one other judicial misconduct case in which such a sanction was imposed for the mere filing of a complaint. This is true even though there are numerous cases of dismissals based on the same reasons used by Judge Kozinski. In fact, the statute itself anticipates the filing of frivolous complaints, which is why it allows for immediate and summary dismissal. So the sanction, itself, is unprecedented.

Moreover, the disclosure of the names and the publication of the opinion is unusual. In each of the judicial misconduct cases decided by appellate courts and referred to by Judge Kozinski in his opinion in this matter, the names of the complainants were withheld by the courts. This is understandable since the court should act so as not to chill the filing of legitimate judicial misconduct complaints through the threat of or concern for retaliation.

Of greater cause for concern, however, is the lack of due process afforded these attorneys in this case, and that, I think, speaks to Judge Kozinski's anger and the fact that it governed his conduct in this matter.

Had there been notice and a hearing, Judge Kozinski would have learned that Attorney Gleason claimed he was not even aware of the filing of the judicial misconduct complaint over his name by the other attorney.

The absence of notice or a hearing is also contrary to the stated case law on the subject, particularly the appellate court governing the Claims Court. I have discussed already the Federal Circuit's opinion in the Asberry case. The Supreme Court in Roadway Express, Inc. v. Piper, 447 U.S.C., had similar concerns. The Court in that case said:

> "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."

In Judge Kozinski's deposition in the case of Mary Eastwood's challenge to her termination, Judge Kozinski said this: "I tend to be very single-minded when I go after things." He is -- to the detriment of an open and complete view of the facts, and in the end, to the detriment of justice.

In this case involving a claim of judicial misconduct, Judge Kozinski was angry. There is no doubt in my mind. I would have been, too, probably. It's easy for anyone to act with outrage. What is not easy, but what is expected and must be demanded of a judge, is a higher degree of self-control and a commitment to due process and the law. Judge Kozinski was lacking in this area as demonstrated by this case.

Let me add that I am well aware that competency of a judge should not and cannot be fairly assessed on the basis of one opinion or decision, alone. I don't mean to suggest that. Judge Kozinski's opinion in this case is important, because it confirms what others have said about him -- that he is intemperate, partial in situations where he has already made up his mind, and impatient.

Judge Kozinski Has Seemed At Times To Engage In Erratic Behavior.

I am also troubled by a slew of reports of actions taken by Judge Kozinski which can only be described as erratic. The most famous (or infamous) of these is probably the "technicolor memos". Judge Kozinski, when at the OSC, used four or five different colors of ink to edit the staff's work. It is that coupled with the intensity of the editing which shocks the viewer when he or she sees one of these memos. I have two examples here at my desk. Mary Eastwood described these edited memos in her affidavit:

> "The caustic, handwritten criticisms made by Mr. Kozinski on that brief (which he called "technicolor") were typical of numerous cruel and intemperate comments he repeatedly wrote on drafts of work and on routing slips to the professional staff in OSC after he became Special Counsel."

She also stated that her early introduction to Judge Kozinski, before he was even on board at the OSC, was a rather public critique of a brief she had supervised, which was subject to this technicolor editing.

Mr. Hollingsworth, a GS-14 in OSC, describes several incidents of erratic behavior in his affidavit. He says:

> "Mr. Kozinski frequently directed and expected that I personally adjust or repair any of his furniture, move furniture or equipment, or clean-up areas. When I did this to avoid his wrath or castigation, he seemed to enjoy watching me do the manual labor as if he took pleasure in my subjugation. It was humiliating to do these chores as a GS-14 professional, but I wanted to keep my job and a satisfactory record until I could locate another position. Also, had I challenged Mr. Kozinski, the turmoil and actions against me would have left me in a bad situation personally, and would have left me ineffective in my efforts to protect the dignity and rights of others in the office.
>
> "Although Mr. Kozinski often got very upset at the staff for not somehow overcoming regulatory/procedural steps in impossible time frames he himself spent much time over a period of weeks and months having his chauffeur drive him around the D.C. area to look at numerous stores' and companies' offerings of carpet, furniture, computer equipment, curtains, and a microwave oven for his office. He seemed preoccupied with the interior appointments of his office.
>
> "Mr. Kozinski's view/evaluation of staff members was that many were incompetent. He gave many staffers very low unsatisfactory performance appraisals and kept them in a high-stress situation due to his ability to keep them in suspense as to his next adverse/unfavorable action to them. Many have verified this. However, in his notice to staff of 7/30/82, he announced 30 awards and 12 promotions for staff. Some of these very same employees previously had received unsatisfactory performance appraisals by Mr. Kozinski; others, including some who worked for me, had well-known performance shortcomings. None of these announced awards had been

> preceded by the required justification. I cannot account for Mr. Kozinski's action except to remember how the press and congressional sources were criticizing him for negative treatment of his staff, prior to these awards. In fact, in a 4/13/82 memo to staff, he had declared in effect that he was requiring a superior level of performance in lieu of the satisfactory level required by law and regulation for within-grade pay increases. His inconsistency on performance, awards and recognition for the staff baffled us."

There are additional instances described in the affidavits in which Judge Kozinski tried to fire a messenger when one piece of material could not be located and reprimanded an employee for allowing a room partition to fall and scrape the wall in the process. Mr. James discusses this and another incident in his affidavit. I quote from that affidavit:

> "In a third incident, an employee who was very loyal to Mr. Kozinski unintentionally caused a portable partition to fall against the wall, leaving a small scar on the wall. When Mr. Kozinski learned of the incident, he initially discussed the matter with the employee in what the employee described as a caustic and demeaning tone. He then gave the employee a written reprimand for causing the partition to fall.
>
> "Finally, in an incident involving my selection of summer law clerks, Mr. Kozinski requested that I get some digs in on an employee who had not taken any improper actions. The incident arose during a discussion between the clerk and Mr. Kozinski, after being hired. The clerk indicated that the processing of her selection had taken a long period of time and she wondered why. Mr. Kozinski subsequently, requested that I find out why it took so long. I explained that I made my selection prior to his confirmation hearings and afterward the Acting Special Counsel suggested that we put a hold on filling positions until after Mr. Kozinski was confirmed. At that point, Mr. Kozinski told me to discuss the matter with personnel in the Adminsitrative Division and see what they had to say for themselves. Pursuant to his request, I did discuss the matter with the Administrative Division and I was told exactly what I told Mr. Kozinski had caused the delay. That same day, I again discussed the matter with Mr. Kozinski and I again advised him that the Administrative Division was not at fault. He then stated he knew, but I should, in his words, 'get some digs in on personnel.' I shook my head and walked away."

These descriptions are not those of a sensitive or compassionate individual. Rather they reflect a quick temper, an absence of patience, a high degree of intolerance and a continuing disregard for the human consequences of one's actions.

It is based on the above considerations that I oppose Judge Kozinski's nomination.

I am well aware of the letters of support for Judge Kozinski that the Judiciary Committee has received, and the respect of some members of the legal community who praise this appointment. And I am aware of the extent to which Judge Kozinski has improved the operation of the Claims Court by reducing the backlog and shortening the time to disposition. He is to be commended for those accomplishments. But I am also aware of the record I have described to you today and it is a record that does not and cannot support nomination to the second highest court in this country. It falls far below the standard for judicial temperament required by the office.

BALANCE OF SENATOR LEVIN'S OPENING STATEMENT

I believe Judge Kozinski is misleading the Senate when, in a letter to Senators Thurmond and Biden describing a settlement agreement arrived at with former Acting Special Counsel Mary Eastwood and the OSC—in a case challenging her termination by Judge Kosinski—he implied that Ms. Eastwood had lost her case. In fact, Ms. Eastwood, who will appear before this Committee this morning, obtained through the settlement reinstatement from her termination up to the settlement date and back pay. Even more, she was also awarded attorney's fees in the amount of $10,000 which are only allowed to a prevailing party according to the ALJ awarding the fees. Judge Kozinski failed to mention this part of the settlement. He enclosed one settlement agreement in the appendix to his letter, but did not include, nor did he even mention, the existence of a second settlement agreement, signed on the same day as the first by the same parties, in which the $10,000 in attorney's fees was granted.

The words used by the former employees of OSC who submitted affidavits to describe Judge Kozinski include "harsh," "cruel," "demeaning," "sadistic," "disingenuous," and "without compassion." These accounts of Judge Kozinski's actions while Special Counsel portray an unusual degree of hostility displayed by Judge Kozinski and at times an almost complete disregard for the consequences of his actions upon the individuals.

His conduct has, according to the affidavits, been erratic. In "technicolor" memos—in which he used four or five different colors of ink to edit staff paper work—he coupled massive rewrites with deprecating comments. Other examples in the affidavits include his attempt to fire a messenger at OSC when one piece of material could not be located, and his reprimand of an employee for allowing a room partition to fall and scrape a wall.

On the Claims Court, in an unprecedented action, Judge Kozinski summarily—without notice or an opportunity for a hearing—fined two attorneys $500 each for filing a nonmeritorious judicial misconduct complaint. The cases he cites in his letter in support of his actions are either not on point or, where they are, they require notice when sanctions are applied.

Judge Kozinski also has acted unfairly toward the Government Accountability Project (GAP), an independent organization whose principal purpose is to protect whistle-blowers, and which opposes his nomination. He has attacked GAP through letters he wrote on official Claims Court stationery soliciting help on his confirmation, which enclose an editorial from a radio station in Boston saying that GAP is "sponsored by the Institute for Policy Studies (IPS) which is a revolutionary group hostile to the United States with ties to terrorist groups." In fact, GAP disassociated itself from IPS a year and a half ago. GAP is described by The Economist, a respected publication, as "an independent organization," and is listed by Good Housekeeping magazine and the American Banker as an organization to contact if one is contemplating whistleblowing.

The circulation of such inaccurate and inflammatory materials by Judge Kozinski demonstrates poor judgment and conduct unbefitting a federal appeals court judge.

I am aware of support that Judge Kozinski has gotten from well-respected members of the legal community. But I am also aware of the fact that no one on the American Bar Association Committee on the Federal Judiciary found him to be "exceptionally well qualified" or even "well qualified." A majority found him to be only "qualified", and a minority in fact found him "unqualified."

There are a number of important qualities to being a judge. Intellectual ability and academic training are important, of course. I believe Judge Kozinski is a very intelligent—probably exceptionally so, academically superior, hard-working person. He has always, he said, wanted to be a federal judge. He was born in 1950 which makes him perhaps the youngest person who would ever serve as a federal appellate judge. He graduated cum laude from UCLA in 1972, was first in his class at UCLA law school, graduating in 1975. While at UCLA he served as the managing editor of the Law Review. He clerked for Judge Kennedy of the Ninth Circuit Court of Appeals and for Chief Justice Burger of the U.S. Supreme Court. No one can argue that he is lacking in academic excellence.

And I am aware of the extent to which Judge Kozinski has improved the operation of the Claims Court by reducing the backlog and shortening the time of disposition. He is to be commended for those accomplishments. But I am also aware of the record I have described for you today.

Judicial temperament is an equally important consideration to intellectual ability and training, and this is where I fear Judge Kozinski comes up short.

Senator HATCH [presiding]. OK. Without objection, so ordered.

Senator DeConcini, do you have any comment?

Senator **DeConcini**. I have a statement I would ask to be put in the record, without objection, and I will proceed with the witnesses.

Senator **Hatch**. Without objection.

[Statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, when Mr. Kozinski's nomination was considered by the Judiciary Committee, I expressed my doubts about whether he possessed the maturity and temperament to serve as a judge on the U.S. Court of Appeals for the Ninth Circuit. Although I expressed these doubts, I did not object to the committee's reporting of Mr. Kozinski for two reasons.

First, I had been party to an agreement with our distinguished chairman in which he agreed to delay Mr. Kozinski's confirmation vote in committee and those on our side agreed to vote at the first committee meeting in September. The Democrats have complied with this agreement.

Second, at the time Mr. Kozinski's nomination was reported by the committee I did not have any specific facts to support my misgivings about his qualifications, including temperament. I am sorry that I did not have time to investigate the issues presented by the nomination, but because I had not, I allowed the nomination to be reported.

Thanks to Senator Levin and his counsel, we now have before us evidence and a factual record on which to base question concerning Mr. Kozinski's temperament and qualifications. I am particularly concerned about Mr. Kozinski's treatment of his employees and the allegations that he ignored the provisions of law and court rulings in order to get his way.

I want to thank the chairman for scheduling this unusual hearing today to give us the opportunity to carry out our responsibility to closely scrutinize Mr. Kozinski's record. I am particularly appreciative that the chairman has seen fit to allow Senator Levin to participate in this hearing. Because of his experience and knowledge as chairman of the Subcommittee on Oversight of Governmental Management, Senator Levin brings an expertise to these hearings that members of the Committee cannot provide. I am grateful for this second opportunity to review Mr. Kozinski's record and I congratualte the chairman for his fairness and desire to thoroughly examine this nomination.

Senator **Hatch**. Senator Simon.

Senator **Simon**. I have no statement.

Senator **Hatch**. Senator Specter.

Senator **Specter**. I have no statement, Mr. Chairman.

Senator **Hatch**. Just let me make one comment before we begin the testimony today. I notice that Mr. Clark is not here and will not testify, but there are two of the accusers who have been willing to appear in person. I don't know why the others are not here, but we will make no judgments about that.

We have talked about the failure of these witnesses to testify. Now, in Mr. Clark's case I think there might be a reason for that.

Consider Mr. Clark. For instance, he said, in his affidavit, that he "* * * recommended keeping the case closed." That's the *Saldanna* case, I believe. That was in his affidavit.

We also have a memorandum to John Erck, trial attorney, from Dorothy Springfield, investigator, and Horace Clark, attorney concerning this particular matter wherein it concludes—

> The information obtained appears to corroborate the allegation that Guadalupe Saldanna endorsed President Carter for reelection at a White House meeting on May 24, 1980. Notwithstanding Saldanna's and Traveso's denials, the press reported that Saldanna endorsed Carter for reelection.
>
> Further, Carter's former Director of Hispanic Affairs stated that the press release prepared by Traveso recorded the substance of Saldanna's speech at the meeting. The press release clearly states that Saldanna, national chairman of the American GI Forum, endorsed President Carter.

Therefore, it appears that Saldanna's political activity was in violation of 5 USC, section 7324.

In other words, his memorandum is apparently inconsistent with his affidavit.

I have another memorandum where he says certain evidence "* * * bolsters our position at trial." I think Mr. Clark needed to be here. In all honesty, I think these memoranda are very interesting under the circumstances.

Now, Jesse James refused to testify at the first hearing and there have been two opportunities in the confirmation process for these people to come forward, and they have not done it in either hearing.

After refusing to testify at the first hearing, he held a press conference the following day criticizing Judge Kozinski. He has also declined to testify today.

Now, Judge Kozinski took over a new court with new jurisdiction, few resources and a myriad of unanticipated problems that accompanied the inauguration of the new Federal court. I think that he has earned the respect and the loyalty of all judges and staff of the court. I don't know of anybody there who does not.

In only 3 years, he has established a court with a fine reputation. He has reduced the backlog that it started with despite being short one judge for more than a year.

He has carried a full caseload in addition to his administrative duties as chief judge and, in 3 years, he has published 56 opinions, disposed of over 170 cases, and handled countless motions and hearings. He has already logged 110 days on the bench this year.

Congresswoman Pat Schroeder specifically requested Mr. Bill O'Connor, Judge Kozinski's successor, to reopen and review 27 cases at the Office of Special Counsel. Mr. O'Connor did so and did not find any basis at all to question any of Judge Kozinski's decisions in those earlier cases even in light of this alleged later evidence.

I just point these things out because I think we have to be careful.

Former Democratic Chairwoman Ruth Prokof of the Merit Systems Protection Board, a Carter appointee, is familiar with Judge Kozinski's work and endorsed his nomination in a letter to the committee.

Now, I am interested in getting to the bottom of all of these, but I also think that there is something that is not quite right with some of the criticisms. So I wanted to point those out before we proceed.

Our first witness today will be——

Senator LEVIN. Mr. Chairman?

Senator HATCH. Yes.

Senator LEVIN. Will you yield just for one moment?

Senator HATCH. I'll be glad to.

Senator LEVIN. Horace Clark apparently was reached just yesterday. This hearing was scheduled yesterday. The information I have is that he is in the middle of an administrative hearing this morning.

Senator HATCH. OK.

Senator **Levin**. It is an administrative hearing being held by conference call. My staff has talked to him. The ALJ in that case will not delay that hearing. So he is apparently in the middle of a hearing this morning. He was notified about this hearing——

Senator **Hatch**. I am not finding anything wrong with him not being here. I'm just saying——

Senator **Levin**. Well, no. You suggested that he come forward. There was an implication——

Senator **Hatch**. I am suggesting that he certainly did not mention this other memorandum where he recommended that the prosecution be brought. I think it is pretty clear.

Senator **Levin**. Yes, but you suggested that he——

Senator **Hatch**. It is justified to accuse him of being wrong when he is wrong.

Senator **Metzenbaum**. I suggest to the Chairman that perhaps the fairest thing to do would be to give Mr. Clark an opportunity to appear.

Senator **Hatch**. I think he has had plenty of opportunity. We had scheduled this today. We scheduled it the minute we got the names from these people. Providing Mr. Clark with another opportunity to appear is fine with me; but I think we are going to finish this today.

Senator **Metzenbaum**. Mr. Chairman, if I could just finish.

There was a suggestion that I thought you made that somehow or other he was not appearing here for some reason today that might have been anything other than the fact that he got 24 hours notice of this and I am now giving the reason as he——

Senator **Hatch**. Well, I will accept that.

Senator **Metzenbaum**. The ALJ, the administrative law judge, would not delay that hearing that he was in this morning——

Senator **Hatch**. I understand.

Senator **Metzenbaum** [continuing]. And that he will attest to any challenges to his affidavit.

Senator **Hatch**. I will accept that he only had 24 hours notice, which is not a great deal of time. On the other hand, we have an extensive affidavit without mentioning the other memorandum.

This bothers me just a little bit. We will keep the record open for him to answer anything he wishes to submit in writing, hopefully under oath. It will not affect the outcome of this hearing, but hopefully under oath he would say the one affidavit and not mention the memorandum that concludes completely contrary to his affidavit on this particular point.

In any event, we will not read into it any untoward reasons for not being here.

Senator Grassley, do you have any comments?

Senator **Grassley**. Not at this point, Mr. Chairman.

Senator **Hatch**. We will begin with our first witness, Mary Eastwood of Washington, DC. Mary, we are going to swear you.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. **Eastwood**. I do.

Senator **Hatch**. Now, Ms. Eastwood, we would like to have you summarize and we would like to limit all witnesses to 5 minutes so we have enough time for questions. I think most of us have reviewed the affidavits and so forth.

We will turn the time to you.

TESTIMONY OF MARY EASTWOOD, WASHINGTON, DC

Ms. **Eastwood**. Yes; thank you. I do not intend to repeat what I stated in my affidavit since that is a part of the record.

Senator **Metzenbaum** [presiding]. Well, I think that you ought to tell us what is in your affidavit because many of us will not get a chance to read it.

Ms. **Eastwood**. Oh, OK.

Senator **Metzenbaum**. So at least give us a summary of it. I don't think you ought to read it, but you ought to tell us what is in it.

Ms. **Eastwood**. OK. The gist of my affidavit and my objections to Judge Kozinski was the method in which he treated the staff of the Office of the Special Counsel. I believe that his treatment of the staff was unnecessarily harsh and cruel, and I did not think that this was a good characteristic for a Federal judge.

That is the reason I submitted the affidavit.

I was Mr. Kozinski's predecessor in the Office of the Special Counsel. I had been designated acting special counsel by the President pending the confirmation of the President's nominee.

There had been no confirmation hearings. So from January 1980 until Judge Kozinski took office, I was the acting special counsel. Prior to that time, I had worked for 18 years in the Department of Justice as an attorney in the Office of Legal Counsel, beginning in the Eisenhower administration, until the Carter administration in 1979.

I am now working in the private sector, since I lost my job. I am president of a company that provides EEO complaint investigative services to Government agencies under contract.

As I stated in my affidavit, I was fired by Judge Kozinski after 21 years of Federal service. I did appeal my removal and the case was settled after Judge Kozinski left office.

I have reviewed his response to my affidavit in his October 17 letter to the chairman and I continue to be concerned that he is less than completely honest with the committee. For example, his letter states:

> In September 1982 on the eve of trial Ms. Eastwood dropped her appeal and abjured, her allegations that the Office of the special counsel, the Special Counsel or any employee of the Office of the Special Counsel engaged in any wrongdoing.

He encloses Tab F.

> By repudiating her charges, Ms. Eastwood bypassed the opportunity to make her case fully and fairly in open court and, if successful, to permanently get her job back.

I understand that Judge Kozinski provided the committee with only part of the settlement agreement in my case. The settlement agreement provided for a reinstatement and 4 months' back pay, which came to something like $22,000, and an attorney's fee, in a second part of the agreement, of $10,000 for my attorney.

I find it hard to believe that if he received a copy of part of the settlement he did not receive the second part.

Senator **Metzenbaum**. What was his testimony, exactly, about the settlement?

Ms. **Eastwood**. He enclosed part of the settlement agreement and he said that I abjured. The term abjured is used in the settlement agreement. He implied that I had simply dropped the case and I got nothing from it, and I dropped all of the charges and that I repudiated the charges, which I did not.

Senator **Metzenbaum**. Did you have his exact words there as to what he said about it?

> In September 1982, on the eve of trial, Ms. Eastwood dropped her appeal and abjured her allegation that the Office of the Special Counsel, the special counsel or any employee of the Office of the Special Counsel engaged in any wrongdoing.
>
> By repudiating her charges, Ms. Eastwood bypassed the opportunity to make her case fully and fairly in open court and, if successful, to permanently get her job back.

I understand your point.

Ms. **Eastwood**. OK. The truth of the matter is that the settlement was quite favorable to me; that the Office of the Special Counsel wanted to settle the case before the new special counsel came in. Judge Kozinski was no longer at the office so there was no reason for me to further pursue my charges at that time.

That's why we settled the case, but it was very advantageous to me financially.

His letter also states that he placed me in charge of the San Francisco office when a vacancy occurred and "that for reasons never fully explained, Ms. Eastwood chose not to go to San Francisco, abandoning the responsibilities entrusted to her." This, also, is not true.

I did explain to him the reasons I did not want to go to San Francisco. He had called me into his office with his deputy on February 12, 1982, and told me that he was planning to assign me to the San Francisco office.

It was over a long weekend and I thought about it, and I didn't give him an answer one way or the other at the meeting. This was oral, by the way.

On the following workday, which was February 16, I sent him and his deputy a memorandum which says:

> Over the weekend, I gave considerable thought to your plan to move me to San Francisco to head the western regional office if Bill Olivier leaves.
>
> I have lived in Washington, DC, for almost 27 years. Most of my friends and part of my family live here. I, therefore, do not wish to leave here.
>
> I understand your view that my present position in Washington, as you construct and perceive it, is a luxury. I do not agree. Nevertheless, to try to help you in your effort to conserve funds I plan to actively seek employment elsewhere.
>
> I thought you should know this right away so you can make other plans for the western region, and so you will not be surprised if you receive any inquiry about me from a potential employer.

So this was 2 weeks before the order for my reassignment to San Francisco. So he had full knowledge of why I did not wish to go.

My reason for writing the memorandum was I hoped that I would have time to find another job in the Federal Government, but 2 weeks was not enough time. So then the process for removing me took effect and I was fired.

I would be glad to answer any questions.

The **Chairman**. Senator Metzenbaum.

Senator METZENBAUM. If it is all right with you, Mr. Chairman, I would yield my time to Senator Levin.

The CHAIRMAN. Well, Senator Hatch comes next.

Senator METZENBAUM. Of course. No problem. I was not suggesting a time.

The CHAIRMAN. The Senator from Utah.

Senator HATCH. Mr. Chairman, I will not be long.

Ms. Eastwood, let me just take one of the points that you have made.

The "Dear Colleague" letter stated that the judge misled the Senate when "* * * in a letter to Senators Thurmond and Biden describing a settlement agreement arrived at with former Acting Special Counsel Mary Eastwood he implied that Ms. Eastwood had lost her case."

Yet the "Dear Colleague," itself, goes on to state, "Judge Kozinski enclosed one settlement agreement in the appendix to his letter."

Now, the question that naturally arose in my mind was, how can he be considered to have misled the Senate when he attached the very document which laid out all the particulars of the settlement. He may not have included the second settlement awarding attorneys' fees to you, Ms. Eastwood, but attorneys' fees are often separate cases from the underlying cause of action.

But as long as that settlement, in the predicate case, was before the Senate, as he was careful to provide, I don't believe there was an intent to mislead. We already had the second part at the committee.

So there was no way that we could have been misled here in the committee.

Let me make just one other point so that I don't take much of Senator Levin's time. Several times, I have heard some of the criticisms, including your main criticisms against Judge Kozinski, center around the writing done by his office.

In fact, you state in point 3:

> The caustic handwritten criticisms made by Mr. Kozinski on that brief, which he called technicolor, were typical of numerous cruel and intemperate comments he repeatedly wrote on drafts of work and on routing slips for the professional staff in OSC after he became special counsel.
>
> 4. As a result of Mr. Kozinski's harsh and demeaning treatment of OSC staff, many professional employees sought employment elsewhere.

Now, I have, of course, the copy of the brief which you attached to your affidavit. I admit, it could be very well used in law schools as an illustration of what legal writing should or should not be and I challenge anybody to look at the criticisms and say that he is not right from an English, literary, grammatical, legal, or intelligent standpoint that he reacted unjustly.

As a supervisor, he has taken a great deal of time to make it clear that there are many things that he felt were wrong with this brief. When I started in a law practice, I used to get so irritated with my superior because he would do the same thing to me.

I thought I was a pretty good writer. I can remember the feelings of animosity I had because he just stripped everything apart. But, today, many years later, the one person in the law that I love more than anybody else as far as my former practice of the law is concerned, is the fellow who did that for me, and who took the time and cared enough for me to thoroughly correct me on my brief-writing.

Now, all I am saying is, I can see where you would be hurt and upset by this, but I also could see where you would benefit greatly by it because there is no question that many of the comments are brilliant. Some of them are caustic. Some of them are tough.

They were just like the ones my partner would write on my briefs. He tore me to shreds. I mean, it hurt my feelings. It abused my ego.

I could hardly write a brief for him for a few months after the first one. But I will tell you, to this day, I am grateful that he did that.

Now, I can see why you would be irritated with this and I don't blame you. On the other hand, I can see why, as a supervisor, I would do this myself—maybe not to this extent, but I would do this myself.

I just wanted to point that out, Mr. Chairman, because, frankly, I don't see anything wrong with a supervisor going over a brief that he thinks can be vastly improved and making comments even though they may be somewhat harsh and caustic from time to time.

I think that you could only benefit from the comments that he has made in these margins.

Ms. EASTWOOD. Could I respond to those comments?

Senator HATCH. Sure.

Ms. EASTWOOD. Your first statement, the significance of the settlement agreement being in two parts and having the attorney's fee separate: the attorney's fee part was significant because——

Senator HATCH. But we have that.

Ms. EASTWOOD [continuing]. It refers to the prevailing party.

Senator HATCH. Sure, but we had that here. We knew that. He did not mislead us at all.

Ms. EASTWOOD. I am glad that you are not misled, then.

Senator HATCH. No, we were not.

Ms. EASTWOOD. I agree with you that some of his editorial comments were well taken. I am a very heavy editor, as members of the staff would tell you, myself; but it is the method in which you do it.

When you accompany writing nasty comments to staff with threats to downgrade members of the staff, when you have those things going together, then it's much more oppressive; and that is what happened in the special counsel's office.

Senator HATCH. I understand how you feel. I felt the same way when I was in similar shoes, and I understand that. I don't have any problem with that.

But what I have problems with is saying he should not be a judge because he did his job, and maybe did it a little more stringently or harshly than maybe you or I would have liked to have had it done.

I don't think I would have spent the time. I don't have that kind of time.

But, on the other hand, if I thought the brief was wrong, I would correct it. I completely cross out any little mistake on letters when

I have a new secretary because I want that secretary to know that I want to be able to rely totally on her because sometimes I cannot always read those letters.

So it is a method of teaching. I am not sure that he should be condemned for that even though I understand your feeling. I do.

I have been there myself. Even today, I have staff who criticize some of my writing, if you can believe that. [Laughter.]

Ms. EASTWOOD. Yes.

Senator HATCH. And it is always a little harsh to me, I can tell you. Sometimes I am a little harsh to them.

Ms. EASTWOOD. One can take a lot of criticism if it is not accompanied by fear of the loss of a job, and that was the problem.

Senator HATCH. No. I understand. I just wanted to make those points because I think that your affidavit is a little strong if you look at that side of the equation. OK?

The CHAIRMAN. Thank you.

I want to say, Ms. Eastwood, that I looked over this document and the original does not appear to be very well written. I think, probably, Judge Kozinski's high standards of quality account for his reaction in making changes and modifications.

Now, maybe he didn't do it in the most pleasant manner, but probably he is a perfectionist. I am not a perfectionist, but I strive for perfection.

I have a speech I have to deliver tomorrow night. It is only four pages long. We have rewritten it four times and it is going to be rewritten a fifth time.

I think we all try to do the best we can to do a good job. Sometimes when people are working hard like that, they may say something that would be better left off.

But, at the same time, when people are working under pressure—I am sure you can understand because you have worked under pressure yourself.

The distinguished Senator from Michigan, Senator Levin.

Senator LEVIN. Mr. Chairman——

The CHAIRMAN. Oh, just a minute. I believe Senator DeConcini is on the committee.

Did you want to go next, Senator DeConcini?

Senator DECONCINI. Yes. Let me ask one quick question here and I will yield the balance of my time to the Senator from Michigan.

Ms. Eastwood, in your affidavit you indicated that six of the eight most senior attorneys in the central office resigned or retired during Mr. Kozinski's first year in office. "In addition, 8 of the 15 investigators in the central office resigned, transferred or retired."

Do you believe most of these employees left the office because of Judge Kozinski?

Ms. EASTWOOD. Yes, I do. The reason I believe that is that is what they told me at the time. Everybody was looking for a job elsewhere, or most of the people were.

Senator DECONCINI. So all of these particular people you recall having talked to you about leaving; and Kozinski is the reason they were leaving?

Ms. EASTWOOD. Yes.

Senator DECONCINI. Let me ask one more quick question.

I assume that most of these employees were hired during the tenure of Mr. Kozinski's predecessor.

Ms. **Eastwood**. That is correct; not all, however. There were one or two that he had hired, also.

Senator **DeConcini**. Obviously including yourself.

Ms. **Eastwood**. Yes.

Senator **Hatch**. Senator DeConcini, would you yield for a moment?

Senator **DeConcini**. Yes, sir.

Senator **Hatch**. Could I ask, how many total employees were there? I am not quite sure.

Ms. **Eastwood**. How many total employees?

Senator **Hatch**. How many in the whole organization?

Ms. **Eastwood**. There were less than 100, I believe. It varied from time to time, but there were around 100.

Senator **Hatch**. Thank you.

Ms. **Eastwood**. Almost half of them left in the central office during his tenure.

Senator **DeConcini**. This reaction you got from the employees, to your best recollection, was it the same type of problems that you faced with Mr. Kozinski that were demonstrate here.

Ms. **Eastwood**. Yes. He did that with everybody.

Senator **DeConcini**. He did do that.

With the investigators? What was their main complaint?

Ms. **Eastwood**. With the investigators, as well.

Senator **DeConcini**. With their reports and that sort of thing?

Ms. **Eastwood**. Yes.

Senator **DeConcini**. Did you ever think about sitting down and talking with Mr. Kozinski about these problems, instead of telling him he shouldn't be writing these very derogative things, such as this report or this brief is a D, or maybe an F? Did you ever approach him to attempt to do that?

Ms. **Eastwood**. Not specifically. I think I did tell him I thought he was too harsh on the staff and that some of the staff were afraid of losing their jobs.

He said, "Well, they do run that risk. They should be afraid." That was his response.

Senator **DeConcini**. Mr. Chairman, I don't know if this particular document is of record, but I would like at the appropriate place to have it appear in the record as an example. That is assuming that Mr. Kozinski confirms that he wrote these things on it. The document is labeled Docket No. F-1831 in the matter of *Sims* v. *District of Columbia Government*.

I thank the witness.

The **Chairman**. Without objection, it will be included.

[The information follows:]

AFFIDAVIT OF MARY EASTWOOD (complete)

I, MARY EASTWOOD, affirm that the following statements are true and accurate, to the best of my knowledge and belief:

1. I began working in the Office of the Special Counsel (OSC), Merit Systems Protection Board, as Associate Special Counsel for Investigation, in March 1979. I served as an attorney adviser in the Office of Legal Counsel in the U.S. Department of Justice for 18 years prior to my transfer to OSC. After the first Special Counsel, H. Patrick Swygert, resigned in December 1979, I was designated by President Carter to serve as Acting Special Counsel, pending Senate confirmation of his nominee. Since that confirmation did not take place, I continued as Acting Special Counsel for 17 months until Alex Kozinski, President Reagan's appointee, became Special Counsel in June 1981.

2. While awaiting Mr. Kozinski's confirmation and appointment as Special Counsel, as a courtesy I sent him an information copy of a brief filed in the Sims case on May 11, 1981, before the Merit Systems Protection Board. Exhibit A. Mr. Kozinski thereafter asked to meet with me and the other attorneys whose names were on the brief. The meeting was held on or about May 15, 1981. At the meeting, Mr. Kozinski returned the brief to me extensively marked up with his handwritten, editorial criticisms in five colors.

ME

Exhibit B. Mr. Kozinski asked that I withdraw the brief, but I declined to do so. The Board sustained the position taken in the brief; Exhibit C is the Board's decision in the Sims case.

3. The caustic, handwritten criticisms made by Mr. Kozinski on that brief (which he called "technicolor") were typical of numerous cruel and intemperate comments he repeatedly wrote on drafts of work and on routing slips to the professional staff in OSC after he became Special Counsel.

→ 4. "As a result of Mr. Kozinski's harsh and demeaning treatment of OSC staff, many professional employees sought employment elsewhere."

5. Six of the eight most senior attorneys (grade 14 and above) in the Central Office resigned or retired during Mr. Kozinski's first year in office. In addition to Mr. Kozinski's deputy, only three, more junior, attorneys were hired by Mr. Kozinski in the Central Office during that period.

6. Eight of the 15 investigators in the Central Office resigned, transferred or retired. None were replaced.

7. Mr. Kozinski placed a "gag order" on his own Public Information Officer, Laura Chin, for allegedly "spreading false and baseless rumors." Exhibit D. She resigned immediately thereafter.

8. Mr. Kozinski devoted a great deal of time and attention to the internal discipline of his dwindling staff, issuing numerous memoranda on such things as answering the telephone, the use of colons, capitalization and office appearance. An index to the memos he issued during the period from June 9, 1981 to April 21, 1982, is Exhibit E. Some of these memos were signed by staff members at Mr. Kozinski's direction or with his approval.

9. Instead of drawing upon my knowledge, experience and willingness to assist, Mr. Kozinski isolated me from working on cases with the other staff; put Shigeki Sugiyama in charge of Investigation even though that was my responsibility as Associate Special Counsel for Investigations; and ordered my reassignment to an out-of-town post which Mr. Kozinski was informed in advance that I would decline.

10. After 21 years as a career federal attorney, I was removed by Mr. Kozinski for declining the geographic reassignment he ordered for me, through his deputy. I appealed my removal to the Merit Systems Protection Board. My appeal was settled after Mr. Kozinski left office.

11. Mr. Kozinski's incessant criticisms of the staff and the actions he took or directed resulted in staff leaving their jobs with OSC, crippled the Office and prevented it from performing its statutory role of protecting the federal merit system in an effective manner.

Mr. Kozinski virtually dismantled the Office of the Special Counsel during his 14 month tenure as head of the Office.

12. Mr. Kozinski's issuance of a training manual entitled "How to Avoid Committing Prohibited Personnel Practices in the Reagan Era: An OSC Seminar" was inappropriate. The Special Counsel's duty with respect to prohibited personnel practices is to investigate the employee complaints alleging such practices and to initiate proceedings before the Board for corrective action or discipline. Training managers on how to avoid being charged with prohibited personnel practices was not mandated by law or regulation and simply was an extracurricular activity which was wasteful of OSC's limited resources. Moreover, this training manual sent the wrong signal to federal government personnel--that Mr. Kozinski's Office was more concerned with protecting managers than the employees who filed complaints with OSC.

13. I have read relevant portions of Mr. Kozinski's testimony to the Senate Judiciary Committee relating to his record as Special Counsel. A number of his statements are misleading and/or inaccurate. For example:

(a) Mr. Kozinski testified that he undertook "a vigorous and well-publicized campaign to promote the First Amendment rights of Federal Employees," noting that he "took bold steps to fight gag orders...." This testimony is misleading because Mr. Kozinski personally wrote the "gag order" imposed on his own Public Information Officer, Laura Chin, and had his deputy show it to her -- which immediately caused her to quit OSC and give up her federal employment career.

(b) Mr. Kozinski testified that he "initiated and this was in November of 1981, a program of monitoring Merit Systems Protection Board appeals for possible intervention by the Special Counsel's Office." However, the number of interventions declined dramatically during his tenure as Special Counsel. During 1980, OSC intervened in 12 employee appeals. During the first five months of 1981, OSC intervened in eight employee appeals. I was Acting Special Counsel during these 17 months. During Mr. Kozinski's first year in office, the Office intervened in only three appeals, according to my records. Therefore, both Mr. Kozinski's representation that he initiated an intervention program and his implication that his program was successful are inaccurate and misleading.

(c) Mr. Kozinski's testimony that he established "a new policy of combatting sexual harassment, in the workplace" is not supported by the record. My former colleague at OSC, attorney Beth L. Don, has written a detailed affidavit describing how the Office's one excellent, prosecutable case against a suspected sexual harassment perpetrator was dropped through Mr. Kozinski's orchestration. Mr. Kozinski was disingenuous when he testified that he "wanted to make sure there were no sexual harassment cases that somehow fell through the cracks and not being handled by our staff." That is precisely what he instigated in killing the sexual harassment case we were preparing for prosecution.

(d) Mr. Kozinski highlighted in his written testimony a May 11, 1982 memorandum he wrote to OSC investigators, instructing them on how to review allegations in employee complaints. The memorandum instructed investigators to give the complainant the benefit of the doubt and always to investigate thoroughly. This memorandum contradicted the policies and practices followed by Mr. Kozinski during his first 11 months in office. Not only was this memorandum a great departure from reality, but it closely followed considerable adverse publicity in the Federal Times newspaper on Mr. Kozinski's stewardship of OSC.

(e) Mr. Kozinski stated in his written testimony that he has "no recollection" of any OSC investigation in which he told agency representatives to consult an attorney before saying anything further. It is surprising that Mr. Kozinski failed to recollect this important meeting in the S________ case early in his OSC tenure where he made such statements in response to an agency representative's virtual admission of reprisal against an employee who spoke to the press. I distinctly recall attending this meeting and hearing remarks made by Mr. Kozinski and the agency representatives.

(f) Mr. Kozinski testified that he "had an excellent working relationship with [his] staff" at OSC. For the reasons stated in paragraphs 2-8 above, I believe this is untrue. My observation was that despite his personal charm Mr. Kozinski had an extremely poor working relationship with most of the OSC staff, especially those in the Central Office with whom he had more frequent, direct contact. His style as a manager was oppressive. Contrary to Mr. Kozinski's testimony, I do not believe there were any "problem employees" in OSC at the time he became Special Counsel. His harsh and insulting treatment of OSC employees was unnecessary and destructive."

(g) Mr. Kozinski testified that in May and June 1982, he gave 50 awards or promotions to OSC employees. This followed articles published in the Federal Times that were critical of his treatment of staff.

(h) Mr. Kozinski testified that he "tried to be fair to employees and to treat them with the respect they deserved." If his treatment of OSC employees was with the respect he believed they deserved, he did not respect them. If he believed his treatment of OSC employees was "fair," his concept of fairness is distorted.

For the foregoing reasons, I do not believe that Mr. Kozinski possesses the judicial temperament required for service on a United States Court of Appeals.

Mary Eastwood
MARY EASTWOOD

Subscribed and affirmed before me this 20th day of September 1985.

Jacky Karnchanaphati
Notary Public

My Commission Expires July 31, 1986

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

IN THE MATTER OF:)
)
NATHANIEL SIMS)
)
v.) Docket No. F-1831
)
DISTRICT OF COLUMBIA)
GOVERNMENT)
)

BRIEF OF THE OFFICE OF THE SPECIAL COUNSEL AS AMICUS CURIAE IN SUPPORT OF ADMINISTRATIVE LAW JUDGE'S ORDER

Case History

Dr. Nathaniel Sims was removed by the District of Columbia Government from his excepted service position as Chief Hearing Examiner, D.C. Rental Accommodations Office, effective April 20, 1979. The basis for the removal, as outlined in a letter to Dr. Sims from Elijah B. Rogers, City Administrator, dated April 20, 1979, was that Sims had violated section 7324(a)(2) of title 5, United States Code, which prohibits D.C. Government employees involvement in partisan political campaigns. Dr. Sims appealed his removal to the Merit Systems Protection Board, as he was so advised by Mr. Roger's letter which stated in pertinent part:

> You have a right to appeal this decision . . . An appeal must be . . . addressed to the Merit Systems Protection Board, . . .

On July 12, 1979, Administrative Law Judge McCarthy entered an order dismissing Dr. Sims' appeal on the ground that the Board was without jurisdiction to hear the case since the Office of the Special Counsel had not initiated the removal action, and, under 5 U.S.C. 1206(g), sole authority to bring such cases rests with the Special Counsel.

By a petition filed on July 27, 1979, Dr. Sims requested the Board to review and reverse Judge McCarthy's dismissal for lack of jurisdiction, claiming that he had a right of appeal directly to the Board regardless of the involvement of the Special Counsel and that he had taken his appeal to the Board in reliance upon Administrator Rogers' letter. On August 16, 1979, the District of Columbia Government filed a Petition for Review and Accompanying Brief requesting the Board to reopen, reconsider, and remand the case for a hearing on the merits. The D.C. Government's position was that section 1206 permits the Special Counsel to investigate only those alleged Hatch Act violations committed by Federal employees. On March 5, 1981, the Board invited the Special Counsel, as well as the Office of Personnel Management, to file briefs on the issues raised in this case.

Issues

1) Whether District of Columbia Government employees are covered by 5 U.S.C. 1206(e) and (g); and

2) Whether the Board's jurisdiction to hear and decide cases under 5 U.S.C. 1206(e) and (g) is limited to actions resulting from the Special Counsel's investigation and subsequent filing of a complaint.

Conclusion

1) District of Columbia Government employees are covered by 5 U.S.C. 1206(e) and (g); and

2) The Board lacks jurisdiction under 5 U.S.C. 1206(e) and (g) to hear and decide cases involving alleged Hatch Act violations unless those cases are brought to it by the Special Counsel.

Summary of Argument

This case presents novel issues regarding the legal relationship between and among employees of the District of Columbia, the Merit Systems Protection Board, and the Special Counsel when a person, employed by the District, is thought to have violated the Hatch Act. The Acting Special Counsel believes that Judge McCarthy's holding is in keeping with all applicable laws and regulations, and should therefore be affirmed by the Board.

Argument

On March 16, 1979, Elijah Rogers, City Administrator for the District of Columbia sent Dr. Sims a 30-day Notice of Intent To Remove letter as required by (District Personnel Manual § 168-3a), for violating section 7324(a)(2) of title 5, United States Code.*/

Under Federal law and the law of the District of Columbia, neither Mr. Rogers nor any other District official has the authority to remove an employee for an alleged Hatch Act violation. Throughout the proceedings in this action the D.C. Government has chosen to retain Federal jurisdiction over Hatch Act violations. Section 9-335.1 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (March 3, 1979 D.C. Law 2-139) provides:

> The provisions of subchapter III of Chapter 73 of title 5 of the United States Code, affecting political activities of employees of the District of Columbia, shall remain effective. (Mar. 3, 1979, D.C. Law 2-139, §2512, 25 DCR 5740.)

---

*/ Assuming, arguendo, that the District Government could remove Dr. Sims, as of March 16, Administrator Rogers lacked the authority to do so, since Mayor Barry did not delegate such authority to him until March 21. (Mayor's Order 79-49)

The Office of Personnel Management's regulations dealing with subchapter III of Chapter 73, title 5, United States Code, 5 CFR §733.101 et seq., are captioned "Part 733 - Political Activity of Federal Employees." Nevertheless, the term "agency" is defined to mean "an executive agency and the government of the District of Columbia." OPM's regulations are somewhat confusing in that §733.201 would allow the employing agency to investigate and decide prohibited political activity cases involving excepted service personnel. From discussions with counsel for OPM it would appear that this section remained in the regulations through an oversight. While it is unfortunate, since the D.C. Government appears to have followed those regulations (see §163-2 DPM) and Dr. Sims in turn relied on the District's representations regarding his removal and appeal rights, nonetheless, statutory authority in the form of the Civil Service Reform Act of 1978 supersedes agency regulations.

Section 1207 of title 5, United States Code, gives the Merit Systems Protection Board authority to hear and decide disciplinary actions presented to it under section 1206(g). The latter section provides in pertinent part: ". . . if the Special Counsel determines that disciplinary action should be taken against any employee . . . the Special Counsel shall prepare a written complaint against the employee . . . and present the complaint . . . to the . . . Merit Systems Protection Board . . . ." (emphasis added) Subsection (e)(1) of section 1206 specifically provides that the Special Counsel "shall" investigate any allegation concerning "political activity prohibited under subchapter III of Chapter 73 of this title, relating to political activities by Federal employees; . . . ."

The Civil Service Reform Act clearly gives the Special Counsel sole authority to investigate and bring disciplinary action complaints to the Board dealing with alleged Hatch Act violations. By retaining the Federal Hatch Act provisions, the District of Columbia has acceded td the authority of both the Board and the Special Counsel.

In its Brief in Support of Review, the D.C. Corporation Counsel takes the position that the Board has appellate jurisdiction in Hatch Act cases, but that the D.C. Government can remove one of its employees for violating the Hatch Act by means of its own adverse action procedures. This position is not in keeping with the plain language of the D.C. Personnel Act. Section 1-346.1 "Adverse Actions" provides that one of the bases for taking an adverse action is: "(12) improper political activity except as otherwise permitted by this Chapter or the Constitution; . . ." This section further provides (at subsection (C)) that the D.C. Office of Employee Appeals has final administrative appeal authority with any further review being found in the judicial system. Nothing in the adverse action section makes reference to an appeal to the Merit Systems Protection Board. Section 1-336.3 of the D.C. Personnel Act, deals with the appeal procedures to the D.C. Office of Employee Appeals. Subsection (a) identifies which agency decisions are appealable to the Office of Employee Appeals by the type of action involved, e.g., performance rating, as well as by the relevant subchapter, e.g., subchapter XIV as regards performance ratings. Subchapter XXV - which covers the Hatch Act - is not one of the covered subchapters. Further, section 1336.3(d) provides that the employee or agency may appeal the Office of Employee Appeals decision to the Superior Court of the District of Columbia. There is no provision for any appeal to the Merit Systems Protection Board. Clearly, then, what the District of Columbia has done by statute, is to separate out Hatch Act cases and have them remain in the Federal sector, whereas other improper political activity cases are processed through its own system with final recourse to the D.C. Court System.

Conclusion

For the reasons stated herein as well as those put forth in Judge McCarthy's opinion, the Acting Special Counsel believes that the Administrative Law Judge's Order Dismissing Dr. Sim's Appeal should be upheld.

Respectfully submitted,

Mary Eastwood
Acting Special Counsel

Lynn R. Collins
Acting Deputy Special Counsel

Jessie James, Jr.
Assistant Special Counsel
for Prosecution

Beth L. Don
Attorney

May 12 1981
Date

John R. Erck
Attorney

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served by certified mail, postage prepaid, copies of the foregoing Brief of the Office of the Special Counsel as Amicus Curiae in Support of Administrative Law Judge's Order, on the following:

Tom Moyer, Esq.
Office of General Counsel
Office of Personnel Management
1900 E Street, N.W.
Rm. 6H31
Washington, D.C. 20415

Jo Ann Chabot, Esq.
Office of General Counsel
Office of Personnel Management
1900 E Street, N.W.
Rm. 6H31
Washington, D.C. 20415

Travis A. Murrell, Esq.
1329 E Street, N.W., Suite 513
Washington, D.C. 20004

Robert E. McCally
Deputy Corporation Counsel, D.C.
Legal Counsel Division
14th and E Streets, N.W.
Washington, D.C. 20004

Nathaniel Sims
7703-12th Street, N.W.
Washington, D.C. 20012

[illegible] 17, [illegible]
Date

Janice A. Preece

THIS IS ONE OF THE [illegible] [illegible] OF WORK I HAVE SEEN. IT SHOWS SLOPPY WORK HABITS, FUZZY THINKING, LACK OF ORGANIZATION, INEXPERIENCE IN FORMING A COHERENT LEGAL ARGUMENT AND TOTAL INATTENTION TO DETAIL.

AS A FIRST DRAFT I RATE IT A D+

AS A FINAL PRODUCT AN F.

AS A [illegible] WHOEVER EDITED IT DESERVES AN F–.

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

IN THE MATTER OF:)
NATHANIEL SIMS)
v.)
DISTRICT OF COLUMBIA GOVERNMENT)

Docket No. F-1831

THERE IS A DIFFERENCE BETWEEN THE MEANING OF [illegible] "ADVISED BY" AND "ADVISED AS" WHICH IS CORRECT HERE?

WHAT IS THIS GUY'S NAME?

IS THERE SOMETHING IN FRONT OF THE ABOVE PHRASE? [illegible] SHOULD BE [illegible]

BRIEF OF THE OFFICE OF THE SPECIAL COUNSEL AS AMICUS CURIAE IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S ORDER

The office of Special Counsel did not participate in the removal action.

Case History

Dr. Nathaniel Sims was removed by the District of Columbia Government from his excepted service position as Chief Hearing Examiner, D.C. Rental Accommodations Office, effective April 20, 1979. The basis for the removal, as outlined in a letter to Dr. Sims from Elijah B. Rogers, City Administrator, dated April 20, 1979, was that Sims had violated ~~section~~ 7324(a)(2) of ~~title 5~~, United States Code, which prohibits D.C. Government ~~employees'~~ ~~involvement~~ in partisan political campaigns. Dr. Sims appealed his removal to the Merit Systems Protection Board, as he was so advised by Mr. Rogers's letter, ~~which stated~~ in pertinent part:

> You have a right to appeal this decision . . . .
> An appeal must be . . . addressed to the Merit Systems Protection Board . . . .

~~[illegible]~~

On July 12, 1979, Administrative Law Judge McCarthy ~~entered~~ ~~an order~~ dismissed Dr. Sims' appeal ~~on the ground that the Board was~~ without jurisdiction ~~to hear the case~~ since the Office of the Special Counsel had not initiated the removal action, and ~~under 5 U.S.C. 1206(g)~~, sole authority to bring such cases rests with the Special Counsel. 5 U.S.C. §1206(g).

① WATCH YOUR GRAMMAR

② AWKWARD PHRASING

FOLLOW BLUE BOOK OR GPO MANUAL OF QUOTATION, ELLIPSES + FORM OF QUOTATIONS

AN AWKWARD, RUN-ON SENTENCE. CAN YOU THINK OF ANY BETTER WAY OF SAYING IT IN 2 OR [illegible]

③ Incorrect, [illegible]

④ FUZZY THINKING — [illegible] [illegible] [illegible] [illegible] [illegible] (ACTION) AT ALL.

IS THIS THE END OF A ¶? IF SO, WHY [illegible] [illegible] [illegible]

DITTO

THIS IS [illegible]. I [illegible] [illegible] [illegible] [illegible] AS [illegible] THE [illegible] [illegible] [illegible]. THE [illegible] IS [illegible] THE TERM "APPROPRIATE" [illegible] THE FIRST TIME W/RESPECT TO OSC. (NOTE [illegible] REFERENCES TO OSC PARTICIPATION, SUPRA) AT THE VERY LEAST ONE MORE SENTENCE IS REQUIRED TO INCLUDE THE [illegible], IF THE NOTE BE.

ALWAYS USE 5 WORDS WHEN ONE WILL DO.

AGAIN, THE ISSUE IS NOT OSC'S INVOLVEMENT IN THE APPEAL, IS IT?

RELEVANCE? MEANING?

~~By a petition filed~~ on July 27, 1979, Dr. Sims PETITIONED ~~requested~~ the Board FOR ~~to review and~~ reversAL Judge McCarthy's ORDER, ~~dismissal for lack of jurisdiction, claiming~~ ARGUING that he ~~had a right of~~ WAS ENTITLED TO appeal directly to the Board regardless of the involvement of the Special Counsel and that he had [illegible] taken his appeal to the Board in reliance upon Administrator Rogers' letter. On August 16, 1979, the District of Columbia ~~Government~~ filed a Petition for Review ~~and Accompanying Brief~~ requesting THAT the Board ~~to~~ reopen, reconsider, and remand the case for a hearing on the merits. The DISTRICT ARGUED ~~D.C. Government's position was~~ that section 1206 permits the Special Counsel to investigate only those alleged Hatch Act violations committed by Federal employees. On March 5, 1981, the Board invited the OFFICE OF Special Counsel~~, as well as the~~ Office of Personnel ~~Management~~, to file A briefs on the issues raised in this case.

SO WHAT?

UNNECESSARY PAST TENSE. ("-ED")

WE JUST SAID THIS. I'M SURE EVEN [illegible] WILL [illegible]

[illegible]

QUESTIONS PRESENTED

~~Issues~~

1) ARE ~~Whether~~ District of Columbia ~~Government~~ employees ~~are~~ covered by § 5 U.S.C. 1206(e) & ~~and~~ (g)~~, and~~ ?

WHY ARE THESE NOT SET FORTH IN FULL UNDER "STATUTES INVOLVED" SECTION?

NEVER USE A CAPITAL IN THE MIDDLE OF A SENTENCE

WHAT DOES THIS MEAN? LIKE A BLANKET? NOTE: YOUR BRIEF DOES NOT CLARIFY THE POINT

2) IS ~~Whether~~ the Board's jurisdiction to hear and decide cases under 5 U.S.C. § 1206(e) & ~~and~~ (g) ~~is~~ limited to [illegible] actions resulting from the Special Counsel's investigation and subsequent filing of a complaint.

UPP

AWKWARD, VERBOSE & REDUNDANT PHRASING

BROUGHT BY THE SPECIAL COUNSEL?

Conclusion

1) District of Columbia ~~Government~~ employees are covered by 5 U.S.C. § 1206(e) & ~~and~~ (g)~~, and~~ (c)

2) The Board lacks jurisdiction under 5 U.S.C. § 1206(e) & ~~and~~ (g) to hear ~~and decide~~ cases involving alleged Hatch Act violations unless ~~these cases are~~ brought to it by the Special Counsel.

IS IT EXCEPT?

I WOULD LIKE TO KNOW WHERE IN THE BRIEF YOU THINK YOU COVER THIS POINT. (ANYONE WHO KNOWS FEEL FREE TO COME FORWARD & TELL ME.)

- THIS IS NOT A SUMMARY OF ARGUMENT.
THE FIRST SENTENCE RESTATES THE QUESTION (ALBEIT IN A NEW, MORE AWKWARD + MORE VERBOSE FASHION). THE SECOND SENTENCE RESTATES THE CONCLUSION. IF YOU CAN'T SAY MORE, SKIP IT.

OTHERWISE ~~[illegible]~~ THE ASPP + ORC MIGHT ALSO AVOID "EMPLOYEES"

Summary of Argument

This case presents novel issues regarding the legal relationship between and among employees ~~of the~~ District of Columbia, the Merit Systems Protection Board, and the Special Counsel when a person, employed by the District, is thought to have violated the Hatch Act. The Acting Special Counsel believes that Judge McCarthy's ~~holding~~ RULING is CORRECT in keeping with all applicable laws and regulations and should therefore be affirmed by the Board.

UPP + AWKWARD THE

UPP

ALTHOUGH YOU HAVE USED IT, THIS IS THE FIRST TIME IT IS NAMED. STANDARD PRACTICE IS TO USE THE NAME AND CITE TOGETHER AT FIRST MENTION TO AVOID ANY CONFUSION.

GOOD GRIEF! THIS IS A BRIEF, NOT AN OPINION SURVEY.

Argument

On March 16, 1979, Elijah B. Rogers, City Administrator for the District of Columbia, sent Dr. Sims a 30-day Notice of Intent To Remove letter as required by (District Personnel Manual § 168-3a), for violating ~~section~~ 7324(a)(2), ~~of title 5, United States Code.~~[*] 5 USC §

IF ANYBODY KNOWS WHO HE IS, SEE P. 1.

HOW DO YOU JUSTIFY THE PARENTHESES?

SLOPPY PROOFREADING

SHOULDN'T THIS PHRASE GO BETWEEN "REMOVE" AND "LETTER"?

Under Federal law and the law of the District of Columbia, ~~neither~~ Mr. Rogers nor any other District official ~~has~~ THE DISTRICT HAS the authority to remove an employee for an alleged Hatch Act violation. Throughout the proceedings in this action the D.C. Government has chosen to retain Federal jurisdiction over Hatch Act violations. Section 9-335.1 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (March 3, 1979 D.C. Law 2-139) provides:

UPP

THIS IS A MAJOR ASSERTION NOT FOLLOWED BY EITHER CITATION OR ARGUMENT. MOREOVER, WHAT IS THE RELEVANCE TO THE ISSUES YOU ARE DISCUSSING?

> The provisions of subchapter III of Chapter 73 of title 5 of the United States Code, affecting political activities of employees of the District ~~of Columbia, shall remain effective.~~ (Mar. 3, 1979, D.C. Law 2-139, §2512, 25 DCR 5740.)

1. WHY IS THIS CITED TWICE?
2. EVER HEAR OF THE BLUE BOOK?

THIS REDUNDANT, BUT NOT COMPLETELY, OVERLAPS THE FACT STATEMENT ON P. 1

1) IT RAISES NEW FACTS WHICH DO NOT SEEM RELEVANT TO THE ARGUMENT AND ARE NOT RECONCILED W/ THOSE ON P. 1 (E.G. WERE THERE 2 LETTERS ONE ON MAR 16 + A SECOND ON APRIL 20?).

3) WHAT IS THIS DOING AS THE FIRST ¶ OF THE ARGUMENT SECTION?

THE SENTENCE MARKED IN YELLOW IS TOTALLY INCOMPREHENSIBLE. I CANNOT EVEN GUESS WHAT IT MEANS FOR D.C. TO RETAIN FEDERAL JURISDICTION IN A PROCEEDING BEFORE THE BOARD. MOREOVER, HOW DOES IT RELATE TO THE ARGUMENT?

---

[*] Assuming, arguendo, that the District Government could remove Dr. Sims, as of March 16, Administrator Rogers lacked the authority to do so, since Mayor Barry did not delegate such authority to him until March 21. (Mayor's Order 79-49)

RELEVANT

1. THIS IS AN ABSOLUTELY AWFUL WAY TO START THE ARGUMENT. WHY ARE YOU BEGINNING A DISCUSSION OF THE BOARD'S JURISDICTION W/A CITATION TO D.C. LAW?
2. ~~[illegible]~~ AS BEST I UNDERSTAND WHAT FOLLOWS THIS ¶ IS TOTALLY IRRELEVANT OR, AT BEST, MERITS A FOOTNOTE.

THIS IT HAS INNUMERABLE FLAWS. [illegible] TO U.S.C. TO OPM REGS.
① YOU SKIP FROM D.C. ~~[illegible]~~ LAW RESEARCH TO U.S.C. TO OPM REGS. IT WOULD HELP IF YOU AT LEAST QUOTED OR EXPLAINED THE FED. STATUTE
② YOU ARE SHORTING YOUR ARGUMENT BY REFUTING DR. S's RELIANCE ARGUMENT, RATHER THAN HIS MORE WEIGHTY STATUTORY ARGUMENT
③ IT IS GARBLED + VIRTUALLY INCOMPREHENSIBLE
④ IT IS UNPERSUASIVE

Nevertheless what? Is it some inevitable, self-understood rule that D.C. employees are never subject to federal regulations? Do you have a cite? Have you checked validity & Do you know?

The Office of Personnel Management's regulations ~~dealing with~~ subchapter III of Chapter 73, title 5, United States Code, 5 CFR §733.101 et seq., are captioned "Part 733 - Political Activity of Federal Employees." Nevertheless, the term "agency" is defined to mean "an executive agency and the government of the District of Columbia." OPM's regulations are somewhat confusing in that §733.201 would allow the employing agency to investigate and decide prohibited political activity cases involving excepted service personnel. From discussions with counsel for OPM it would appear that this section remained in the regulations through an oversight. While it is unfortunate, since the D.C. Government appears to have followed those regulations (see §163-2 DPM) and Dr. Sims in turn relied on the District's representations regarding his removal and appeal rights, nonetheless, statutory authority in the form of the Civil Service Reform Act of 1978 supersedes agency regulations.

DON'T THESE THINGS BROUGHT TO [illegible] OR [illegible]?

COME ON NOW! SINCE WHEN DO WE CITE CAPTION HEADINGS AS AUTHORITY, MUCH LESS AS LEAD-OFF ARGUMENT?

THIS IS A TOTALLY NEW THOUGHT. THE 1st 2 SENTENCES DEAL W/ THE QUESTION OF WHETHER D.C. IS COVERED BY OPM RULES. THIS ADDRESSES QUESTION OF WHETHER FED AGENCIES ~~[illegible]~~ CAN INVESTIGATE ~~[illegible]~~ PPA CASES W/RESPECT TO EXCEPTED SERVICE PERSONNEL. WHAT IS THE CONNECTION?

WHAT TERM [illegible] A FLOATING ARGUMENT BY [illegible] FUZZY THINKING

THIS IS AWFUL: ① DISCUSSIONS W/OTHER COUNSEL NEVER CITED; ② IF YOU DO CITE IT, YOU SHOULD GIVE A [illegible] NAME, TO VERIFY THAT IT IS SOMEONE WHO WOULD HAVE THE KNOWLEDGE. ③ OPM IS FOLLOWING THEIR OWN [illegible] HAVE YOU CHECKED & MADE SURE THEY DO NOT CONTRADICT THIS?

~~Section 1207 of title 5, United States Code, gives~~ the Merit Systems Protection Board authority to hear ~~[illegible]~~ URP 5 USC § 1207 disciplinary actions ~~presented to it~~ BROUGHT under section 1206(g). The latter section provides in pertinent part: ". . . if the Special Counsel determines that disciplinary action should be taken against any employee . . . the Special Counsel shall prepare a written complaint against the employee . . . and present the complaint . . . to the . . . Merit Systems Protection Board . . . ." (emphasis added) Subsection (e)(1) of section 1206 specifically provides that the Special Counsel "shall" investigate any allegation concerning "political activity prohibited under subchapter III of Chapter 73 of this title, relating to political activities by Federal employees; . . . ." SO BIG DEAL. WHERE DOES THIS GET YOU? DOES IT SAY ANYTHING ABOUT EXCLUSIVITY?

DUE [illegible] — [illegible]

WHAT A NEW THOUGHT. I ABSOLUTELY DO NOT UNDERSTAND THE CONNECTION

I AGREE THIS IS A NEW ARGUMENT. NO TRANSITION

UPP

THIS IS A NEW TERM. MEANING? CONNECTION?

URP AS OPPOSED TO GENERALLY - PROVIDING

BESIDES, POWER OF OSC TO INVESTIGATE IS NOT THE SAME AS ~~[illegible]~~ JURISDICTION OF MSPB TO HEAR CASES.

WHAT ARE YOU TALKING ABOUT? WHICH § OF CSRA? HOW DOES IT SUPERCEDE? WHY DOESN'T OPM HAVE DISCRETION TO DRAFT REGS ~~[illegible]~~ AMONG BROAD INTERPRETATION OF CSRA.

[illegible] I AM LOST —

THIS IS [illegible] FOR [illegible] OF THE FOLLOWING REASONS.
① IT IS AN UNSUBSTANTIATED, UNCITED ASSERTION.
② NOTHING SAID ABOVE ADDRESSED THE ISSUE OF EXCLUSIVITY. ALL YOU TALK ABOUT IS WHAT OSC MUST DO. IT IS QUITE POSSIBLE OTHERS CAN DO SOME OF THE SAME THINGS
③ IN ANY CASE, THIS IS NOT THE ISSUE HERE SINCE NO ONE BROUGHT A DISCIPLINARY ACTION TO THE BOARD. THIS -- YOU RECALL -- IS AN APPEAL FROM AN ADVERSE ACTION BY DC. SO THE ARGUMENT IS BESIDE THE POINT.

THIS IS A WORD ALWAYS USED WHEN THERE IS DOUBT. IT'S A DEAD GIVEAWAY -- AVOID IT.

// MEAN

The Civil Service Reform Act clearly gives the Special Counsel sole authority to investigate and bring disciplinary actions BEFORE ~~complaints to~~ the Board dealing with alleged Hatch Act violations. By retaining the Federal Hatch Act provisions, the District of Columbia has acceded to the authority of both the Board and the Special Counsel.

WHAT DOES THIS MEAN? THIS IS WRONG, OVER-STATED AND/OR BESIDE THE POINT IN SO MANY WAYS, I WILL LET YOU FIGURE IT OUT.

In its Brief in Support of Review, the ~~D.C. Corporation Counsel~~ DISTRICT OF COLUMBIA ~~takes the position~~ ARGUES that the Board has appellate jurisdiction in Hatch Act cases, but that the D.C. Government can remove one of its employees for violating the Hatch Act by means of its own adverse action procedures. This position is not in keeping with the plain language of the D.C. Personnel Act. Section 1-346.1 "Adverse Actions" provides that one of the bases for taking an adverse action is: "[illegible] improper political activity except as otherwise permitted by this Chapter or the Constitution; . . . ." This section further provides (at subsection (C)) that the D.C. Office of Employee Appeals has final administrative appeal authority with any further review being found in the judicial system. Nothing in the adverse action section makes reference to an appeal to the Merit Systems Protection Board. Section 1-336.3 of the ~~D.C. Personnel Act, deals with the appeal~~ procedures to the D.C. Office of Employee Appeals. Subsection (a) identifies which agency decisions are appealable to the Office of Employee Appeals by the type of action involved, e.g., performance rating, as well as by the relevant subchapter, e.g., subchapter XIV as regards performance ratings. Subchapter XXV - which covers the Hatch Act - is not one of the covered subchapters. Further, section 1336.3(d) provides that the employee or agency may appeal the Office of Employee Appeals decision to the Superior Court of the District of Columbia. There is no provision for any appeal to the Merit Systems Protection Board. Clearly, then, what the District of Columbia has

WHAT POSITION THE PREVIOUS SENTENCE STATES TWO.

THE TWO [illegible] ARE NOT [illegible] INCONSISTENT WITH [illegible] [illegible].

RELEVANCE? REGARDLESS, THE ISSUE IS MSPB JURISDICTION. HOW CAN D.C. P.A. AFFECT THAT?

THIS IS A [illegible] THING!

BE [illegible] PAPER [illegible] 4 ME

AGAIN -- WHAT IF IT DID? CAN DC LAW ENLARGE MSPB's JURISDICTION.

IS THIS A NEW ARGUMENT? HOW ABOUT A NEW [illegible]?

THIS IS TOTALLY IRRELEVANT TO YOUR ARGUMENT. DO YOU SEE WHY?

SEE NEXT PAGE FOR ACERBIC COMMENT

—WHO STUCK THIS IN HERE? DON'T YOU REALIZE YOU HAVE SHIFTED GEARS AND THIS IS A TOTAL IRRELEVANCY? (HINT: YOU HAVE JUST SHOWN THAT THERE ARE NO HATCH ACT CASES AT ALL.

① THIS IS FAR FROM CLEAR ON THE BASIS OF YOUR ARGUMENT —
② AGAIN, WHAT IS RELEVANCE OF DC LAW?
③ IS IT FAIR TO INTRODUCE A TOTALLY NEW CONCEPT IN YOUR LAST SENTENCE? I.E. WHAT IS DIFF. BETWEEN HATCH ACT AND IMPROPER POLITICAL ACTIVITY?

done by statute, is to separate out Hatch Act cases and have them remain in the Federal sector, whereas other improper political activity cases are processed through its own system with final recourse to the D.C. Court System.

IS THAT LIKE THE PRIVATE SECTOR?

Conclusion

LEGALESE!

For the reasons stated herein as well as those put forth in Judge McCarthy's opinion, the Acting Special Counsel believes that the Administrative Law Judge's Order Dismissing Dr. Sim's appeal should be AFFIRMED ? ~~upheld.~~

WHY CAP?

COME ON -- HOW ABOUT JUST PLAIN ENGLISH? DO YOU TALK THIS WAY?

Respectfully submitted,

Mary Eastwood
Acting Special Counsel

Lynn R. Collins
Acting Deputy Special Counsel

Jessie James, Jr.
Assistant Special Counsel
for Prosecution

Beth L. Don
Attorney

[illegible] EVER
USE THIS WORD
IN A BRIEF

May [illegible] 1981
Date

Washington, D.C.

John R. Erck
Attorney

SIM OR SIMS?

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served by certified mail, postage prepaid, copies of the foregoing Brief of the Office of the Special Counsel as Amicus Curiae in Support of Administrative Law Judge's Order, on the following:

Tom Moyer, Esq.
Office of General Counsel
Office of Personnel Management
1900 E Street, N.W.
Rm. 6H31
Washington, D.C. 20415

Jo Ann Chabot, Esq.
Office of General Counsel
Office of Personnel Management
1900 E Street, N.W.
Rm. 6H31
Washington, D.C. 20415

Travis A. Murrell, Esq.
1329 E Street, N.W., Suite 513
Washington, D.C. 20004

Robert E. McCally
Deputy Corporation Counsel, D.C.
Legal Counsel Division
14th and E Streets, N.W.
Washington, D.C. 20004

Nathaniel Sims
7703-12th Street, N.W.
Washington, D.C. 20012

[illegible]
Date

Janice A. Preece

RECEIVED
JUN 29 1981

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NATHANIEL SIMS v. GOVERNMENT OF THE DISTRICT OF COLUMBIA	MSPB Docket No. HQ12008110051

OPINION

This case comes before the Merit Systems Protection Board on petitions for review filed by both parties after appellant's appeal was dismissed by Administrative Law Judge McCarthy for lack of jurisdiction.

Dr. Nathaniel Sims, the Chief Hearing Examiner of the District of Columbia Rental Accommodations Office, was removed from his position on April 29, 1979, by the City Administrator, after a finding by him that Dr. Sims violated the Hatch Act (5 U.S.C. § 7324). The ground for dismissal was that on February 22, 1979, Dr. Sims had officially declared his candidacy as a Democrat for election to the City Council from Ward 4 in a special election which was to be held on May 1, 1979. Dr. Sims appealed his removal to the Merit Systems Protection Board pursuant to instructions in his letter of termination setting forth his right to appeal.

On July 12, 1979, Administrative Law Judge McCarthy dismissed the appeal on the ground that the Merit Systems Protection Board lacked jurisdiction in the case. Judge McCarthy found that 5 U.S.C. § 1206(e)(1)(A) grants the

Special Counsel the exclusive right to investigate alleged violations of the Hatch Act; that under 5 U.S.C. § 1207 the Merit Systems Protection Board is empowered to act on alleged Hatch Act violations only after the Special Counsel has filed a complaint with the Board; and that the Merit Systems Protection Board could not exercise its original jurisdiction because the Special Counsel had not initiated the action against Dr. Sims. The Judge also held that Dr. Sims, as an excepted service employee, did not meet the definition of "employee" in 5 U.S.C. § 7511(a)(1); that 5 U.S.C. § 7513(d), conferring a right of appeal from agency adverse action, therefore did not apply to him; and the Board therefore had no jurisdiction under 5 U.S.C. § 7701 to hear the case as an appellate matter.[1]

Both Dr. Sims and the District of Columbia Government then petitioned the Board for review of the order dismissing the appeal. Dr. Sims argues that he has been denied his Fourteenth Amendment right to due process if he has no recourse to the Board. The District of Columbia Government argues that the Special Counsel's authority under section 1206(e)(1) does not by its terms apply to District of Columbia employees; that the decision of Judge McCarthy repeals by implication regulations in 5 C.F.R., Part 733, concerning procedures to be followed by employing agencies when excepted service employees are charged with Hatch Act violations;[2] and that the Board's appellate authority over the agency's action arises out of section 7325 of title 5 which confers power on the Board with respect to penalties for violation of section 7324.

---

[1] Dr. Sims had argued that 5 U.S.C., ch. 75, subch. II, covered his removal and gave him a right of appeal. Chapter 75, subchapter II, covers adverse actions "for such cause as will promote the efficiency of the service." However, the agency did not purport to bring its action under chapter 75 but specifically charged violation of chapter 73 and apparently used the procedures under 5 C.F.R., Part 733, Subpart B, relating to enforcement of chapter 73. Whether an alleged violation of the Hatch Act can ever be the basis for an adverse action under chapter 75 is not before us.

In substance, the basic issue raised in the petitions for review is whether the Administrative Law Judge correctly interpreted the Civil Service Reform Act of 1978[3] in deciding that the Board has only original jurisdiction over Hatch Act cases. Correlative to that question are whether the authority conferred on the Special Counsel in section 1206(e)(1) of the Reform Act[4] superseded the jurisdiction of employing agencies to investigate and take disciplinary action for Hatch Act violations against excepted service employees and whether District of Columbia employees in both

---

[2] At the time the action was taken against Dr. Sims in April 1979, 5 C.F.R., Part 733, provided for procedures to be followed in all instances of allegations of Hatch Act violations by federal employees and District of Columbia employees. Subsequently, on August 21, 1979, these provisions were deleted by OPM as obsolete, except for section 733.201. 44 Fed. Reg. 48954. The questions presented by Dr. Sims' case must be resolved on the basis of the regulations at the time of the action taken against him. We also note that OPM's action followed by one week the technical amendment of section 7325 of the Hatch Act, which substituted the Board for the Civil Service Commission as the body with authority to mitigate penalties. Act of Aug. 14, 1979, Pub. L. No. 96-54, § 2(a), 93 Stat. 384.

[3] Pub. L. No. 95-454, § 202(a), 92 Stat. 1111, effective January 11, 1979.

[4] Section 1206(e)(1) provides in pertinent part:

> . . . the Special Counsel shall . . . conduct an investigation of any allegation concerning --
> (A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;
> (B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

the competitive and excepted service are excluded from the Special Counsel's authority to investigate and act on alleged Hatch Act violations.

The questions directly affect the jurisdiction of the Special Counsel and the continuing validity of the regulation at 5 C.F.R. § 733.201 in which the Civil Service Commission recognized the responsibility of an employing agency to investigate and decide allegations of prohibited political activity. The Board therefore solicited the views of the Acting Special Counsel and the Office of Personnel Management (OPM) with an opportunity for those agencies as well as the parties to file reply briefs. Acting Special Counsel and OPM filed briefs. There were no reply briefs.

Acting Special Counsel and OPM have taken the position that authority to initiate Hatch Act cases resides exclusively in the Special Counsel since passage of the Reform Act, and that District of Columbia employees are subject to the Special Counsel's authority in such matters. After careful analysis of the interrelationship of past and current provisions of law with respect to the investigation and adjudication of alleged violations of the Hatch Act, we agree and will affirm the dismissal of the case.

A review of the law persuades us that the Reform Act conferred on the Special Counsel sole authority to initiate actions alleging prohibited political activity; therefore the Board's jurisdiction can be invoked only by the Special Counsel. Because federal agencies and the Government of the District of Columbia no longer have authority to take independent action on alleged Hatch Act violations, the Board has no appellate jurisdiction over such cases.

This constitutes a change from pre-Reform Act practice in which the Civil Service Commission directly enforced the Hatch Act against employees in the competitive service and agencies enforced it against employees in the excepted service with an appeal to the Comission. Our interpretation of the Reform Act eliminates the previously existing dichotomy between classified employees and excepted service employees in Hatch Act matters. In addition, we believe that the Reform Act did not create a new dichotomy between federal employees and District of Columbia employees, that the latter continue to be treated like federal employees, and that they are subject to the Special Counsel's authority in Hatch Act matters.

HISTORICAL BACKGROUND

Historically, the Civil Service Commission enforced the prohibition against political activity with respect to competitive service employees under its authority to enforce the Civil Service Rules.[5] The agencies did so with respect to excepted service employees as a result of a series of Executive Orders.[6]

---

[5] The authority arose out of Executive Order 642 (1907) amending the Civil Service Rules, which the Civil Service Commission was already empowered to enforce. CSC Annual Report XXIV at 104 (1907).

[6] This authority stemmed from a series of Executive Orders beginning in 1877 authorizing discipline of excepted service employees for prohibited political activity. D. Rosenbloom, The Federal Service and the Constitution, 39-40. (1971); White, Leonard D., The Republican Era: 1869-1901 at 330 (1958). Since these Executive Orders were not part of the Civil Service Rules which the Commission had authority to enforce, enforcement resided in the employing agency. CSC Annual Report XXIV at 8-9 (1907).

The Hatch Act, enacted in 1939 as the first statutory prohibition on political activity, did not specify how it was to be enforced against either classified or nonclassified employees.[7] The D.C. District Court in 1944 stated that Congress made the rules of conduct adopted by the Civil Service Commission applicable to both classified and nonclassified employees, but that enforcement of the rules of conduct remained as before - with the Civil Service Commission for classified employees and with the agencies for nonclassified employees.[8] On appeal, the Supreme Court recognized the Commission's authority to enforce the Hatch Act against classified employees, and commented that "there is no designation of a single governmental agency for its [Hatch Act] enforcement."[9]

In 1950 and 1962, the Hatch Act provision requiring removal from office of a District of Columbia employee or a federal employee for violating the Act was amended to provide that the Civil Service Commission by unanimous vote could impose a lesser penalty within certain limits.[10] For the first time the Civil Service Commission was specifically named as the agency with final adjudicatory authority over federal and District of Columbia employees.[11]

---

[7] Ch. 410, § 9(a), 53 Stat. 1147. As originally enacted, the prohibition applied only to federal employees. The prohibitions were made applicable to District of Columbia employees and certain state and local employees in 1940. Act of July 19, 1940, ch. 640, § 2, 54 Stat. 767. The Hatch Act as currently in force is codified at 5 U.S.C. §§ 1501-1508 and 7321-7327 (1976 & Supp. II 1978) as amended by Act of Aug. 14, 1979, Pub. L. No. 96-54, § 2a, 93 Stat. 384.

[8] United Public Workers of America v. Mitchell, 56 F. Supp. 621, 626 (D.D.C. 1944), aff'd, 330 U.S. 75 (1947).

[9] United Public Workers v. Mitchell, 330 U.S. at 79 (1947).

[10] Under the 1950 amendment, the penalty could be reduced to not less than 90 days' suspension without pay. Act of Aug. 25, 1950, ch. 784, § 1, 64 Stat. 475. The minimum sanction was reduced to 30 days' suspension without pay in 1962. Act of Oct. 5, 1962, Pub. L. No. 87-753, 76 Stat. 750.

The Civil Service Commission interpreted the 1950 and 1962 amending statutes as conferring mitigating authority on it but not as effecting a change in matters of jurisdiction for investigation and enforcement. The Commission still viewed its authority over classified employees as stemming from the Civil Service Rules, which by Executive Order authorized the Civil Service Commission to investigate and prosecute Hatch Act violations, and its authority over excepted service employees as appellate only.[12] The result was that employees in the same agency could be subjected to different interpretations of the law and to different enforcement policies depending on whether they were members of the competitive or excepted service.

At the time of passage of the Civil Service Reform Act in October 1978, the Civil Service Commission rules preserved the historical distinction in treatment between classified and excepted service employees for alleged Hatch Act violations by federal and District of Columbia employees. Title 5, Code of Federal Regulations, Part 733 (entitled Political Activity of Federal Employees) was divided into two subparts. Subpart A was entitled "The Competitive Service;" Subpart B was entitled "The Excepted Service."

---

[11] The authority of the Civil Service Commission over state and local employees was specifically provided for at the time they were made subject to the Hatch Act in 1940. See n. 7, supra. The Reform Act, § 906(a)(7), 92 Stat. 1225, specifically amends 5 U.S.C. § 1504 to transfer the Civil Service Commission's investigatory authority to the Special Counsel and the hearing authority to the Board upon presentation of charges by the Special Counsel.

[12] In United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 572 (1973), the Supreme Court recognised the development of a body of law under the Commission's original jurisdiction over classified employees and made that body of law the groundwork for interpreting the prohibitions against political activity by federal, District of Columbia, and state and local employees. The court did not address the question of the difference in the Commission's jurisdiction over competitive and excepted employees.

Subpart A provided in essence in sections 733.131-137 that the employing agency was to inform the Commission of any instance of prohibited political activity by employees in the competitive service;13/ the Commission would then investigate the allegation and decide whether to issue charges against an employee; and if charges were issued, a hearing would follow with the Commission making a final decision based on the record.14/ Subpart B made the employing agency responsible for investigating and deciding allegations of prohibited political activity by excepted service employees in accordance with provisions in Subpart A (5 C.F.R. § 733.201) and removing the employee if a violation was found (5 C.F.R. § 733.202). Section 733.203 of Subpart B provided an employee dismissed by an agency a right of appeal to the Civil Service Commission which would follow further procedures set out in Subpart A. In substance, therefore, the Civil Service Commission acted as investigator, prosecutor, and adjudicator of alleged Hatch

---

13/ For purposes of Subpart A, the term "agency" was defined to include the government of the District of Columbia. 5 C.F.R. § 733.101(b).

14/ Sections 733.131-137 were deleted by the Office of Personnel Management as obsolete on August 21, 1979. 44 Fed. Reg. 48954. See n. 2, supra.

Act violations by competitive service employees but acted only on an appeal from an agency's removal of an employee in the excepted service.

Although the provisions of Subpart B (with the exception of section 733.201) were deleted subsequent to Dr. Sims' removal and appeal to the Board, the District Government and Dr. Sims assumed their validity at the time the appeal was taken under section 733.203.[15] What we must first decide, therefore, is whether the Commission's rules summarized above were effective at the time of Dr. Sims' removal or whether they had been superseded[16] by the provisions of the Reform Act relating to investigation and prosecution of alleged Hatch Act violations.

THE REFORM ACT

A. Elimination of Distinction Between Excepted and Competitive Service Employees

Our review of the legislative history and analysis of the Reform Act lead us to conclude that the jurisdictional distinction between competitive and excepted service employees was erased; that the sole authority to investigate and prosecute alleged Hatch Act violations resides in the Special Counsel; and that upon the effective date of the Reform Act, all such authority in Hatch Act cases based on competitive or excepted service was removed from other agencies.

---

[15] Petition for review by the District of Columbia Government at 1; *see* Petition for Review on behalf of Dr. Sims at 1. *See* n. 2, *supra*.

[16] 5 U.S.C. § 907 and the savings provision of the Reform Act (§ 902(a)) provide for continuance in effect of all rules and regulations unless and until they are rescinded, modified, superseded, terminated, repealed, or made inapplicable by law.

Creation of the Special Counsel and consolidating investigatory and prosecutory functions in him was an important element in the Reform Act. The role of the Special Counsel in investigating Hatch Act cases warranted specific reference in the President's message to the Congress accompanying Reorganization Plan No. 2 of 1978.17/ The Reorganization Plan transferred to the Special Counsel "all functions with respect to investigations relating to violations of Title 5, United States Code, chapter 15 [and] Title 5, United States Code, subchapter III of chapter 73 (political activities)." 18/ (Emphasis added.).

Consistent with the Reorganization Plan to transfer all functions, the Reform Act provided in section 1206(e)(1) that ". . . the Special Counsel shall . . . conduct an investigation of any allegation concerning" certain prohibited political activity. (Emphasis added.) The word "shall" in the enacted legislation mandates the Special Counsel to conduct investigations of alleged prohibited political activity.19/

17/ "The Plan will create, within the Board, a Special Counsel to investigate and prosecute political abuses and merit systems violations." H. Doc. 95-341, 95th Cong., 2d Sess., May 23, 1978, 43 Fed. Reg. 36037.

18/ Id. at 5, § 204.

19/ In contrast, H.R. 11280 and S. 2640, identical bills introduced on March 3, 1978; substitute S. 2640 reported out by the Senate Committee on July 10, 1978; and S. 2640 passed by the Senate on August 24, 1978; provided only that ". . . the Special Counsel may . . . conduct an investigation . . . ." (Emphasis added.) 95th Cong., 2d Sess., § 202(a), inserting § 1206(f)(1), (§ 1206(g)(1) in substitute S. 2640) reprinted in House Comm. on Post Office and Civil Service Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978 at 12, 1279, 1380, 1747-48 (Comm. Print No. 96-2, 1979) [hereafter referred to as Legislative History]. The mandatory language first appears in the House Committee Print of H.R. 11280 of June 15, 1978 (§ 1206(f)(1)) for use at the House Markup sessions and was included in S. 2640 as amended and passed by the House on September 13, 1978. (§ 1206(e)(1), reprinted in Legislative History, 105-106, [illegible], [illegible]. The Conference Committee adopted the mandatory language of the House amendment and reported S. 2640 with section 1206(e)(1) as amended by the House. H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 20 (1978), reprinted in Legislative History, 1862.

The Special Counsel's investigatory authority was made not only mandatory, but also exclusive. Section 1206(e)(1) enjoins the Special Counsel to investigate any allegation of prohibited political activity.

Section 1206(e)(2) confirms his mandatory and exclusive role in investigations of political activity. Under section 1206(e)(2), the Special Counsel has discretion to determine that allegations of violations of civil service laws, rules, or regulations and allegations of discrimination may be handled more appropriately under an administrative appeals procedure and he is instructed not to investigate in those instances. This discretion to permit resolution by administrative appeals does not extend to allegations of prohibited political activity, however. The legislative history of the Act reveals that this discretion was first given and then withdrawn.20/

Thus, Congress plainly considered allowing at least some Hatch Act violations21/ to be handled through an administrative appeals procedure and decided against it. Having withheld that discretion to allow Hatch Act violations to be heard in an administrative appeals procedure, Congress

---

20/ H.R. 1128 and S. 2640 as introduced, and S. 2640 as passed by the Senate, gave the Special Counsel discretion to allow resolution of investigations of some prohibited political activities under an administrative appeal procedure. § 1206(f)(2), reprinted in Legislative History, 12, 1279, 1748. The House Committee deleted that discretion; and the House passed S. 2640 with amendatory language deleting the discretion. § 1206(e)(2), reprinted in Legislative History at 520, 1161. The Conference adopted the House language. H.R. Rep. No. 95-1717, supra, at 20, reprinted in Legislative History, 1862.

21/ Investigations of state and local employees were never considered for an appeals procedure.

must be presumed to have made the Special Counsel's responsibility to investigate and prosecute Hatch Act cases non-delegable.[22]

In addition, for the first time Congress established statutory procedures for the adjudication of allegations of violations of section 7324, the provision under which Dr. Sims was removed. When, upon investigation, the Special Counsel deems that disciplinary action should be taken, specific procedures are prescribed under section 1206(g)(1). He "shall" prepare a written complaint against the employee containing that determination with supporting facts and present the complaint and statement to the employee and the Board in accordance with section 1207. Section 1207 prescribes an employee's entitlements in any hearing before the Board on a complaint by the Special Counsel; lists the penalties generally available to the Board; provides for judicial appeal by the employee; and provides for the use of chapter 15 procedures if the complaint is against a state or local employee.

---

[22] In contrast, section 1206(b), authorizing the Special Counsel to conduct investigations of information provided by "whistleblowers," requires in paragraph (2) that the Special Counsel transmit such information to the appropriate agency head; and under paragraph (3)(A) of subsection (b) the Special Counsel may require an agency head to conduct an investigation and submit a written report. No such requirement to report alleged violations of the Hatch Act to the agency head or to allow the agency head to conduct an investigation of such allegations is present in section 1206(e)(1)(A) and (B).

We do not mean, however, that an agency may not submit its allegations and the basis for its allegations to the Special Counsel, who may then pursue whatever investigation is necessary to determine whether to file a complaint before the Board. But, an agency may not take action against an employee for any alleged forbidden activity under investigation by the Special Counsel without the approval of the Special Counsel. 5 U.S.C. § 1206(f).

The Special Counsel's exclusive authority to investigate Hatch Act violations under section 1206(e)(1) and to file a complaint with the Board under section 1206(g)(1), and the employee's right to hearing before the Board under section 1207 thus superseded the Commission's regulations under 5 C.F.R., Part 733, relating to the investigation, prosecution, and adjudication of alleged violations of the Hatch Act.[23] Consequently, the regulations under which Dr. Sims was removed as an excepted employee and under which he sought to appeal to the Board were void at the time he was removed.

B. Applicability of 5 U.S.C. § 1206(e)(1)(A) to District of Columbia Employees

Having determined that the Special Counsel has exclusive authority under the Reform Act to investigate and prosecute and the Board has only original jurisdiction to discipline Hatch Act violations, we must examine the District Government's argument that District of Columbia employees as a group are not subject to that authority. The District

---

[23] By prescribing the procedures to be followed, the Reform Act avoided any hiatus when the Civil Service Commission's regulations were made invalid by the Reform Act.

Government argues that paragraph (A) of section 1206(e)(1) limits Special Counsel investigations of political activity to allegations against federal employees.

Paragraph (A) of section 1206(e)(1) covers "political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees." (emphasis added) Paragraph (B) of section 1206(e)(1) covers "political activity prohibited under chapter 15 of this title, relating to political activities by certain state and local officers and employees."

The District Government contends that the inclusion of the word "Federal" in paragraph (A) excludes District employees from the Special Counsel's authority to investigate Hatch Act allegations. The effect of this interpretation would be to place all District of Columbia Government employees, whether excepted service or competitive service, outside the Special Counsel's investigatory authority and the Board's original jurisdiction and to subject such employees to differing standards of investigation and enforcement from all others subject to the Hatch Act.

Indeed, the District Government's interpretation would mean that the Reform Act creates a distinction between District employees and federal employees for Hatch Act purposes where none previously existed. We think such an interpretation is unwarranted. There is nothing in the passage of section 1206 to support an argument that while eliminating one discrepancy, Congress intended to create another.

Section 7324 of subchapter III of chapter 73, which was the basis for the action against Dr. Sims, prohibits political activity by "[a]n employee in an Executive agency or an individual employed by the Government of the District of Columbia. . . ." Thus, as admitted by the District, subchapter III of chapter 73 of title 5 applies not only to federal employees but also to District of Columbia Government employees. The same activities are prohibited to one as to the other. They are subject to the same penalties and mitigating authority set out in section 7325.[24] They have traditionally been considered a single group for purposes of the Hatch Act.[25] The Board's view is that all employees covered by subchapter III of chapter 73 continue to be treated alike and are subject to the Special Counsel's authority under section 1206(e)(1)(A).

---

[24] The District Government's reliance on section 7325 as continuing appellate jurisdiction in the Board is untenable. Whatever appellate jurisdiction section 7325 may have recognized has been superseded by the provisions of section 1206(e)(1). Section 7325 remains effective for purposes of mitigating the removal penalty.

[25] *E.g.*, Part 733 of 5 C.F.R. on which the District Government relied is entitled "Political Activity of Federal Employees" but is applicable to District Government employees as well.

No reason for insertion of the word "Federal" in section 1206(e)(1)(A) appears in the legislative history. Neither H.R. 11280 nor S. 2640 as introduced nor S. 2640 as passed by the Senate included "Federal".[26] It first appeared without comment in H.R. 11280 as reported by the House Committee and was part of the House amendment to S. 2640.[27] The language was adopted, again without comment, in the bill reported out by the Conference Committee.[28] In reporting out the bill, the House Committee apparently did not consider the word a significant change. The Committee stated that section 1206(e) authorized the Special Counsel to investigate allegations of violations of the Hatch Act,[29] without any suggestion that any group of employees covered by the Hatch Act was to be excluded from the Special Counsel's authority.

[26] § 1206(f)(1)(A), *reprinted in* *Legislative History* at 12, 1279, 1747-48.

[27] § 1206(e)(1)(A), *reprinted in* *Legislative History* at 520-21, 1160.

[28] H. R. Rep. No. 95-1717, *supra*, 19, *reprinted in* *Legislative History*, 1843.

[29] H.R. Rep. No. 95-1403 at 20, *reprinted in* *Legislative History*, 657. At the time the word was added, the House Committee also added to H.R. 11280 a title IX entitled "Political Activities" (*reprinted in* *Legislative History*, 621-630) that would have amended the Hatch Act to reduce the restrictions on political activities by federal, District, and state and local employees. That title was deleted on a point of order on September 7, 1978, because it was not germane to the purpose of the Reform Act, 124 Cong. Rec. 9279-9285 (daily ed.) *reprinted in* *Legislative History*, 833-845. However, proposed title IX anticipated that all alleged violations of the Hatch Act would be investigated by the Special Counsel and would be adjudicated by the Board under section 1207. § 901 proposing to amend subch. III of ch. 73, § 7327, *reprinted in* *Legislative History*, 627. Thus, it would seem that at the time the word "Federal" was added, it was not considered restrictive of the Special Counsel's authority over District employees.

The paramount change from prior law effected by section 1206(e)(1)(A) and (B) is a new coherency in investigation and enforcement of the Hatch Act. We can posit no logical reason for Congress to have included in section 1206(a)(1) all employees subject to the Hatch Act, with the sole exception of District of Columbia employees.[30]

We agree with the Administrative Law Judge, therefore, that the word "Federal" was apparently included in section 1206(e) "to distinguish subchapter III Hatch Act violations from chapter 15 violations, which relate to state and local employees, rather than to distinguish D.C. Government employees from Federal Government employees" and that the word "serves to identify a general branch of the Hatch Act, not a specific type of employee."[31]

---

[30] The District Government relies on passage of the District of Columbia Self-Government and Governmental Reorganizations Act which authorizes establishment of an independent merit personnel system. Pub. L. No. 93-198, Stat. 774 (1973). Although independent personnel systems exist in state and local governments, Congress made them subject to the Special Counsel's investigatory authority. The authority of the District of Columbia to establish its own personnel system is therefore not a persuasive argument. Moreover, if District Government employees are not subject to section 1206(e)(1)(A), it is problematical what procedural rules for investigation and hearing would apply since the Commission's procedural rules in Subpart A of Part 733 of Title 5 C.F.R. have been superseded.

[31] Order Dismissing Appeal, 5.

CONCLUSIONS

We hold that the Special Counsel has the sole authority to investigate and prosecute allegations of Hatch Act violations, and the Merit Systems Protection Board has the sole authority to adjudicate whether a Hatch Act violation has occurred. We hold further that because the proceeding did not come to us on a complaint of the Special Counsel, we have no authority to act on the merits of Dr. Sims' appeal; therefore, Dr. Sims' appeal was properly dismissed.[32]

The Board GRANTS the petitions for review and AFFIRMS the order dismissing the appeal in accordance with this opinion.

FOR THE BOARD:

June 26, 1981
(Date)

Ronald P. Wertheim

Washington, D.C.

---

[32] We need not address the question of what other avenues of recourse may be available to Dr. Sims, since that question is not before us.

TABLE OF CONTENTS

DATE	Subject Matter
6/09/81	Detail of William E. Caldwell to the OSC.
6/09/81	Delegation of Personnel Authority.
6/09/81	Telephone Courtesy.
6/09/81	Delegation of Personnel Authority.
6/11/81	Evaluation of Investigation Division.
6/15/81	Deputy Special Counsel.
6/16/81	New Memorandum of Telephone Conversation Forms.
6/16/81	Redelegation of Personnel Authority.
6/17/81	Reception in honor of Mrs. Prokop.
6/18/81	Lanier Word Processing Equipment Survey.
6/18/81	Clerical Assignments.
6/18/81	Signatory Authority on Letters of Inquiry and Close Out Letters.
6/18/81	Division Staff Meeting.
6/24/81	Chronological File Copies.
6/24/81	Briefs.
6/25/81	Evaluation of the Case Reporting System.
6/26/81	Delegation of Authority.
6/29/81	Performance Plans.
June	Notices of MSPB/OLC Summer Picnic.
6/30/81	Unanswered Telephones.

6/30/81	Expenditure of Funds.
7/02/81	Procedures for Preparation of Written Materials.
7/02/81	Performance Standards Workshop Due date for Performance Standards for Non-Merit Pay Employees.
7/06/81	Guidance on Replying to Congressionals.
	Preparation of Letters for Alex Kozinski's Signature.
7/06/81	Word Processing Systems.
7/06/81	Format for Congressional Letters.
7/06/81	Telephone Courtesy reminder memo.
7/07/81	Meeting of Deadlines.
7/15/81	Preparation of Letters for Alex Kozinski's Signature.
7/16/81	Uniform legal and letter format produced on Lanier WP machines.
7/16/81	Absence From Work Stations.
7/16/81	Print Quality.
7/16/81	Cleanup, Etc.
7/22/81	Discontinued Use of Carbons.
7/22/81	Lanier Advance Training.
7/22/81	Availability of published reports on the Office of the Special Counsel.
7/23/81	Dating of Letter for Special Counsel and Deputy Special Counsel.
7/24/81	Uniform letter and memorandum format.
7/24/81	Telephone Courtesy and Answering Responsibilities.
7/24/81	Procedure for complaints against staff.
7/27/81	Training Seminar for Attorneys.

July	Notice of MSPB/OSC Picnic.
7/27/81	Case Assignment Summary Report.
7/28/81	Attorney Recruiting.
7/30/81	Form of testimony by witnesses during investigations
8/04/81	Express Mail and Federal Express Service.
8/05/81	Equipment Usage Survey.
8/05/81	Appointment of Summer Clerk-Typists.
8/05/81	Timecards.
8/13/81	Case Time Accounting System.
8/14/81	Assorted Procedures and Points of Style on Preparation of Documents.
8/18/81	Absence from Duty.
8/20/81	Critiquing of Written Materials.
8/20/81	Timecards.
8/20/81	Blanket Travel Advances.
8/21/81	Use of Colons (revisited).
8/21/81	Vacancy Announcements for the Office of the Special Counsel.
8/24/81	Telephone and Office Conversation Memorandum Forms.
8/25/81	Case Time Accounting System Action Items.
8/26/81	Availability of Office Supplies in the Central Office.
9/02/81	Actions Required to Implement Case Time Accounting System.
9/04/81	New Time Control Numbers for Case Time Accounting System.
9/09/81	Contract Airline Service Between Selected City-Pairs.

9/09/81	CTAS Procedures.
9/10/81	MSPB NOTICE - National Hispanic Heritage Week.
9/11/81	Briefs and Other Written Materials.
9/15/81	Addendum.
9/15/81	Review of Member Wertheim's Seminar Comments.
9/16/81	Interim Reorganization.
9/17/81	Combined Federal Campaign (2 memos).
9/18/81	Building Passes.
9/21/81	Delay in Implementation of Case Time Accounting System.
9/21/81	Access to Official Records and Materials.
9/25/81	MSPB NOTICE - Organization of a Blacks in Government (BIG) Chapter.
9/25/81	Fun and Games.
9/28/81	Time Reporting.
9/30/81	Assignment of Control and Data Entry Functions Under Case Time Accounting System.
10/01/81	Revised CTAS Time Sheets.
10/02/81	Welcome Relief.
10/05/81	Appointment of Executive Assistant to the Deputy Special Counsel.
10/06/81	Establishment of a Legal Work Product File.
10/07/81	OSC Circular.
10/07/81	OSC Participation in MSPB Newsletter.
10/07/81	Fun and Games Part II.
10/16/81	Funds Control.
10/19/81	Time Cards.

10/22/81	Typing Support.
10/22/81	Getting Settled In.
10/23/81	Employee of the Month.
10/23/81	Revised CTAS Control Clerk Assignments.
10/26/81	Typing, Etc.
10/26/81	Policies and Procedures for Assignment of Case Supervisors.
10/26/81	CTAS Time Control Number 92.
10/27/81	Scheduling Annual Leave to Avoid Forfeiture.
11/03/81	Old Cases.
11/06/81	Funds Control.
11/07/81	Settlement of Cases.
11/07/81	KP.
11/17/81	Drafts of Briefs.
11/17/81	Memoranda of Office Conferences.
11/19/81	Monitoring of MSPB Appeals.
11/20/81	Review of Time Sheets.
11/23/81	Shutdown of OSC Offices.
11/23/81	Shutdown of OSC Offices #2.
11/25/81	"Eat, drink and be . . . [neat]."
11/30/81	Office Appearance.
12/07/81	Temporary Reassignment of Support Staff.
12/10/81	Brief Format.
12/10/81	Capitalization.
12/11/81	United States Court Directory.

12/14/81	Health Benefits Open Season (1981).
12/14/81	Reprisal for Filing Grievances and Referral to Grievance Procedures.
12/14/81	CTAS.
12/15/81	Workshops on Maintenance of Investigative Files.
12/15/81	U.S.D.C. for DC, Rules (on OSC Library shelf).
12/17/81	FTS Usage.
12/18/81	Writing with Flair.
12/22/81	Suggestions for Cost Savings.
12/23/81	Security of Case Files and Case Information in the Central Office.
12/28/81	Duplication Fees for Freedom of Information Act and Privacy Act Requests.
12/28/81	Legal Work Product File.
12/28/81	Telephone Procedure.
12/29/81	Print Quality II.
12/29/81	Routing Slip.
1/08/82	Reports of Investigation.
1/08/82	Neatness & Organization of the Prosecution Division.
1/11/82	Organization of the Prosecution Division.
1/11/82	Accuracy of Time Sheets and Revised CTAS Control Clerk Assignments.
1/12/81	Woop-Tee-Do.
1/15/82	OSC Law Week.
1/18/82	Miscellaneous CTAS Items.
1/22/82	Federal Employees Health Benefits (FEHB).

1/22/82	Sexual Harassment Cases.
1/26/82	Performance of Supervisory Functions.
1/26/82	Performance Standards.
1/26/82	Miscellaneous CTAS Items (Amendment).
1/27/82	Security of Case Files and Case Information.
1/27/82	Update on CTAS Special Project Numbers.
1/27/82	My "In" Box.
1/29/82	MSPB MEMO -- Code-Tronic Entry System.
1/29/82	Memorandums to the File and Initials on All Typewritten Materials.
1/29/82	Grievance Procedure.
1/29/82	Merit Pay Performance Plans.
2/01/82	Charge for photocopying documents: Freedom of Information Act and Privacy Act requests.
2/01/82	CTAS Code for Sexual Harassment Project.
2/01/82	MSPB NOTICE - Black History Month.
2/03/82	Discontinuance of Health Unit Services.
2/05/82	Overtime.
2/10/82	Access to CTAS Reports.
2/22/82	Closing of the Boston Branch Office.
2/22/82	MSPB NOTICE - Artwork for Office Display.
2/23/82	Leave Plans.
2/24/82	Adjustment of Work Schedules for Religious Observances.
2/26/82	Initials.
3/15/82	Reducing our Use of Express Mail.

3/17/82	Time Reported Under CTAS.
3/18/82	Use of Numbers and Numerals.
3/19/82	Retraction.
3/22/82	Reducing our Use of Express Mail.
3/24/82	Inventory of Central Office Library - United States Code Annotated.
3/24/82	UGH!
3/25/82	EEO Policy.
3/25/82	Duty Hours and Overtime.
3/26/82	Summary Performance Ratings.
3/30/82	Notifying Agencies of Case Closures.
4/01/82	Nepotism Contest.
4/09/82	MSPB Notice - National Volunteer Week.
4/15/82	Contingency Plan for Emergency Medical Assistance.
4/20/82	Transfers to the Merit Systems Protection Board.
4/21/82	Project Evaluation Memorandum Forms.
4/21/82	Outline of OSC Seminar for the FCC.
4/21/82	Secretaries' Luncheon.

Memorandum **Office of the Special Counsel**

Subject

Communication with Field Personnel

Date

September 14, 1981

To Laura Chin
Public Information Officer

From Alex Kozinski
Special Counsel

DRAFT

Some field office personnel have told me that you have been spreading false and baseless rumors. This has created a serious morale problem. To deal with this problem, I am instituting the following policy.

Effective immediately, you may not communicate with OSC field or branch office employees unless you have specifically cleared the communication with the relevant field office chief.

This means:

(1) You will not use office telephones to call field or branch office personnel for any purpose, and you will not use any other telephones to discuss official business with field or branch office personnel, unless the conversation has first been cleared. Similarly, you will not correspond with field or branch office personnel on official business without passing the correspondence through the field office chief.

(2) If you should receive a telephone call from an employee in a field or branch office, and the relevant field office chief has not specifically told you that the telephone call is authorized, you will say only the following and then promptly hang up: "I am not authorized to speak to you unless your field office chief calls me and tells me it's o.k. Thank you. Good bye." Correspondence from field or branch office employees should be promptly referred to Bob Mayer.

You are, of course, free to discuss any matter not constituting official business with field or branch office personnel so long as both of you are in a non-duty status and are using private telephones and/or stationery.

This policy will be in effect until the present problem has been cleared up. Please give Bob Mayer any thoughts you may have on the subject.

AK/dms

cc: H. Robert Mayer
Leonard Dribinsky
P.J. Winzer
William Olivier
Paul Lively

Senator DECONCINI. Let me ask: Was this brief eventually filed?

Ms. EASTWOOD. Oh, it was filed before he edited it.

Senator DECONCINI. Oh, before he edited it.

Ms. EASTWOOD. It was filed while I was still the acting special counsel and I sent him a copy as a courtesy. I wanted to keep him briefed on what was going on.

Senator DECONCINI. That is very interesting.

How did the court rule in this case, do you know?

Ms. EASTWOOD. They ruled in favor of the Office of the Special Counsel.

Senator DECONCINI. Of the office.

Ms. EASTWOOD. Yes.

Senator DECONCINI. Were there any remarks in the ruling about the sloppiness of this work or anything wrong with it?

Ms. EASTWOOD. None whatsoever, no.

Senator DECONCINI. Thank you, Ms. Eastwood.

The CHAIRMAN. Any other questions?

Senator DECONCINI. No. Thank you.

The CHAIRMAN. The Senator from Michigan, Senator Levin.

I guess I will go to the committee, first. Senator Simon.

Senator SIMON. I would like to yield the bulk of my time to Senator Levin.

The CHAIRMAN. Senator Levin.

Senator SIMON. Just one question.

The CHAIRMAN. Excuse me just a minute. Senator Grassley is over here. I had overlooked him.

Senator SIMON. Oh, I am sorry.

Senator GRASSLEY. Mr. Chairman, I don't have any questions at this time.

The CHAIRMAN. Senator Levin.

Senator SIMON. If I may, just one question.

You mention in your affidavit—

> Six of the eight most senior attorneys, grade 14 and above, in the central office resigned or retired during Mr. Kozinski's first year in office. In addition to Mr. Kozinski's deputy, only three more junior attorneys were hired by Mr. Kozinski in the central office during that period.

Have you, in your 18 years in the Federal Government, found any comparable change in anything that you have experienced?

Ms. EASTWOOD. I had never seen that kind of a turnover in any office before, no. It is much higher than the normal attrition rate.

Senator DECONCINI. Have you had any similar experience of difficulty with someone you were working under prior to this experience with Mr. Kozinski?

Ms. EASTWOOD. I had never had any problems with any of my supervisors in the Government before and I had worked for people of all political persuasions, including some very conservative members of the Federal judiciary, such as Justice Rehnquist and Judge Scalia who were both my bosses in the Office of Legal Counsel at Justice.

I have never had any problems with any supervisor before.

Senator DECONCINI. OK. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Pennsylvania, Mr. Specter.

Senator, do you have any questions?

Senator **Specter**. I have no questions at this time, Mr. Chairman.

The **Chairman**. Senator Levin, we are glad to have you with us. You may proceed now.

Senator **Levin**. Thank you, Mr. Chairman. I thank you for your courtesy in inviting me to join you this morning.

I would like to put in the record another memo which was edited by Judge Kozinski, this one in technicolor. It would be identified as a letter to Secretary Pierce, a draft dated August 19, 1981.

The **Chairman**. Without objection.

[The memo follows:]

Why do you think these cat little phrases are necessary?

Obviously you have not read my memo of Aug 14 on style

THIS ¶ is AWFUL. I HAVE NO IDEA WHAT WENT ON

BE SURE TO ASK DAVIS FOR A COPY.

Recognize?

60-1-00034

DRAFT
8/19/81

Department of

The Honorable Samuel R. Pierce, Jr.
Secretary
Housing and Urban Development
Washington, D.C. 20410

The ~~[illegible]~~ address needs formatting just like everything else

Do you think Sam Pierce needs to be told what "HUD" stands for?

Dear Mr. Secretary:

We have

~~This office has~~ received a complaint from Your Donald D. Nicholl, a former ~~employee~~ of the Atlanta region of the Department ~~of Housing and Urban Development (HUD)~~. Mr. Nicholl alleges that HUD has failed to comply with the November 26, 1980, decision of the Equal Employment Opportunity Commission (EEOC) Office of Review and Appeals, on ~~Mr. Nicholl's~~ discrimination complaint. A copy of the decision is enclosed~~, for your reference~~.

DITTO

Are there more than one?

~~In his discrimination complaint,~~ Mr. Nicholl alleged reprisal in connection with a thirty day suspension. After a hearing, an EEOC complaints examiner issued a recommended decision finding reprisal and recommending that Mr. Nicholl be restored to his previous position. The agency adopted the examiner's finding of reprisal but modified the recommended corrective action. Mr. Nicholl appealed to the EEOC.

Is this the correct word?

~~In its decision on appeal~~ the EEOC ordered ~~that~~ Mr. Nicholl ~~be~~ restored to his Equal Opportunity Specialist, GS-13, position in the Atlanta regional office. Although HUD requested that the EEOC ~~commissioners~~ reconsider ~~the~~ its appeals office decision, 29 C.F.R. § 1613.235 provides that an agency ~~shall~~ comply with a decision issued on appeal if the decision orders retroactive restoration.

Is there retroactive

On April 30, 1981, our Atlanta Field Office requested information ~~on this~~ matter from ~~the HUD~~ regional director ~~in Atlanta~~, who forwarded our request to Washington. We have yet to receive a ~~response from HUD~~.

As you know, the Office of the Special Counsel is authorized to investigate allegations of prohibited personnel practices and other violations of civil service law, rule or regulation. 5 U.S.C. §§ 1206(a) and (e). The office is also authorized to investigate involvement by agency officials in prohibited discrimination, 5 U.S.C. § 1206(e)(1)(E), and may file complaints for

Now.. what does this mean? This is really poor, fuzzy, unspecific & generally substandard phrasing.

Think. Don't just use a formula. You're a person not a computer.

Don't understand. I thought the action was a suspension not a removal.

Restoration Too?

Note (over)

AWKWARD

Why have all these synonyms in succession in same sentence?

You can cut at least 1/3 of the words out of this ¶ w/o loss of meaning.

THIS is [redacted] AWKWARD

PROFUSE!

The Honorable Samuel R. Pierce, Jr.
Housing and Urban Development
Date
Page Two

WITH THE SHIFT FROM "AGENCY OFFICIALS" TO "EMPLOYEES"? DON'T YOU THINK THIS INTRODUCES ~~AN~~ UNNECESSARY CONFUSION INTO SENTENCE?

disciplinary action against employees with the Merit Systems Protection Board. 5 U.S.C. § 1206(g).

I am writing ~~to you~~ pursuant to this authority, as well as in the interest of promoting the efficiency of the federal service. ~~All of us in the Administration have an interest in assuring that agency officials promptly implement final decisions in discrimination cases.~~ I ~~We~~ would like to get your views on this matter and give you the opportunity to take corrective steps if any are warranted. I would therefore appreciate your reviewing this matter and advising me of its status as well as any steps you might have taken as a result of this inquiry.

If I can provide further information or clarification, or otherwise be of assistance, please do not hesitate to call me at 653-7122.

Sincerely,

Alex Kozinski
Special Counsel

?

Enclosure :ME

AK:DV/bow

IS THE DECISION HERE FINAL?
(SEE ¶1 ¶3)
~~THAT~~ IT ABSOLUTELY WILL NOT DO TO JUST LIFT LANGUAGE LIKE THIS FROM A PREVIOUS LETTER + MINDLESSLY [illegible] INSERT IT HERE. A SECRETARY IS ENTITLED TO [illegible] A GS-13 AND AN SES MUST THINK ABOUT WHAT THEY ARE SAYING -- PARTICULARLY TO A CABINET SECRETARY.

Senator LEVIN. Mr. Chairman, I want to go to the letter which Judge Kozinski wrote to you on October 17. This is how he characterized the dropping of Ms. Eastwood's appeal.

He quoted one document in which she abjured her allegations that the Office of the Special Counsel or any employee engaged in any wrongdoing, and this is what he then went on to say:

> By repudiating her charges, Ms. Eastwood bypassed the opportunity to make her case fully and fairly in open court and, if successful, to permanently get her job back.

"By repudiating her charges * * *."

Did you repudiate your charges?

Ms. EASTWOOD. No. As a matter of fact, we spent about 2 hours on the language of that settlement agreement and that was one of the words that I really refused. I just could not sign an agreement with it as much as I wanted to settle the case.

I agreed to use the word "abjure" finally at the insistence of the Special Counsel attorneys because my attorney explained that it means "to abstain from" or to simply not pursue your rights.

So, with that explanation and that definition, I went ahead and permitted that.

Senator LEVIN. With that definition of "abjure."

Ms. EASTWOOD. Yes.

Senator LEVIN. By the way, if I could indicate, Black's Law Dictionary does define "abjure" as renounce or abandon, and the first definition of renounce is to make affirmative declaration of abandonment.

So you understood that you abandoned your rights to pursue the claim.

Ms. EASTWOOD. Yes.

Senator LEVIN. You did not repudiate.

Ms. EASTWOOD. No.

Senator LEVIN. Now, this is the way he continued to characterize Ms. Eastwood's departure:

> For reasons never fully explained, Ms. Eastwood chose not to go to San Francisco, abandoning the responsibilities entrusted to her.

As a matter of fact, had you sent him a memo dated February 16, 1982, about that reassignment?

Ms. EASTWOOD. Yes; I did.

Senator LEVIN. In that memo, did you state that you gave considerable thought to his plan to move you to San Francisco to head the western regional offices and that, "I have lived in Washington, DC, for almost 27 years. Most of my friends and part of my family live here. I, therefore, do not wish to leave here"?

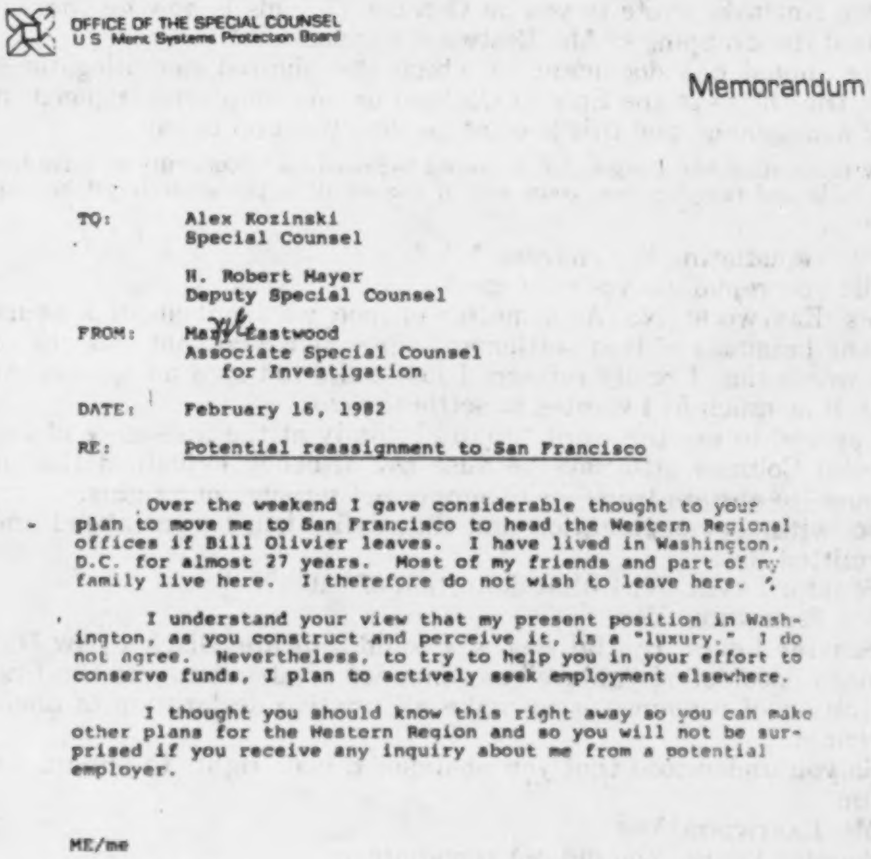
Was that your memo?

Ms. EASTWOOD. That is correct.

Senator LEVIN. I would like to insert this memo in the record, Mr. Chairman, at this time.

The CHAIRMAN. Without objection.

[Memorandum follows:]



OFFICE OF THE SPECIAL COUNSEL
U S Merit Systems Protection Board

Memorandum

TO: Alex Kozinski
Special Counsel

H. Robert Mayer
Deputy Special Counsel

FROM: Mary Eastwood
Associate Special Counsel
for Investigation

DATE: February 16, 1982

RE: Potential reassignment to San Francisco

Over the weekend I gave considerable thought to your plan to move me to San Francisco to head the Western Regional offices if Bill Olivier leaves. I have lived in Washington, D.C. for almost 27 years. Most of my friends and part of my family live here. I therefore do not wish to leave here.

I understand your view that my present position in Washington, as you construct and perceive it, is a "luxury." I do not agree. Nevertheless, to try to help you in your effort to conserve funds, I plan to actively seek employment elsewhere.

I thought you should know this right away so you can make other plans for the Western Region and so you will not be surprised if you receive any inquiry about me from a potential employer.

ME/me

Senator LEVIN. Now, that memo pretty clearly told Judge Kozinski why she did not accept the position in San Francisco which he had offered. The way this is characterized to us, the Senate, is, "For reasons never fully explained, she chose not to go to San Francisco, abandoning the responsibilities entrusted to her."

That's the characterization to us. Is it a fair characterization? We can make up our own minds.

We check the characterization against the memo and decide if it's fair, and then we notice something interesting. That is that Judge Kozinski, in his voluminous attachments of exhibits in his letter to us—voluminous, one tab after another; and this is a man who edits like this, folks—there is no more perfectionist that I know of than Judge Kozinski, and I want to give him credit for being, by the way, a hard-working judge and a perfectionist. We are talking here about temperament, not how hard he works or whether he has speeded up the docket at the claims court, which he has and deserves credit for.

We are talking about another side of the issue of judicial qualification, a difficult issue which this committee has an extremely hard and difficult job, always, in making these decisions.

At any rate, he is obviously a perfectionist and he included I don't know how many tabs in his letter to the committee trying to sustain his characterization of that settlement when Ms. Eastwood sued him. What he did not include, this very, very careful judge, was another part of the settlement.

Now, Senator Hatch says we already had it. That is not the issue. I don't know if minority staff had it, by the way, or not, but that is not the issue here at all, Senator Hatch.

Senator HATCH. What is? I am sorry, I missed that.

Senator LEVIN. The issue is not whether or not we had the other part of the settlement or the majority had the other part of the settlement in the Eastwood case.

The question is whether when he represented to the committee that she repudiated her charges, that she "for reasons never fully explained * * *" chose not to go to San Francisco, "* * * abandoning the responsibilities entrusted to her" when she had sent a memo to him saying that she chose not to go because her roots, her family were here, she had lived here for 25 years—that was the reason she gave to him.

He characterizes that as abandoning the responsibilities entrusted to her for reasons never fully explained. My point here is that this very careful, methodical person—and read his letter to the committee, it is perfect; there is not a grammatical error in it. No technicolor editing would find its way to this letter.

It is the intent—it is the spirit of this letter.

He did not include a piece of the settlement of the administrative law judge in which $10,000 in attorney fees were awarded to her attorney.

Under the terms of another agreement executed simultaneously with the settlement agreement, the agency undertook to pay up to $10,000 in attorney fees if it had the authority to do so. Here is what the administrative law judge says:

"Pursuant to 5 USC," such and such a section, "the Board or an Administrative Law Judge may require the payment of reasonable attorney fees if the employee is the prevailing party." "* * * if the employee is the prevailing party," and he then awarded attorney fees.

Now, would any of the flavor that she was the prevailing party come through—or at least partially prevailed, sufficiently to give that judge the authority to issue her attorney fees—the letter that Judge Kozinski sends to Senator Thurmond on October 17 that she repudiated her charges, she bypassed the opportunity to make her case fully and fairly in open court and, if successful, permanently get her job back, "For reasons never fully explained * * * she abandoned her responsibilities"?

Obviously, to me, none of that came through at all. I have to believe, given the care and methodical nature of this judge, that it did not come through purposefully.

Ms. Eastwood, you read your affidavit, I presume, before you signed it.

Ms. EASTWOOD. Of course.

Senator LEVIN. Do you stand by each of the allegations in that affidavit?

Ms. EASTWOOD. Yes; I do.

Senator LEVIN. Thank you, Mr. Chairman.

The CHAIRMAN. Are you through, Senator?

Senator LEVIN. Thank you.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Ms. Eastwood, you are welcome before the committee and I know how you feel, and I have had some feelings that way myself in my past experiences.

I would like to point out to my friend and colleague from Michigan that the semantic distinctions between repudiate, renounce, and abandon, and the word in your settlement, abjure, are very fine, indeed.

It may well have been Ms. Eastwood's understanding that she "abandoned." It was OSC's understanding, as I understand it, that you "repudiated." But they agreed on the word "abjure."

Now, I think this is hardly a reason to accuse Judge Kozinski of "misleading."

I can understand the feelings. I did not like the criticism I got as a young lawyer and I sometimes don't like it as an old lawyer.

Let me just say this. The committee has received letters from former employees of Special Counsel Kozinski who voluntarily wrote to the ABA, expressed their enthusiastic approval of his judicial temperament and ability. In addition, I have numerous other letters from individuals who have associated professionally with the judge and voluntarily expressed their support to the ABA.

It is truly an impressive outpouring of support. These people came forward and testified in support of his nomination through letters sent to committee or as live witnesses.

You have come today and I admire you for doing so. Bill O'Connor, Judge Kozinski's successor, testified that there are still many problem employees at the Office of the Special Counsel.

If anything, we want competent efficient management at these agencies. Again, although I have to admit the editing of the brief that Senator Levin put into the record is extensive, I would challenge anybody to find anything wrong with the editing.

I would challenge anybody to say he was wrong from an English standpoint or even a judgment standpoint, because there are judgments made, that you could——

Senator **Metzenbaum**. I don't want to flyspeck the judge, but for a man who writes a letter of this kind which has so many unbelievably strong statements in it——

Senator **Hatch**. Tell me where they are wrong, Senator.

Senator **Metzenbaum**. When I went to school, they never permitted you to split an infinitive. He did that in his notes. [Laughter.] You know, he is normal. He makes the mistakes that these people make.

Senator **Hatch**. I would imagine he would not mind somebody pointing that out to him, maybe even in harsh terms like you just did.

Senator **Metzenbaum**. I think I ought to get a red pencil in order to do it, however.

Senator **Hatch**. Well, a blue one will do.

The **Chairman**. Well, let's move on with the hearing. Senator Hatch, are you through.

Senator **Hatch**. I am through.

Senator **Levin**. Mr. Chairman, may I just have one more moment because I want to focus the issue here.

The **Chairman**. Senator.

Senator **Levin**. The issue here is not on the meaning of abjure. I have read the first meaning from Black's Law Dictionary.

The **Chairman**. Sure.

Senator **Levin**. It is, you have testimony here from Ms. Eastwood as to the fact that she specifically refused—as I understand her testimony—to repudiate her charges.

Ms. **Eastwood**. That is correct; and we spent 2 hours on what word to use.

Senator **Levin**. The other point is this, and this is the critical one: it is the representation to us relative to that settlement, the failure to tell us in this letter which reads totally that she abandoned her appeal, renounced her appeal, renounced her job, did not explain why. That's the whole letter to us.

It is the failure of Judge Kozinski, this careful methodical judge, to include this part of the settlement in which the administrative law judge says that he may require the payment of reasonable attorney fees if the employee is the prevailing party, and then he goes on and awards the attorney fees.

It is that failure which troubles me a great deal relative to this particular incident; at least, it is one of the things which troubles me a great deal.

Thank you very much.

The **Chairman**. Thank you, Ms. Eastwood.

Ms. **Eastwood**. Thank you.

The **Chairman**. Our next witness is Mr. John Fred Hollingsworth. Will you come around, Mr. Hollingsworth?

Would you raise your hand. Do you swear your testimony here will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. **Hollingsworth**. I do.

The **Chairman**. Have a seat.

You can take 5 minutes and give a brief statement, and then answer questions.

TESTIMONY OF JOHN FRED HOLLINGSWORTH, SHIPPENSBURG, PA

Mr. HOLLINGSWORTH. Mr. Chairman, members of the committee, my name is John Hollingsworth. I have been in the Federal civil service for 21 years in personnel management and administration.

I have worked in various agencies including SBA, Department of Justice, Civil Service Commission, Special Counsel and Department of Army. Currently I am working on Department of Army at U.S. Army Depot System Command in Chambersburg, PA.

I am a GS-14, currently. I was a GS-15 and a GS-14 in the Office of the Special Counsel from September 1979 until December 1982.

I will have to start off by saying I have no particular ax to grind with Mr. Kozinski, or Judge Kozinski. In fact, I always had an admiration for his intellect, but I did have some problems with him in my particular assessment of his ability to manage people, his caring for people, his sensitivity with people in the office.

There were a number of incidents which I observed as Director of Administration at the GS-15 to GS-14 level with employees that I thought were very unfair; and I am going to make this as brief as possible.

There was one case of a messenger who Mr. Kozinski wanted to fire because there was a lost piece of correspondence. He wanted me to fire him, I declined. Later, that piece of correspondence turned up with an attorney.

There was an elderly lady, a black lady in the office who had cancer. Mr. Kozinski announced that she was departing before she announced that she was departing.

There were other incidents. I can remember, in August 1982, Mr. Kozinski called me and Mr. Caldwell to his office—this is covered in my affidavit—and he said to us, "Why are we not getting the air-conditioning in the word processing room where the secretaries are working? Don't we have any compassion?"

He was quite angry. "Why are we not doing something about it so the secretaries would have comfortable temperatures?"

I said, "We are doing the best we could." We were pushing it through GSA, trying to put it through the building manager, spending lots of time. In fact, at the time I was probably working 65 or 70 hours a week to keep up with what I thought were Mr. Kozinski's demands.

In answer to his question, I said, "Well, yes, I have compassion. I would have taken them out of the room because the temperature in there is 90 degrees." Mr. Kozinski, then, proceeded to say that I was not doing my job, that I could not accomplish anything.

He did not care how I got results. He expected, for the $50,000 salary he paid me, for me to do the impossible.

I told him I would always try to do the impossible and he demanded that, by the next day, we have things accomplished such as getting the air-conditioning in the word processing room, fixing a squeaky door in his office, repairing his new lounge seating group in his office, and some other tasks that I cannot recall.

My concern with Mr. Kozinski is his sense of fairness, his even handedness and his reasonableness with such incidents as I described and such a meeting as I described.

When I was still there, just before I transferred in December of 1982 to the Department of Army in Pennsylvania, I questioned with Mr. Caldwell—my immediate boss who reported to Mr. Kozinski—why Office of the Special Counsel funds were being used to purchase furniture and equipment, and install a kitchen for the Merit Systems Protection Board since I understood that these were separate appropriations and separate budgets.

Mr. Caldwell, my immediate supervisor, would not answer, but on a number of occasions he seemed to take special satisfaction in the fact of this maneuver to use Office of the Special Counsel money to buy things for Merit Systems Protection Board, and the Merit Systems Protection Board could pay them back out of their appropriation in the following fiscal year.

That was fiscal year 1981 funds that I understood were being used, about $200,000 worth of Office of the Special Counsel funds, that were not expended or obligated in fiscal year 1981.

Senator METZENBAUM. Did you say $200,000?

Mr. HOLLINGSWORTH. Yes, sir.

The CHAIRMAN. Your time is up, but I will indulge you a little longer. Go ahead.

Mr. HOLLINGSWORTH. In my affidavit, I did attach a sheet which describes the equipment and furniture. That exercise, because I had started in the Office of the Special Counsel in 1979 and because there had been even congressional sources who have said, "If you have to lay off employees in Office of the Special Counsel, you do; but you do not use Merit Systems Protection Board budget or funds and they do not use yours," I will not dwell on this.

Mr. Kozinski seemed to have very high standards and, from my point of view and from a number of other staffs' point of view, impossible standards. In fact, a number of employees, especially minorities and women, were given low performance appraisals. Their within-grades were withheld.

Even the personnel officer, Ms. Marie Glover, sent a memo to Mr. Kozinski which questioned why he was not taking action on satisfactory performance appraisals or giving within-grade increases for a number of minorities and women in the office.

She was really questioning his requiring a superior standard of performance to be rated as satisfactory.

In Mr. Kozinski's last few months in office, in August 1982, he did give in a memo awards to about 20 employees. I questioned the justification for those awards. There was no documentation for those awards that I was aware of.

In fact, after Mr. Kozinski's announcement I was asked to write a justification for one of my employees whose name was in the memo. I wrote the justification because I thought it was deserved in that case; but there were employees on the list who Mr. Kozinski had taken to task, whom he had rated very low in their performance in the past.

A number of the things I have mentioned are in my affidavit. That is all I have to say at present. I will be glad to take any questions.

[Information follows:]

Exhibit 3

AFFIDAVIT

I, John F. Hollingsworth, being duly sworn, depose and state:

I was employed by the Office of the Special Counsel from 9/2/79 - 12/11/82. After Mr. Alex Kozinski was appointed Special Counsel in mid-1981, he took a number of adverse actions and humiliating actions toward many employees, myself included. First, he hired another individual, Mr. William Caldwell, to assume the duties of my position, Director of Administration and Program, GS-15, and threatened me with removal, downgrade, or loss of pay. I felt so harassed and intimidated that I accepted the change to a lower grade, GS-14, on 9/6/81. In spite of this treatment and many humiliating actions toward me by Mr. Kozinski (such as issuing and withdrawing a letter of reprimand), I believe that I remained loyal, conscientious and productive to the U.S. Government and to the Office of the Special Counsel. However, I cannot help but question Mr. Kozinski's sense of fair-play, even-handedness, and sensitivity or judgment in dealing with people.

After 20 years of Federal personnel management experience, I cannot recall a more callous disregard for people than Mr. Kozinski exhibited. Incidents included demanding that a messenger be fired when one piece of correspondence could not be located; issuing a notice of farewell to an employee who had cancer and had not yet finalized plans to leave the office and retire; insulting/belittling staff in front of others or in written comments; and similar incidents....

Besides derisive remarks on writing, Mr. Kozinski was prone to berate the staff for items over which staff had no control or influence. For example, on 7/29/82, Mr. Kozinski called Mr. Caldwell and me to his office. He was very upset and angry. He shook when talked to and had a menacing look on his face. He reamed us out verbally about the following -- lack of air conditioning; not fixing his squeaky, sticky door; not repairing his new lounge-seating group; and not acquiring new sectional desks. When we tried to explain that GSA or private companies had been continually urged to provide the services and that the delays were uncontrollable, Mr. Kozinski asked me: "Don't you have compassion for the girls in the word processing room who are burning up from lack of air-conditioning?" I replied, "Yes, besides trying to get air-conditioning on an expedited basis from GSA, I would have taken the girls out of the word-processing room months ago if allowed." Mr. Kozinski stated that I always had too many excuses and that he expected much more for my salary of $50,000. Also, he stated that he expected the impossible from me and that he didn't care how I got results, but he wanted results. Mr. Kozinski closed by demanding in a furious manner that air-conditioning and other mentioned repairs/adjustments/receipts be accomplished "by tomorrow."

The **Chairman**. The distinguished Senator from Ohio, Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Hollingsworth, in connection with this last matter, do I understand your point to be that he handed out these awards and you felt that there was no basis for them, that he just handed them out strictly on a personal basis? Is that what you are saying?

Mr. **Hollingsworth**. Well, he seemed very intent on giving lots of awards and going ahead and giving them before the required regulatory procedures and required documentation was in effect.

Senator **Metzenbaum**. Are there personnel rules or statutes with respect to the circumstances and terms under which awards are made?

Mr. **Hollingsworth**. Yes, sir. There are civil service regulations which would require written documentation in advance to support awards.

Senator **Metzenbaum**. Did Judge Kozinski follow those rules and regulations?

Mr. **Hollingsworth**. Not to my knowledge.

Senator **Metzenbaum**. You stated that some of the awards were made to persons with unsatisfactory performance ratings. How did you know that?

Mr. **Hollingsworth**. Well, I do have a copy of the personnel officer's memo and she questions Mr. Kozinski in that memo as to why he is giving poor performance ratings or why he is considering denial of a within-grade increase to certain employees.

One of the employees in Ms. Glover's memo, her name is in that and, also, she received a reward a few months after that.

Senator **Metzenbaum**. Were these awards made after there had been press—let's see, you stated in your affidavit that the awards were given shortly after "* * * press and congressional sources were criticizing Judge Kozinski for negative treatment of his staff."

Would you comment on that statement?

Mr. **Hollingsworth**. Yes, sir. That's my opinion, that there was bad press about Mr. Kozinski's treatment of employees.

Senator **Metzenbaum**. You said that he told the black lady who had cancer—he announced she was leaving. Are you saying that he indicated she was being fired, or what did he say?

Mr. **Hollingsworth**. Well, sir, I don't know if there was any intent there or not, frankly. I know that his standard procedure was to issue a memo to the staff bidding farewell to the staff member who is departing, whether they were leaving by resignation or transfer, retirement or whatever.

There was a memo issued in the case of this lady. I don't know if it was an oversight, an error or whatever.

Senator **Metzenbaum**. Did you have any conversation with the lady?

Mr. **Hollingsworth**. No, I did not.

Senator **Metzenbaum**. Now, this question of transferring funds from the Office of the Special Counsel to purchase Merit Systems Protection Board supplies or furniture, which did you say?

Mr. **Hollingsworth**. It was furniture, supplies, office space rent, a kitchenette for the Merit Systems Protection Board.

Senator METZENBAUM. Now, are these two operations totally separate as far as their funding is concerned?

Mr. HOLLINGSWORTH. Yes, they are; separate appropriations.

Senator METZENBAUM. Is it permissible, under the law, for one department to use up a part of its funds and then have those funds be paid in the next fiscal year? Is that legal?

Mr. HOLLINGSWORTH. Not to my knowledge, sir. I am no expert, but to my knowledge it is not legal.

Senator METZENBAUM. Did you have any conversation with Mr. Kozinski about this matter?

Mr. HOLLINGSWORTH. No. I raised it with my immediate boss, Mr. Caldwell, who said it was all right. It was appropriate. It had been checked out.

Senator METZENBAUM. Let me just go back to one point. In one instance, he was actually prepared to fire the messenger? Why was that, because the messenger could not find a particular letter?

Mr. HOLLINGSWORTH. Because he blamed the messenger for having lost the letter, thinking that the messenger had misplaced it or lost it somehow.

Senator METZENBAUM. And then it showed up, you said, in the hands of an attorney. What do you mean by that?

Mr. HOLLINGSWORTH. It was found on an attorney's desk. She had received it and she was working on a case in connection with that letter.

Senator METZENBAUM. Was the messenger at all at fault?

Mr. HOLLINGSWORTH. Not to my knowledge.

Senator METZENBAUM. Do you know whether Judge Kozinski apologized at all to the messenger?

Mr. HOLLINGSWORTH. I do not know, sir.

Senator METZENBAUM. Do you know whether Judge Kozinski berated the messenger for having lost the letter?

Mr. HOLLINGSWORTH. I do not know.

Senator METZENBAUM. He just told you he wanted to fire him or her.

Mr. HOLLINGSWORTH. That's correct.

Senator METZENBAUM. I have no further questions, Mr. Chairman.

The CHAIRMAN. This is a 5-minute bill. We will have to take a recess. Senator Hatch will be back in a minute, and also Senator Levin. They can carry on when we come back. So we will take a recess until they get back.

[A brief recess was taken.]

Senator HATCH [presiding]. Mr. Hollingsworth, let me just in the interests of time ask only one question. I think Senator Levin is not through yet or we would move to the next witness. Therefore, we will wait until he gets back.

It is clear from your testimony that Judge Kozinski demanded a high level of performance from you and others with whom he served.

Do you feel that he demanded the same of himself?

Mr. HOLLINGSWORTH. I don't think I can answer that question. I am not sure that one can be as tough——

Senator HATCH. Did he work hard? Did he accomplish a lot? Did he write a lot of opinions? Did he write them well?

Mr. HOLLINGSWORTH. I am sorry. I don't think I can answer that, sir.

Senator HATCH. You just don't know.

You did say that you admired his intellect at the beginning.

Mr. HOLLINGSWORTH. Yes.

Senator HATCH. You do admire that.

Mr. HOLLINGSWORTH. I certainly do.

Senator HATCH. But you don't know about anything else. You admitted he was a hard worker.

Mr. HOLLINGSWORTH. Certainly. There was no question about that.

Senator HATCH. But you cannot pass judgment on the quality of his work or anything else.

Mr. HOLLINGSWORTH. I really cannot. I am not an attorney.

Senator HATCH. OK. All right.

Here is Senator Levin. We will let him finish his questions, and then we will move on to the next witness.

Senator Levin.

Senator LEVIN. Thank you very much, Mr. Chairman.

What is your present occupation. I am sorry I don't know.

Mr. HOLLINGSWORTH. I am chief of program evaluation, recruitment and placement, and career management—a mouthful—at U.S. Army Depot System Command in Chambersburg, PA.

Senator LEVIN. Did you come down from Pennsylvania for this hearing today?

Mr. HOLLINGSWORTH. Yes, sir. I left at 7 this morning.

Senator LEVIN. Did you read your affidavit before you signed it?

Mr. HOLLINGSWORTH. Yes, I did.

Senator LEVIN. Do you stand by everything in that affidavit?

Mr. HOLLINGSWORTH. I do.

Senator LEVIN. Did you say in your affidavit that Mr. Kozinski was prone to berate the staff for items over which staff had no control or influence?

Mr. HOLLINGSWORTH. Yes.

Senator LEVIN. Was that true?

Mr. HOLLINGSWORTH. To my knowledge, it is; and I cited a personal example.

Senator LEVIN. The example that you cited was, as I understand it here this morning, that—as you put it in your affidavit he "reamed you out verbally" about not fixing his squeaky, sticky door, about not repairing his new lounge seating group, about not acquiring new sectional desks and you tried to explain that "* * * GSA or private companies had been continually urged to provide the services," and that "The delays were uncontrollable."

Is that true?

Mr. HOLLINGSWORTH. Yes.

Senator LEVIN. You indicated in your affidavit that he frequently directed and expected that you personally adjust or repair his furniture, move furniture or equipment, or clean up areas and that when you did this, to avoid his wrath or castigation, he seemed to enjoy watching you do the manual work as if he took pleasure in your subjugation.

Is that true?

Mr. HOLLINGSWORTH. Yes, it is. In fact, I even have a picture of me repairing his furniture. I have that with me.

Senator LEVIN. Is that part of your job description?

Mr. HOLLINGSWORTH. No. No, sir, not as a GS-14 Director of Administration.

Senator LEVIN. Had you tried to get those jobs done by people who were supposed to do those jobs?

Mr. HOLLINGSWORTH. Yes, I did; but when I could not, to avoid Mr. Kozinski's wrath, I decided discretion was the better part of valor and I did it myself.

Senator LEVIN. In your affidavit, you state that he gave many staffers very low or unsatisfactory performance appraisals and "* * * kept them in a high-stress situation due to his ability to keep them in suspense as to his next adverse or unfavorable action to them.

"However, in his notice to staff of July 30, 1982, he announced 30 awards and 12 promotions for staff. Some of these very same employees previously had received very unsatisfactory performance appraisals by Mr. Kozinski; others," including some who had worked for you, "had well known performance shortcomings."

"None of these announced awards had been preceded by the required justification." You cannot account, you said, "* * * for Mr. Kozinski's action except to remember how the press and congressional sources were criticizing him for negative treatment of his staff prior to those awards."

Did you write that in your affidavit?

Mr. HOLLINGSWORTH. Yes, I did.

Senator LEVIN. Now, you say there that he actually gave awards following a press account criticizing him for negative treatment of his staff to people who had previously received unsatisfactory performance appraisals, including some who worked for you and who had well known performance shortcomings.

Then you say that "None of those announced awards had been preceded by the required justification." What is that required justification as the basis for an award?

Mr. HOLLINGSWORTH. That would be something written in advance to support a special act, a special achievement, or that the individual exceeded their performance standards.

Senator LEVIN. To your knowledge, awards were given to people although that prior step had not been taken.

Mr. HOLLINGSWORTH. That's correct.

Senator LEVIN. Do you know whether the employees who received those awards or promotions had done a special act or exceeded, to a superior degree, written performance standards?

Mr. HOLLINGSWORTH. No, but I questioned some of them because Mr. Kozinski had questioned them before.

Senator LEVIN. What was their response, when you say you questioned them?

Mr. HOLLINGSWORTH. I am sorry. I questioned the validity or the deservingness of those awards.

Senator LEVIN. Oh, I see. You questioned it then in part because he had questioned it.

Mr. HOLLINGSWORTH. Yes.

Senator LEVIN. I have no other questions.

Senator HATCH. Well, thank you, Senator Levin.

I might just state that these are never wonderful hearings, but in your affidavit you state, "In fact, his obsession with proper writing caused him to require all staff to attend a USDA-sponsored writing course from September 8 to September 11, 1981, at a cost of $14,000 and travel costs for staff of $25,000."

Now, several times we have had mentioned that Judge Kozinski was meticulous about writing done by his particular office. For some reason this seems to be cited as a fault.

Frankly, I just have to ask: Why is attention to proper writing an obsession? And even if it is an obsession, why would that not be considered a high endorsement for judicial authority?

It is a question that I think anybody would have to ask when talking about a nomination to the Ninth Circuit of Appeals, one of the most important circuit courts in the country. I would want people who were meticulous and obsessed with their writing abilities, and those around them.

It is one of the great training grounds of this country. I would hope that whoever works with Judge Kozinski when he's on the Ninth Circuit Court of Appeals as law clerks will receive the full benefit of whatever he can give to them from a legal writing, analysis, reasoning, and legal acumen standpoint.

So I can see where personalities can irritate each other. There is no question about that. Sometimes one side is right and the other side wrong. Sometimes both are right. It is just a difference in personalities.

Now, you mentioned that Judge Kozinski gave 20 awards for meritorious performance. You agreed with him at least on one of those, didn't you?

Mr. HOLLINGSWORTH. Yes, I did.

Senator HATCH. OK. In other words, apparently he used a carrot as well as a stick as he managed the office. He treated the staff well, even though he did not treat them as well as you thought he should.

Would that be a fair statement?

Mr. HOLLINGSWORTH. Yes, that's correct, and——

Senator HATCH. OK. I think that is all.

Senator LEVIN. Mr. Chairman, may I just ask one additional question?

Senator HATCH. Sure.

Senator LEVIN. That writing course that you made reference to was in September 1981, I believe.

Senator HATCH. Right, from the 8th to the 11th. I just quoted right out of Mr. Hollingsworth's affidavit.

Senator LEVIN. Did something unusual happen when you were all gone to that writing course relative to the notice about the departure of an employee?

Mr. HOLLINGSWORTH. Well, harking back to Senator Hatch's using my term "obsession," I used that term because Mr. Kozinski required that everyone go to it and there was some dissatisfaction; but it was the manner in which he required it.

They had to travel from all over the country, come to Washington, be there for a couple of work days and be there for the weekend, too. He seemed to not care about any personal hardships that people had.

I questioned the propriety of it at the time and even quoted a Comptroller General decision—this is not in my affidavit—that said employees should be advised in advance of the kind of pay status they are in when they are required to travel and come in and work on a weekend or be in training on a weekend.

That was ignored and individuals received no compensation or consideration for that required writing course.

Senator LEVIN. Let me be more specific in terms of my question. I want to read you a passage from Mr. James' affidavit. He says that "Example of Mr. Kozinski's abuses include the following: At the time of Mr. Kozinski's confirmation as special counsel the Office of the Special Counsel employed as a clerk typist an elderly female employee who had been a loyal and dedicated Federal employee in excess of 20 years:

> Prior to Mr. Kozinski's arrival, the employee had been hospitalized for several months after learning that she had cancer.

By the way, I believe this woman's name is Ms. Proctor, the woman that we are talking about.

> Her condition was such that we were uncertain whether she would live or ever return to work. However, to our surprise, she regained her strength and managed to return to the office just about the time of Mr. Kozinski's confirmation.
>
> About three or four weeks after his confirmation, Mr. Kozinski summoned me and at least one or two individuals from the OSC Administrative Division, and informed us that he was going to terminate the elderly employee. When I questioned the basis for the termination, Mr. Kozinski claimed that the employee was not performing her duties.
>
> I found that difficult to believe because I knew what assignments she had received and was uncertain whether such a small number of assignments were sufficient to form the basis for termination. Further, the employee only performed duties as required by the staff attorney she worked for.
>
> Because of her illness and age, she was slower and not as proficient as younger secretaries; but I did not feel her performance was such that it warranted removal. This was especially true because it was generally well known she planned to retire shortly.
>
> When I determined that Mr. Kozinski was determined to terminate the employee, I questioned the basis for the termination. I suggested he wait until the employee retired. Because no one in attendance at the meeting was certain when the employee would retire, I was asked to find out and advise Mr. Kozinski.
>
> Upon checking with fellow employees, I learned that the employee planned to retire in October of '81. This meant that Mr. Kozinski only had to wait two months and the employee would voluntarily leave the office.
>
> I subsequently advised Mr. Kozinski of my finding and he indicated that he would take no further action. However, a few weeks later, some time during the first week of September, while I and all professional staff members were attending a training course, Mr. Kozinski circulated throughout the office one of his famous memos in which he stated that, on that day, he was saying goodbye to the employee and he thanked her for her extensive number of years of Government service.
>
> Prior to receiving the memo, there was no formal or informal discussions with the elderly employee about leaving the office. She made no formal statements about leaving at that time.
>
> When the employee received Mr. Kozinski's memo, she got up, placed her OSC Government identification on her typewriter, walked out the door and never returned to the office. When the employee's husband called and raised questions about Mr. Kozinski's actions, he claimed it was all a mistake.

My question of you is: You have described a time when you were gone from the office and others were gone. Is that the same time, do you know, that Mr. James is referring to in his affidavit when this incident took place with Ms. Proctor being notified of her departure—this woman who was sick, ill, and elderly?

Mr. HOLLINGSWORTH. I do not know, sir.

Senator LEVIN. All right. Thank you.

The CHAIRMAN. Do you have any questions, Senator.

Senator HATCH. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you for your presence. You are excused. Our next witness is Lynn R. Collins, Deputy Special Counsel, Merit Systems Protection Board. Would you come around, please? Raise your hand to be sworn. Do you swear that the testimony you give will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. COLLINS. Yes, sir; I do.

The CHAIRMAN. Have a seat.

Mr. COLLINS. Thank you.

The CHAIRMAN. Do you care to make a 5-minute statement concerning Mr. Kozinski?

Mr. COLLINS. Yes.

The CHAIRMAN. The question that the committee has to decide is the qualifications of this man to be a judge. So, if you could, talk to that.

Mr. COLLINS. Yes, sir; I will be happy to.

TESTIMONY OF LYNN R. COLLINS, DEPUTY SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD, WASHINGTON, DC

Mr. COLLINS. Mr. Chairman, members of the committee, first I ought to advise the committee of my background so you will know from where I am speaking.

I have been an employee of the Office of the Special Counsel since that office was established in January 1979. In December of that year, I was appointed by the First Special Counsel, H. Patrick Swygert, to the Senior Executive Service position of Associate Special Counsel for Prosecution and I occupied that position in the office until February of this year when I assumed the responsibilities that I currently have.

Also, during that period and during the latter part of the administration of Acting Special Counsel Mary Eastwood, I was her acting deputy. I was the Associate Special Counsel for Prosecution during the time that Chief Judge Kozinski was the Special Counsel of the Merit Systems Protection Board and I had opportunity to observe him, his relationships with the staff, his work habits.

Also, I have some information that I would like to share with the committee about a matter that has been raised here; and that is the Hatch Act case involving one Guadalupe Saldana. There have been some allegations raised about Chief Judge Kozinski's handling of that case. I want to share some of my knowledge of that with you.

When Judge Kozinski came as Special Counsel to the Merit Systems Protection Board, he came from a background of being a law clerk to a judge on the Ninth Circuit Court of Appeals, from being a law clerk to the Chief Justice of the United States, from being an associate in a very prestigious and well-known Washington law firm, and he came with very high standards of what he expected of himself, of his supervisors, and of his staff in the way of legal research and legal writing.

Some of his criticisms of staff appeared, at that time to many, to be harsh.

He had some concerns as there had been public criticism by members of the Merit Systems Protection Board and others of the quality of the legal work being done by the staff of the Office of the Special Counsel. One of Judge Kozinski's goals was to improve the legal work product of the staff, to improve the supervisory review of that work product to the highest professional level possible.

The measures he took to point out problems, to point out shortcomings in that work may have seemed harsh to some. His management style may not have been my own personal management style.

But, in my view, it was necessary at that particular time in order to bring about the change that he felt was needed and that many others felt was needed in the work being done by the office.

As to his working relationships with staff, I was one of his senior staff members. He was always accessible to me. I never heard from any junior member of my staff that he was not accessible to them and, to my knowledge, he was always accessible to them.

His demanding style, his insistence on the highest standards of research and writing did cause some apprehensions among staff members, but those who demonstrated a willingness to work for his standards, to work toward his standards were applauded; those who did not demonstrate that willingness were subject to criticism.

With regard to the Hatch Act case, which has been cited before this committee, that case was under the continuing first-line supervision of a Mr. John Erck, who was the attorney responsible for Hatch Act matters in the Office of the Special Counsel and who was a member of my staff.

My own recollections as to the specifics of the processing of that case are not crisp. I have no specific recollection, for example, of personally approving the prosecution of that case; but that was not necessarily required as things were operating in the office at that time.

I do remember instructing Mr. Clark—and I know that Mr. Horace Clark has submitted a statement, or it has been submitted for him, to this committee—with regard to his involvement in that matter.

I did instruct Mr. Clark to prepare a draft complaint in that case. That was not unusual. I very often ask my attorneys to prepare draft complaints, even when no prosecutive determination has been made, so that I or anyone else who is making that prosecutive decision can see what that complaint would look like and what it is we are alleging that the employee did or did not do.

I have had occasion recently to review—as a matter of fact, yesterday—the relevant parts of that case file. Mr. Clark has stated in his statement to this committee that he told John Erck and told me, on several occasions, that the case should not be prosecuted.

I have no recollection of Mr. Clark ever making any such statements to me. To the contrary, and as Senator Hatch has pointed out, the memoranda which are now before this committee indicate that Mr. Clark was one of the investigators on the Saldana matter.

He was, in part, responsible for the preparation of a very brief investigative report, which is the subject of one of those memoranda. He initialed that memorandum, if I recall correctly, and concluded that memorandum with his opinion that it appeared to him that Mr. Saldana had, in fact, engaged in a violation of the Hatch Act, contrary to the denials which the office had received from Mr. Saldana and one or two other people.

Then there was the subsequent memorandum, also mentioned and presented by Senator Hatch, where he—that is, Mr. Clark—again talked about a legal question as to the admissibility of copies of newspaper articles as opposed to originals, and concluded, and I'm quoting:

"Although the Star and Journal articles may not ultimately prove crucial to the case in light of the * * *," and I have deleted the names of organizations and people here, "* * * press release and the signed statement of * * *" a particular witness, "* * * they would, nonetheless, bolster our position at trial."

In neither of those documents nor in any other note, nor any document in the case file in the Saldana matter did Mr. Clark ever note his objection or his reservations about the prosecution or trial of that case.

Senator HATCH. Could I interrupt you on that point?

Mr. COLLINS. Yes.

Senator HATCH. Let's put that document into the record, also. It's the one from Horace B. Clark dated April 5, 1982, to John R. Erck. Is that correct? I believe that is what it is.

Mr. COLLINS. How is it styled, Senator?

Senator HATCH. It has "Re: *Special Counsel* v. *Guadalupe Saldana,* prefiling * * *"——

Mr. COLLINS. "Prefiling status"?

Senator HATCH. It does have that sentence at the end, "Although the Star and Journal articles may * * *".

Mr. COLLINS. Yes.

Senator HATCH. All right.

Mr. COLLINS. That is the memorandum referred to.

Senator HATCH. Mr. Chairman, could we put that in the record at this point?

The CHAIRMAN. Without objection, so ordered.

[Affidavit follows:]

AFFIDAVIT OF HORACE CLARK

Silver Spring
~~CITY OF WASHINGTON~~)
Montgomery County) ss:
~~DISTRICT OF COLUMBIA~~)
Maryland

I, HORACE G. CLARK, being duly sworn, depose and state:

1. I am 34 years of age and reside at 2213 Georgian Way, Wheaton, Maryland. From around May 1981 through September 1984 I was employed as an attorney at the Office of the Special Counsel (OSC) of the Merit Systems Protection Board (MSPB). Since that time I have been employed as an attorney at the Department of the Interior. My current grade is GS-12.

2. This affidavit supplements my responses to a survey on the accuracy of Mr. Alex Kozinski's testimony to the Senate Judiciary Committee in connection with his nomination to the Ninth Circuit Court of Appeals. My responses are attached as Exhibit 1. In general, I found Mr. Kozinski's testimony to be inaccurate for subjects about which I am knowledgeable. In some instances, however, I will provide more detailed responses based on a review of my records and further thought.

3. I served as the prosecuting attorney in the Saldana case, in which the OSC filed a Hatch Act complaint against a Mexican-American employee for allegedly endorsing President Carter for reelection. The Administrative Law Judge (ALJ) dismissed the complaint after presentation of the OSC's case and awarded attorney fees to the defendant, a sanction which was later overturned by the U.S. Court of Appeals for the Federal Circuit. The ALJ held that the OSC was prosecuting the case

without "any" evidence. His order and opinion is attached as Exhibit 2. Although I had done my best to prosecute the complaint, I agreed with his conclusion. It was the weakest case at the Office, in my professional experience of over four years at the OSC. I served on the case in protest, after repeatedly advising my supervisors not to pursue the complaint due to the lack of persuasive evidence, the amount of time that has elapsed between the alleged offense (March 24, 1980) and receipt of the information by the Special Counsel's office (January 1981) and the even greater lapse of time between the alleged offense and the filing of the complaint. As it turned out the complaint was not filed until July 1982, approximately 27 months after the alleged offense occurred. Much of my disclosure in this statement concerns inaccuracies in Mr. Kozinski's testimony on the Saldana case.

4. Mr. Kozinski testified that the Saldana investigation was undertaken routinely by the Office staff. Even that was misleading. The Office had received information about Saldana's alleged endorsement in January 1981. There was a serious problem from the start that the case was stale due to the passage of time; a weakness that hampered our efforts and which I pointed out repeatedly.

5. Mr. Kozinski further testified that he authorized filing a complaint based on a staff recommendation. He failed to point out, however, that the original staff recommendation was to close the case. On October 9, 1981 Ms. Dorothy Springfield, the investigator assigned to Saldana, recommended that "this office

Øgj

take no further action on the allegations raised." Ms. Springfield's recommendation was concurred in by her supervisor, Elliot Davis. Her memorandum is enclosed as Exhibit 3.

6. In December 1981 Mr. Jessie James assigned me to review the case again. After reviewing the file, which contained no direct evidence of illegality, I recommended keeping the case closed. Ms. Springfield, who also had participated in the renewed investigation, agreed with this conclusion. Mr. James concurred as well. Nevertheless, in January 1982 Mr. Lynn Collins assigned me to prepare a draft complaint. Shortly before, I had started to brief John Erck on the lack of persuasive evidence, but after appoximately one minute into the briefing he interrupted to reassure me that "we've got enough." I responded that I wanted to explain that we had serious weaknesses with the case, but Mr. Erck did not appear to listen and repeated that there was "enough." I was to hear that word used frequently and without explanation in connection with this case over the next six months. To my knowledge, Saldana is the only case where an investigator's and supervisor's recommendations to close a case were overruled and it was filed anyway.

7. Although I prepared the draft complaint as assigned, it was not filed until July. During that period my draft was updated repeatedly, with no significant changes to the workproduct except the date. This long delay in acting on a completed workproduct also was not routineand in my opinion, gave further reason for not pursuing the case.

8. During the delays on Saldana, I repeatedly warned my

Hge

Vg

supervisors, Mr. John Erck and Mr. Mr. Lynn Collins, that the case should not be pursued due to the lack of persuasive evidence and staleness. I recall warning Messrs. Erck and Collins on at least two occasions each that we should not file a complaint. I was quite frank. I stated that there were serious weaknesses, that I did not think the case was going to fly and that I really did not think we should file the complaint. On each occasion I received the same response: there was "enough." I felt so strongly about this point that even in a formal prosecutive memorandum to summarize our position, I carefully avoided language indicating that we could make a case for sufficiency of the evidence.

9. I believed that if we were going to pursue the case we should have some direct evidence of political activity, so Ms. Springfield and I attempted to obtain from televsion networks the tape of the event where Saldana allegedly had endorsed President Carter's reelection. The only possibility to obtain the tape was from CBS, which would have charged the Special Counsel's office $280. Mr. Collins and Mr. Erck each told me that it would not be necessary to purchase the tape, because we had "enough" to go forward. After the case later was dismissed, Mr. Collins told me that he had known nothing about the CBS tape.

10. Mr. Kozinski also has testified that there "was certainly never any implication that party affiliation or anything of that sort played a role in the decisionmaking process [for Hatch Act prosecutions]." That statement, in my opinion, is absolutely false with respect to the Saldana case. Immediately after reviewing the file I came to see Mr. James and informed him

Vgc

Hgc

that I had concerns about why Mr. Kozinski was going after Saldana. As I recall, I exclaimed, "Jessie, I don't believe this. It's a joke. Does this have anything to do with party affiliation?" He responded by advising me to close the door and indicated that he shared similar concerns. Mr. James resigned from the OSC soon after, but I continued to advise Messrs. Erck and Collins throughout the spring that I was concerned the Office would be attacked for engaging in political harassment through a partisan prosecution. This was the third major reason I advised that litigation would be unwise, along with staleness and lack of direct evidence.

11. Mr. Kozinski testified that his only involvement with Saldana was to authorize filing the complaint. That statement, in my opinion, also is inaccurate. There is no way that it can be seriously contended that Mr. Kozinski was unaware of the weaknesses in Saldana. There was absolutely no support for filing this case, except from staff members who functioned as the mouthpieces for Mr. Kozinski's policies. Although I did not discuss the case directly with Mr. Kozinski, the policy in the Prosecution Division at the time, as itt had always been, was for the chief of the division (Collins) to brief the Special Counsel, and for the Special Counsel to approve the filing of any complaint, be it for disciplinary or corrective action. Unlike other cases, Mr. Collins was unwilling to discuss this one with me freely. It was clear to me that he was a buffer, not a decisionmaker on the matter. Similarly, it appeared obvious that the decision already had been made for Mr. Erck in January when I

Hgc

Hgc

tried to brief him about the lack of persuasive evidence, because he did not wait for me to get to the facts before interjecting that there was "enough."

12. In early February 1983 I received more direct confirmation of the obvious -- that Mr. Kozinski had kept the case alive for a prolonged period and made the decision to file the complaint in spite of the staff's opposition. I discussed Saldana with Mr. Collins, because I had heard that Mr. O'Connor reportedly was upset with the results of the case, and gradually I was losing my responsibilities at the Office. I asked Collins if it were due to Saldana. Mr. Collins responded, "No, I took responsibility for that and got my ass chewed out by O'Connor." I added, "Lynn, I told you on two occasions that case should never have been filed." He responded, "Yeah, and I so advised Alex."

13. I am informed that Mr. O'Connor testified to the Senate Judiciary Committee in July that he had reviewed a number of OSC cases from Mr. Kozinski's tenure and did not find any problems with them. I wonder why he did not discuss his assessment of the Saldana complaint. On January 10, 1983 Mr. Lawrence Shearer, who had been detailed to the Special Counsel from the MSPB, informed me that I was being removed as lead attorney in another case, because O'Connor was "upset" and "pissed off" about Saldana, although Shearer assured me that he and Lynn Collins both had explained to O'Connor that the results were not my fault, that there had been nothing I could do to avoid the result and that it could not be attributed to me. During the meeting I recounted to Mr. Shearer the history of opposition to this

Hgc

Agc

prosecution from Dorothy Springfield, Jessie James and myself. A memorandum to the file that I prepared that same day, January 10, 1983, is enclosed as Exhibit 3. Despite this explanation, my duties at the Office continued to deteriorate. I lost my office and was relocated to sit in a corner. It appears to me that Mr. O'Connor exercised a double standard of accountability. I too had been upset, at being forced to prosecute the Saldana case despite my warnings that we did not have any direct supporting evidence.

14. Mr. Kozinski testified that he pushed and pushed for the OSC to do more for federal employees and was frustrated by a lack of good cases. He insisted, "I brought everything I had." This statement is as inaccurate as the testimony about Saldana. An example from my own experience was the case of Sandy Padilla. Ms. Padilla was a federal employee removed from her career position, reassigned to a Schedule C job and then dismissed. After the investigation was completed, I prepared a corrective action letter to the head of the agency under 5 U.S.C. 1206(c)(1), at the direction of Mr. Shigeki Sugiyama. A copy of the letter is enclosed as Exhibit 4, along with Mr. Sugiyama's pointed comments about the delays in our action and the benefits that we could achieve. Although Sugiyama told me that the corrective action request should be sent and that he had informed Kozinski, to my knowledge nothing ever happened. See Mr. Sugiyama's comments on my June 15, 1983 performance appraisal, attached as Exhibit 5. The case simply died. Although I was the lead attorney to handle the work, I have no idea why we did not

Agc

Hgc

follow through. I received no explanation. This was true of many promising cases and assignments that were begun during Mr. Kozinski's tenure.

15. I further believe that Mr. Kozinski's testimony about the lack of good cases was inaccurate, because we were not assigned enough work to stay busy even reviewing complaints, despite the constant demand by federal employees for help from the Special Counsel. We had to fill out computerized time sheets accounting for every fifteen minutes of our time, but one of the most difficult challenges that I faced was figuring out how to justify my time in light of the lack of assignments. I resorted to repeating my work on the same project, just so that I would be able to fill out the form fully. Other employees told me that they had the same problem.

16. Mr. Kozinski also testified that he "initiated" a program to monitor MSPB appeals for possible intervention by the Special Counsel. He added that this step was taken "to make sure that if intervention by the Special Counsel was required, that we would be there to serve." Those statements were inaccurate on two grounds. First, this had been done by his predecessor Ms. Eastwood. Second, we did not follow through to actually conduct the interventions, even when we again had "good" cases. An example from my own experience in enclosed as Exhibit 6. In this decision, Lacy B. Ward and Renea A. Webb v. U.S. Consumer Product Safety Commission, the MSPB Presiding Official clearly erred by holding that the requirement that job references must be based on personal knowledge only applied to references from members of Congress. The holding flatly contradicted the legislative

Hgc

HGC

history and would have created a huge loophole, by exempting all members of the Executive branch from one of the prohibited personnel practices. 5 U.S.C. 2302(b)(2). On May 17, 1982 I submitted my analysis on the holding to Collins. I never heard anything more about the case, in which the Special Counsel did not intervene.

I have read the above nine page affidavit and it is true, accurate and complete to the best of my knowledge and belief.

Horace G. Clark

Horace G. Clark

19th Oct 85

Kenneth F. Taylor

7-1-86

HGC

EXHIBIT 1

SURVEY OF OFFICE OF SPECIAL COUNSEL PERSONNEL

I. BACKGROUND INFORMATION

1. Name HORACE G. CLARK
2. Address 2213 Georgian Way, Apt. No. 33
WHEATON, MARYLAND 20902
3. Phone (301) 946-2466 (H); (202) 343-6346/2510 (W)
4. Confidentiality:

a. May we release your survey answers to the Senate Judiciary Committee? (circle one)

[✓ yes] no

b. May we release your name to members of the Senate Judiciary Committee?

[✓ yes] no

c. May we release your name to the press?

[✓ yes.] no

II. OSC SUCCESSES

A. Written testimony (Page numbers refer to uncorrected transcript off Mr. Kozinski's testimony at Senate Judiary Committee.)

Campaign against gag orders

1) p. 66 -- "There was a vigorous and well-publicized campaign to promote the First Amendment rights of Federal Employees. The Office of Special Counsel under my direction took bold steps to fight gag orders issued by Agencies, orders which prohibited employees from communicating with Congress, the Press, or with persons outside the Agency. I will present to the Committee, for its review, four case histories, well documented, not only within the files of the Special Counsel but also within the press, where the actions of the Special Counsel caused agencies to rescind unlawful and unconstitutional gag orders."

accurate inaccurate [✓ unknown]

Comments: In general, I have no first-hand knowledge of the truth of this statement, except that I know for a fact that any campaign to promote First Amendment rights was not well-publicized in the office

Outreach -- general

2) pp. 75-6 -- "I would note, however, from what I can reconstruct, that there were at least 50 different public outreach activities during my tenure as Special Counsel.

"I, myself, appeared on a panel discussion in December of 1981 on whistleblowers sponsored by the National Academy of Public Administration. And, without going through the details, a number of high-ranking officials in the central office, including hte Deputy, the Chief of Investigation, the Chief of the Case Control Branch all participated in public outreach activities that spanned such agencies as Organization of Federally Employed Women, BIG, Blacks in Government, AFGE Conference and the like."

accurate   inaccurate   [✓ unknown]

Comments: although I was in the office, I was not aware
– of these public outreach activities

Outreach -- field offices

3) pp. 75-6 -- "I am able to say that the same (outreach) activity took place in my field offices. By sheer happenstance I happened to have found a memoranda from two of my field offices that show a large number of public outreach activities and I would like to present those for the record, to be reviewed by the Committee.

"They show that, for example, in the southern region, there was attendance by our staff and a publication of activities by our staff of our functions at AFGE meetings, of OPM seminars at IMAGE state conventions and so on. We were very active in this area."

accurate   inaccurate   [✓ unknown]

Comments: Same as #2 above

Outreach -- headquarters review of MSPB aliens

4) p. 66 -- "There was significant outreach effort to bring the Special Counsel to attention to those whom it was designed to serve. While I was Special Counsel, I initiated and this was in November of 1981, a program of monitoring Merit System Protection Board appeals for possible intervention by the Special Counsel's Office. I tender to the Committee, my memorandum of November 19, 1981, to Assistant Special Counsel and Field Office Chiefs, advising them to consider monitoring of MSPB appeals to be an important area for development of the Civil Service Law and instructing them to review each and every case coming in to an MSPB field office to make sure that if intervention by the

Special Counsel was required, that we would be there to serve."

accurate [✓ inaccurate] unknown

Comments:

Sexual harassment

5) p. 67 -- "We engaged in a new policy of combatting sexual harassment, in the workplace. On January 22, 1982 I circulated a memo to all investigators stating that sexual harassment was a very serious problem in the workplace, and it is one that we took incredibly seriously in in the central office of the Special Counsel and requesting that no cases, making allegations for sexual harassment be closed, unless and until special approval was received by the Assistant Special Counsel for investigation or by somebody designated within. We wanted to make sure there were no sexual harassment cases that somehow fell through the cracks and not being handled by our staff. That was in November or January 22, 1982 memorandum."

accurate inaccurate [✓ unknown]

Comments:

Promoting settlements

6) p. 67 -- "Now, we had an increased emphasis on resolving cases through settlement rather through litigation. We felt that that was an important step in saving resources and making sure that employees were protected."

accurate inaccurate [✓ unknown]

Comments:

Success in achieving settlements

7) p. 114 -- "The question was asked, Kozinski may have tried hard but what did he have to show for his efforts? Ask the people who dealt with him. Apparently the witness were not aware of the fact that we had a consistent program of trying to settle cases within the agency without litigation, within publicity. Going through my file, incomplete though they are, I found that the January 4, 1982, memo from my southern region listing no fewer than 30 cases that had been resolved to the satisfaction of the emloyee without the need for litigtion. That is one sample in one region, one regional office. I have no idea how it happened to be ascribed in my file."

accurate inaccurate [✓ unknown]

Comments:

Signatures by agency chiefs for whistleblowing reports

8) pp. 67-8 -- "During my tenure, the Special Counsel's Office . . . tightened greatly the rules for response to Special Counsel inquiries under Section 1206(b) by agencies of acquired (sic) agency head, be it the Secretary of Defense, the head of SBA, to sign those reports himself. This had not been clear before and by regulation instituted under my direction and finalized, that took place."

accurate [✓ inaccurate] unknown

Comments: See attached

Gingell's case

9) p. 72 -- "Now, Mr. Tobias also does not seem to be aware of some of the other very well documented cases where we intervened on behalf of the Merit System, for example, there was a well publicized case by the name of Gingells (sic) very early in my tenure.

"It involved the Department of Interior and the claim that Mr. Gingells was removed because he was a Democrat. And in that case the Special Counsel intervened, and with a great deal of publicity, I am giving the Committee copies of those records, got Mr. Gingells his job back. Shortly after the Special Counsel's Office intervened, the agency caved in and settled the case, and gave Mr. Gingells his job back."

accurate inaccurate [✓ unknown]

Comments:

B. Written testimony -- none relevant

III. STATEMENTS OF GENERAL OSC POLICY

A. Written testimony

Giving complainants the benefit of the doubt

10) pp. 68-9 -- "Now, perhaps the most important step, important

single step, that I took as Special Counsel in giving directions to staff was in a memorandum on how to review allegations in complaints. Causing or directing employees, investigators to look at complaints very thoroughly and not to leave any possibilities of a prohibited personnel practice uninvestigated. Now, this memorandum is important and I would like to quote a very brief part of it into the record, because it sets the tone for what was my administration of the Special Counsel and what I repeated orally time and again. But here is the quote, this is from a memoradnum of May 11, 1982 to all investigators. 'Unless the complaint reveals that the matter is outside our authority, for example a Postal Service employee, give the Complainant the benefit of the doubt in the initial review, with an eye to finding a basis of action, rather than closing it out. Also remember that the Complaint is only a starting point for your inquiry. As Personnelists you may detect Merit System abuses of which the Complainant is not aware. Always consider the possibility of disciplinary action even though corrective action may not be possible. Be expansive in your view of what matters should be submitted to discipline. If you see a wrongdoing, i.e., any tampering with the Merit System, discuss the possibility of a disciplinary action with your supervisor, even if our jurisdiction is questionable.'

"That was the tone I set for the Office, throughout my tenture (sic). That was the tone that the memorandum and all office communications reflect."

accurate [✓ inaccurate] unkonwn

Comments: See attached

B. Written testimony (Where applicable, Senator Simon's questions are identified by number and underlined. The page reference of the question and answer precedes each passage.)

Investigations -- involvement with changes

11) pp. 7-8 -- "What was the typical investigatory procedure at the OSC when you were there? How was it altered from the procedure before you were there?"

"During my tenure, the office was in the midst of reevaluating and revising investigation procedures, case file maintenance and other processes under the guidance of advisers from the FBI and other investigatory agencies. Since I am not an investigator by profession, I was not directly involved in this effort. My instructions were to turn the much criticized investigation staff into a professional and effective operation to carry out OSC's statutory mission."

accurate [✓ inaccurate] unknown

See attached

Comments:

Investigations -- follow-up with complainant

12) p.6 -- "In all cases where the complaint set forth allegations within the Special Counsel's jurisdiction, or if jurisdiction was unclear, staff was instructed to conduct an investigation by telephone or on site."

[✓ accurate] inaccurate unknown

Comments: However, this had been the standard procedure before

Evaluation of complaints

13) p. 6 -- "My instructions on this point are set forth in my memorandum to all investigators of May 11, 1982 (a copy of which I presented to the Committee at last week's hearing):

(1) Try to understand precisely why the complainant believes he has been wronged. If details appear to be missing, ask yourself whether there are any circumstances under which the missing details might make the complaint viable. If so, note what those circumstances might be.

(2) On the basis of your notes, frame questions which will probe for the missing information without suggesting particular answers. Then call the complainant and talk to him informally, asking those questions as well as any follow-up questions that seem appropriate.

(3) If the inquiry reveals a prohibited personnel practice or other basis for corrective action, proceed with the investigation, subject to instructions from your supervisor. Note that corrective action may or may not give the complainant precisely what he wants. (For example, if we establish that procedures for a merit promotion were improper, we might be able to reverse the promotion but could not assure the complainant that he would then be selected for the position.)

(4) Always consider the possibility of disciplinary action even though corrective action may not be possible. Remember, if a prohibited personnel practice cannot be established, a violation of any other civil service law, rule or regulation may still be a basis for discipline. Be expansive in your view of what matters should be subject to discipline. If you see wrongdoing, i.e., any tampering with the merit system, discuss the possibility of disciplinary action with your supervisor even if our jurisdiction is questionable."

accurate inaccurate [✓ unknown]

Comments: See also comments to #10

Coaching management

14) pp. 9-10 -- "Did you ever, in an investigation, tell an agency or its representatives to go back and revise their comments? Did you even inform an agency that it should consult an attorney before saying anything further to you? Do you believe that such actions were proper?"

"I have no recollection of any cases involving such interactions. Whether it would have been proper for me to do so would depend entirely upon what I would have said, and the context of those statemens. I would note that I always did what I thought was proper, in light of my responsibility as a government prosecutor."

accurate inaccurate [✓ unknown]

Comments:

Closing cases

15) p. 6 -- "How often did you close cases without any investigation?"

"My policy was to close cases without investigation only if the complaint alleged a matter not within the Special Counsel's jurisdiction. I do not have records as to the number that were so closed. I understand that that policy had been in effect before I got there and continued after I left."

accurate [✓ inaccurate] unknown

Comments: – a number of complaints were closed which did allege matters within the Special Counsel's jurisdiction

Closeout letters to complainants

16) p. 3 -- "My standing instructions to staff were that there were to be no routine letters, but that each letter was to respond fully and fairly to the allegations raised by the complainant. The following is the guidance on this point in my memorandum to investigators of May 11, 1982, a complete copy of which I provided to the Committee at last week's hearing:

"Your closeout letter should contain enough information so the complainant will know that someone has examined and understood his claim. Simply reciting some formula such as 'we have reviewed your allegation and it does not disclose any information within our investigative authority' is insufficient.

"Remember, the idea behind writing tersely and succinctly is to avoid obscurity. Letters are communications between us and the complainant, and they should convey some information relevant to his claim. While the letter need not dispose of every single factual matter raised, it would contain enough to let the complainant know that you have read what he has written, have understood the gist of his allegation and that there is a reason we cannot proceed. Where several serious legal issues are raised, you should generally dispose of each of them. If you have spoken to the complainant, mention the coversation, as well as any other inquiries you have made. Please refer to Jim Sugiyama's memorandum of April 9, 1982, for further guidance on case closure letters.

"I know that every case is different and complainants vary greatly in their intelligence, persistence and communicative skills. These suggestions should therefore not be viewed as ironclad rules. (I know many of you are already doing many of these things.) Do, however, remember that you are dealing with another person who, justifiably or not, believes he has been wronged. Approach each case with sympathy for that person and with an understanding that you may have to go out of your way to articulate his claim or to explain to him why he has none."

[✓ accurate] inaccurate unknown

Comments: However, the problem was closing cases without investigating, even when they contained matters within the Special Counsel's jurisdiction

Ability to answer inquiry on results of whistleblowing report evaluations

17) pp. 6-7 -- "Had you ever used your statutory authority to say the report of an agency investigation of a reprised [sic] allegations was inadequate?"

"Allegations of reprisal for whistleblowing are within the primary jurisdiction of OSC and I do not recall any case where such investigation was conducted by the agency or a report thereof was received by the Special Counsel. To the extent that the question refers to substantive whistleblowing allegations, I have no recollection on the point and no records on which to base a response."

accurate inaccurate [✓ unknown]

Comments:

Evaluation criteria for whistleblowing reports

18) p. 7 -- "What was your criteria for deeming an agency's investigation report reasonable?"

"Review of agency investigations of substantive whistleblowing allegations were routinely handled by what was referred to as the 'whistleblower' unit in the investigation division. Handling and review of those investigations were conducted by career staff and, as best as I recall, pursuant to the same general criteria that existed at the time of my appointment."

accurate inaccurate [✓ unknown]

Comments:

IV. Resonse to Criticisms -- Staff Relations

A. Oral testimony

Working relationship with staff

19) pp. 77-8 -- "Well, Mr. Chairman, I believe that during my tenure, I had a very fine working relationship with most of the employees in the Agency. As I stated at the outset, there were problems. There were some problem employees and as the Chief Administrative Officer of the Office, I felt that its resources were limited and those who could not or would not perform, would not be entitled to stay on the Federal payroll.

"Now, one of the problems most frequently mentioned by employees when I talked to them, and I talked to each and every one of them when I came to the Office, was that somebody else down the hall, and it was a very limited number of people simply were not pulling their weight, in such a small office . . . .

"Now, there were problem employees and I believe that we solved those problems and for the most part, I believe that I had an excellent working relationship with my staff."

accurate [✓ inaccurate] unknown

Comments:

See attached

Postive reinforcement policy

20) p. 78 -- "Now, during my tenure I promoted and rewarded a very large number of employees. And I again, by sheer luck, I have run across some memos that documented this.

"During May and June, I had 50 awards and promotions and the office was 86 people. I do not think that I was skimpy with treating good staff well. I also happen to have run across a memorandum I wrote to supervisors in March of 1982, chastizing them for not giving enought outstanding ratings. There was kind of a tendency that if employees are doing okay, you just give them an average rating. And I said, giving outstanding employees an outstanding rating is just as important as giving a bad rating to bad employees, that is in a memorandum of March 26, 1982. I said, you evaluate a performance and if somebody does real well, you be sure that they hear about it and more important, that I hear about it."

accurate [✓ inaccurate] unknown

Comments: see comments

Budget cuts as explanation for turnover

21) pp. 78-9 -- "Now, as far as turnover, there was turnover but I do not believe that it was excessive in light of the budget problems that we suffered during my tenure. The fact that we suffered a 14% cut in our budget, a crippling 14% cut in our budget and brought us to the precipice of a furlough."

accurate [✓ inacurate] unknown

Comments: The turnover in personnel should not be attributed to the budget, but to Mr. Kozinski's actions and demeaning + demoralizing tactics

B. Written testimony

22) p. 4 -- "How many people left the OSC after you came and what is the general reason why? How many were attorneys? How many left voluntarily? How many were career bureaucrats? Did these people have other jobs to go to?"

"It is impossible to answer this question precisely without access to the agency's official personnel records. Nevertheless, as best I can reconstruct, the situation is as follows: About 43 people left OSC during my tenure, of which approximately 11 were attorneys; about 15 people were hired during my tenure, of which approximately 6 were attorneys. Arrivals and departures include some employees who were hired for the summer or otherwise on a temporary basis.

"I cannot identify a 'general' reason why people left the office; different people left for different reasons. As best I can tell, these reasons fell into the following general categories:

a. Personal reasons not directly related to career goals (e.g., spouse transferred to a different location);

b. desire for career advancement or to go into a different area of practice;

c. removal or departure in order to avoid adverse action;

d. termination of summer or other temporary employment;

e. desire to return to school;

f. disability;

g. retirement; and

h. disagreement or discomfort with office policies.

"It is difficult to tell exactly what reason applied to what departure and there are probably a number of employees who left for more than one reason.

"I, my deputy and our secretaries were the only non-career employees during my tenure. All other hires and departures were career service employees.

"It is my impression that most people who left had other jobs (or other activities such as school) to go to. I made every effort to give employees departing involuntarily reasonable time to find a new job. I am not certain that all those who left had another job to go to, but I believe most did."

accurate [✓ inaccurate] unknown

Comments: Not So - ~~[illegible]~~, most people left because of Mr. Kozinski

23) p. 11 -- "We've had indications from a number of people that you:

constantly harassed senior staff and office staff alike;

made employees cry;

threatened attorneys with downgrading;

made attorneys rewrite briefs many many times when they had very little time;

placed a gag order on a public relations officer;

routinely wrote insulting, biting remarks on briefs you found to be unacceptable.

"Is this proper behavior for a head of an agency? For a U.S. circuit court judge with life tenure?"

"As I have noted, I believe that I performed the job of Special Counsel in a scrupulous, effective and conscientious manner. I tried to be fair to employees and to treat them with the respect they deserved. Nevertheless, there were some employees who would not or could not perform adequately and dealing with such problem employees is never pleasant. . . ."

accurate [✓ inaccurate] unknown

Comments: The actions described above & attributed to Mr. Kozinski is true; his response is not

V. RESPONSE TO CRITICISMS -- POLICY SHIFTS

A. Oral testimony

Lack of good cases neutralized pro-employee policy

24) p. 86 -- "I can repeat again and again, and I hope that the meager records that I brought with me, that I pulled from my management files show that every waking minute that I was Special Counsel that I pushed and pushed and I pushed for employees, for staff to do their job conscientiously according to the law. There is no one that has ever heard me say or imply anything different.

"Now, the results that come out at the other end are very difficult to judge. Cases come along that are not asked for but at randum. . . . I can only represent to you that we brought every case that we had. I did not want to bring bad cases. I did not want to bring cases that would be burdensome to the employee, the agency, and would make bad law. Every case that I thought could be brought, was brought. No one has suggested different. They said that there were not enough cases, again, I brought everything that I had."

accurate [✓ inaccurate] unknown

Comments: As I recall, Mr. Kozinski did not file a disciplinary action complaint until late December of 1981, after he'd been special counsel for approximately 6 mos. The office simply did not review complaints with an eye toward bringing disciplinary/corrective action. →

a case involving *Sandy Padilla* *v. Hud* is an example — ~~[illegible]~~. That was never filed. I am certain that I have a copy of the final draft, along w/ Jim Sogigma's comments expressing his puzzlement as to why the matter was never filed

Policy to favor whistleblowers

25) p. 83 -- "Let me answer the broader question, the suggestion that I did not protect whistleblowers.

"It is not true. We did the very, very best we could with the resources that we had. Directions that I gave to staff consistently said, bend over backward to try to find a basis for protection, a basis for action, a basis for discipline."

p. 84 -- "I do not want to make too much out of one case, because we are all going to make some misjudgments, but the general allegation that you were not responsive to whistleblowers and protected them, that allegation is not accurate?"

"I deny that allegation 100%. We did everything we could with the tools at our disposal.

"If we failed to protect any whistlelbower, I must take responsibility for it, because I was the head of the Office. I did not do it knowingly and I did not do it willfully. It was certainly not a policy of the Office."

accurate [✓ inaccurate] unknown

Comments: The FCC record speaks for itself. This single document is an example of Mr. Kozinski's 'protecting' whistleblowers

Inability to respond to criticism of OSC record

26) pp. 69-70 -- "My records on many of these issues (criticisms), I have no access to these records, because OSC, Office of the Special Counsel files are personnel files, they are not open to me. So that, for example, Mr. Tobias makes claims about the number of cases filed, and so on, I have no basis for refuting it."

accurate inaccurate [✓ unknown]

Comments:

Definition of personnel action -- RIF's

27) pp. 72-4 -- "Now, Mr. Tobias' apparent unfamiliarity with practices in cases before the Special Counsel leads to an even more odd error in his testimony. For example, at page 6 he makes a statement, 'Mr. Kozinski stated the outrageous opinion that RIF's' and for the Committee's benefit, these are reductions in force, 'are not personnel actions and therefore they did not come within the jurisdiction of the Special Counsel.' . . .

"The fact of the matter is that I do not remember making such a statement, but if I did, it is absolutely correct as far as it goes. RIFs are not personnel actions and I do not know anybody who is knowledgeable in the area of personnel law who would claim that they are. Now, to be sure, RIF's then result, or can result or frequently do result in personnel actions which are transfers of employees or dismissals. Those are personnel actions, and in that case, the Special Counsel gets involved."

accurate inaccurate [✓ unknown]

Comments:

Hatch Act -- no policy changes

28) p. 74 -- "The Office of the Special Counsel is charged with two functions (with respect to the Hatch Act). To give advisory opinions in the Hatch Act area and it prosecutes violations of the Hatch Act. I made virtually no changes in the procedure of Hatch Act cases while I was Special Counsel. I tried to encourage staff to write advisory opinions that are clear and to the point. I tried to make sure that they were responsive to the inquiry."

accurate inaccurate [✓ unknown]

Comments:

Hatch Act -- impartiality

29) pp. 74-5 -- "As to (Hatch Act) prosecutions also made largely on staff recommendations and for the most part, for the greatest part, I defer to staff. A few occasions I said no, let us let this person go, it was inadvertant or what not. But every time there was a prosecution it was on the basis of staff recommendations. There was certainly never any implication that party affiliation or anything of that sort played a role in the decisionmaking process."

accurate [✓ inaccurate] unknown

Comments: See attached

FCC Manual/Course as outreach for merit system

30) pp. 76-7 -- "Now, one of the activities that we were engaged in was a seminar for managers at the Federal Communications Commission and that seminar was designed to teach federal managers to stay within the law. The Office of Special Counsel like any law enforcement agency is not interested in finding

abusers. It is interested in making sure, that in fact, agency managers ~~those~~ whom it polices do what they are supposed to do under the law.

"It turns out that it is a complicated law and we did much to try to educate those who dealt with us."

Senator Grassley: "In response to that seminar, do you think that that was an appropriate use of office resources consistant with your mission as Special Counsel?"

"Absolutely, Mr. Chairman.

"It was one of a number of public outreach activities that one of perhaps 50 during the time that I was there, educating those who deal with the Merit System and it is an important function of the office, and unlike allegations made by others, anybody who has reviewed the seminar materials or was present at the seminars, will tell you that all we did was to tell what the law is. I was present at the beginning of the seminar, and what I said is, if you break the law, we will be after you. If you stay within the law, you are okay. Now that is what a law enforcement office is supposed to do, in my view."

accurate inaccurate [✓ unknown]

Comments: Except that I do not & did not think his action was appropriate. you don't tell a burglar how to avoid getting caught, especially if your duty is prevention of wrongdoing

B. Written testimony

31) p. 7 -- "Why did you authorize the mass closings of cases brought to your attention? Was it a policy of clearing desks or did these cases just not have merit? There was sudden lack of merit in cases in 1981 than there was in 1979 before your arrival."

"The [illegible]ial Counsel's Office had been subject to substantial criticism prior to my arrival for failing to process cases in [illegible]ely manner. The April 8, 1983, GAO Report (discussed more fully in the answer to Qustion No. 16 below) notes that my predecessor had instituted 'a push to reduce the inventory of older cases,' a policy which I reemphasized when I came into office. At the same time, I instructed staff that cases were to be reviewed on their merits. If any meritorious cases were closed out during my tenure (and I know of none), this would have been contrary to all directions I had given to staff."

accurate [✓ inaccurate] unknown

Comments: Even cases of merit were summarily closed

32) p. 9 -- "Did the attorneys in your division ever feel that certain cases that they would normally have investigated before your tenure were not being investigated in your tenure there?"

"Investigations were generally conducted by investigators, not attorneys. There may well have been different views among staff as to specific cases and issues; I encourage differences of opinion among my staff. In general, I believe that the effectve, competent OSC career staff approved of my running of the office. (See also answer to Question No. 34 below)."

accurate [✓ inaccurate] unknown

Comments: As an attorney who also investigated a number of cases, I felt a sense of uselessness when cases of merit were closed or recommendations for action were not followed

33) p. 1 -- "People who worked in the OSC claim that the mission of the office changed after you came on board. One former employee said that 'all of the staff felt that the office changed from an advocate for employees to one more concerned with office procedure and grammar.' And further, 'that is too bad because employees have nowhere else to turn.' How do you respond to this serious allegation that employees with legitimate complaints were being neglected?"

"I am firmly of the view that any office, particularly one charged with investigation and prosecution of cases, cannot perform its function unless its employees are able to communicate effectively and perform their functions in a professional manner. The resources I devoted to training personnel were, in my view, an investment in the future. At the same time, I emphasized the need to forge ahead with cases, doing the best job possible under the circumstances to carry out OSC's mission."

accurate [✓ inaccurate] unknown

Comments: I agree 100% with the comments attributed to the former employee. Mr. Kozinski did focus primarily on grammar, etc.

34) pp. 8-9 -- "A GAO study claims that the lack of investigation was due more to a specific policy directly issued by you to close pending cases than to any lack of funding? How do you respond?"

"Insofar as the report suggests that staff were instructed to close cases without adequate investigation, I categorically deny the allegation; my consistent guidance to staff on this point was entirely to the contrary."

accurate [✓ inaccurate] unknown

Comments:

VI. Response to Criticism -- Specific Cases

A. Oral testimony -- none relevant

B. Written testimony

35) pp. 1-2 -- "Do you recall the case of Guadalupe Saldana? Could you briefly describe it?

a. How did the judge rule in that case? Do you remember the specific language he used?

b. You directed this investigation? Under your jurisdiction?

c. Wasn't this the only case in which the judge awarded fees against the OSC for harassment?"

"b. The investigation was undertaken routinely by office staff. While I have no specific recollection, it is my impression that the inquiry was prompted by newspaper reports suggesting that Mr. Saldana had violated the Hatch Act. To the best of my recollection, my only involvement with the case was to authorize a complaint to be filed. This authorization was issued on the basis of a routine staff recommendation which indicated (as best I can recall) that there were newspaper reports, as well as the confirming affidavit of an eye witness, that the violation had occurred."

accurate [✓ inaccurate] unknown

Comments: See attached

36) p. 2 -- "Do you remember the case of Jay Thal, a mortgage service specialist of HUD? Can you give us the details in that case. How did you decide?

a. Do you recall the response letter to Thal indicating that the matter was one of 'personal disagreement with . . . involving a single family home' when in reality he was using that particular case to illustrate a general practice of HUD? Did you routinely refer to matters of reprisal allegations as 'personal disagreements'?

b. Did you order an agency investigation into the substantial disclosure pursuant to 5 U.S.C. section 1206(b)(3) or (b)(2) or (7)?

c. Did developments elsewhere prove Mr. Thal to be correct in his allegation later?"

"a. I have no recollection of the letter sent to Mr. Thal, I am unable to indeed such a letter was sent during my tenure at OSC. . . .

c. I am not aware of any other aspect of Mr. Thal's case, except as suggested in Senator Simon's question at last week's hearing."

accurate inaccurate [✓ unknown]

Comments:

37) pp. 3-4 -- "Do you recall the case of a coal mine safety inspector in West Virginia who alleged he was fired because he spoke to the press?

a. Did you allow the agency to return repeatedly to plead their case while not affording that same privilege to the complainant?

b. Did you ever advise the agency to revise their comment to you and your staff? Did you advise them to speak with a lawyer before they spoke with you again?

c. Did this agency ever imply to you that they fired this employee because he went to the press?"

"I remember that there was a case involving a mine safety inspector in West Virginia. I do not remember the name of the case or the allegations of the complainant or any other specifics about the case.

a. I have no recollection as to specific handling of the case. I would note that it was not uncommon to go back to both sides in a controversy to assure that they had an opportunity to rebut or explain issues raised during the investigation.

b. I have no recollection of ever having done so.

c. I have no recollection of any specifics concerning the case."

accurate inaccurate [✓ unknown]

Comments:

VII. CONCLUSIONS

38) On balance, do you believe that Mr. Kozinski attempted in good faith to implement the legislative intent of the Civil Service Reform Act to protect federal employees from prohibited personnel practices?

yes [✓ no] no opinion

Why, or why not? His actions speak to the contrary

39) On balance, do you believe that Mr. Kozinski succeeded in implementing the legislative intent to protect federal employees against prohibited personnel practices?

yes [✓ no] no opinion

Why, or why not? See # 38

40) Would you agree to testify before the Senate Judiciary Committee concerning Mr. Kozinski's nomination for the United States Court of Appeals?

[✓ yes/opposed] yes/in favor no no opinion

Why, or why not?

#8 I [redacted] being assigned the task of researching the issue of whether signing of reports under §1206(b) could be delegated or whether the reports must, as a matter of law, be signed only by the agency head. As I recall, Ms. [illegible] was the individual assigned the task. However, I, and I venture to guess, most of the agency personnel were never advised what decision was reached. [redacted]

#10 I am aware of the memo to which Mr. Kozinski referred, however, I don't believe that the terms of the memo was followed by him.

#11 I am not aware of what efforts Mr. Kozinski took to turn the investigation staff into a professional & effective operation. As I recall,
[redacted] of allegations virtually came to
his reign.

#4 - I [illegible]call that at some point during Mr. [illegible]zinski's tenure as Special Counsel that attorneys in the office were assigned the task of reviewing MSPB decisions for the purpose of possible intervention by the Special Counsel. However, it had always been my understanding that this had been the policy under Mary Eastwood before Mr. Kozinski.

I specifically recall being assigned the task of reviewing a decision by the MSPB involving the appeal of two employees of OSM. After reviewing the decision, I briefed Lynn Collins and recommended that OSC file a brief addressing ~~the~~ what I felt was an erroneous interpretation of a portion of the Civil Service statute; Ms. Collins agreed. The brief [redacted] reviewed and typed in final, filed. I believe I have a copy of it and will make every effort to submit it to GAO as soon as possible.

#19 Th[redacted] statement is NOT accurate! Mr. did not have a good relationship with most of the staff. His attitude and demeanor were totally at odds with what one would expect of any public official or human being. Except for a few, those of his choosing, the staff was antagonized and made to feel unwelcomed. While it is true that he did meet one-on-one with the staff [redacted] I'm not aware, and simply do not believe that information given him was that others in the office were not pulling their weight.

#20 I received a promotion under Mr. Kozinski. However, good employees who performed well were also forced to leave because of Mr. Kozinski's unreasonable actions and demeaning t[redacted] treatment of Beth Orr, Mary E Chin, Vince Fuller & Phil Hoff will attest to that.

#29 [redacted] case of Guadalupe Saldaña in an [redacted] of what I have reason to believe was motivated by party affiliation. I recall that the investigator, Dorothy Springfield had recommended to Elliott Davis, her supervisor, that no further action be taken; Davis concurred. At some later point I was ~~asked~~ told by Jessie James, my supervisor, to review the case. He told me that he would not give me his opinion [redacted] after I'd reviewed the case. After I'd [redacted] so, I went to James and ~~asked~~ simply asked that he be candid with me & tell me why the office was pursuing the allegation since: (1) the allegation (complaint) was several months after the alleged offense; (2) the evidence was very weak (especially since it was doubtful whether the complainant could produce any substantive info.); and (3) T[redacted] likely be a problem of ad- [redacted] of substantive evidence could be produced. I then asked James whether Saldaña's party affiliation had been a factor. James responded by telling me that he too, had problems with the case; that the decision had been made by (pointing in the direction of Kozinski's office); and that he had assig[redacted] to review the case because Kozinski did not want to rely on the decisions made by investigators. I was later to advise both John Eck and Lyman Collins that while there may have been a violation, assuming the allegation were true, the office would face problems in trying to prove the violation. I also specifically recall advising Collins and Eck that it would be a wise [redacted] decision to obtain the news tape from an affiliate (I believe it was CBS) and review it ~~to~~ before making the final decision of whether or not to file a complaint. Collins' response was that the office could not afford $780 for the tape, and that he believed there was sufficient evidence to prove a violation. Eck's response was that the tape was [redacted]y. I later advised Eck that we likely would have problems of admissibility of the newspaper accounts since we had no success in obtaining the entire papers and since a proffer for their admission likely would be met, successfully, with an objection of unreliability.

I [redacted]call again speaking with Collins ab weakness of the case in general. This conversation took place ~~in the summer~~ approximately one-two weeks before the complaint was filed. At the time, I was attending a course at D.U. university on the techniques of Trial Advocacy sponsored by the FCC or FTC, or in any event, another federal agency. I ~~did not~~ advised [redacted] Collins that we could anticipate argument by Soldano that Kozinski was abusing his authority in that the complaint was based solely his (Soldano's) party affiliation. Collins made no response to this statement, but as an aside stated that he had reviewed my draft of the complaint and that it likely would be filed later that week. The complaint [redacted] while I was attending the Trial Advocacy. I should also add that on October 13, 1983, ~~after~~ the day of the trial, but after ~~my~~ the case had been dismissed & I'd returned to the office, Collins met with me and Robert Meyer, then Deputy Special Counsel. Before Meyer arrived in the office, Collins first comments were: "Horace,

what [redacted] I hear about some tapes?"
"John mentioned something about some
tapes; why wasn't I informed of this?" or
words to that effect. He then asked
whether, in my opinion, the ALJ was cor-
rect in dismissing the case. I told him that
in my opinion he was, and that the
case should never had been brought
and that it was sad no one would
~~[illegible]~~ listen months earlier, and th[redacted]
it was even sadder that no one
authority wanted to accept responsibility
now!

#35 Mr. Kozinski is correct that the OSC
inquiry was prompted by newspaper reports
and an alleged eyewitness' account. However,
I do not believe that his only involvement
was authorizing the filing of the complaint.
[redacted] & Lynn Collins had been
that the ~~complaint~~ case should
be dropped.

Memorandum Office of the Special Counsel

EXHIBIT 2

Subject	Date
Administrative Close-out	5. 9 81

To Elliott H. Davis, Chief
Investigations Branch

From Dorothy J. Springfield
Investigator

On January 26, 1981, this office received a copy of a press release from Eduardo Terrones, Director, Office of Civil Rights, Environmental Protection Agency, (EPA). The press release alleged that Guadalupe Saldana, an employee of the EPA, endorsed President Jimmy Carter for re-election. The media showed Saldana with the President at the time that he, according to the press endorsed Jimmy Carter.

Seperate interviews were held with the Director, Office of Civil Rights Eduardo Terrones, and the President of the National Counsel of Lraza, Rauel Yzaguirre. The following are summaries of those interviews.

Eduardo Terrones was interviewed on May 8, 1981. Mr. Terrones stated that he didn't know who made the press release in which Saldana was alleged to have endorsed President Carter for re-election. According to Terrones, the press release was submitted to his office from an anonymous source. He further stated that he did not see Saldana on television and has no factual evidence that Saldana endorsed President Carter for re-election.

Raul Yzaquirre was interviewed on May 12, 1981. Mr. Yzaquirre stated that he did not hear Saldana endorse President Carter for re-election. He saw Saldana and Ruben Bonilla, standing beside President Carter on television.

The television announcer said two hispanic leaders endorsed President Carter for re-election. According to Mr. Yzaquirre, Saldana did not verbally endorse President Carter. Ruben Bonella, did all the talking and endorsed President Carter on behalf of the league of United Latin American Citizens.

Louis Tellez' office prepared the press release. He refused to comment on Saldana's alleged endorsement of President Carter. Ed Torres, Director, of Hispanic Affairs during the Carter administration also refused to comment.

Recommend this office take no further action on the allegations raised.

EXHIBIT 3

OFFICE OF THE SPECIAL COUNSEL

Memorandum of Telephone ____ Conversation
Office ____ Conversation

____________________ Case Name

____________________ Case Number

DATE: January 10, 1983 TIME 11:05 A.M.

D.C./Field/Branch ____________________

CONVERSATION WITH: Larry Shearer and Stephen McHale

Telephone Number: ____________________ Call to ________; From ________; Returned ____

AGENCY ____________________

RE: Saldana and Spanton Cases

Today at approximately 11:02 A.M., I was called by Larry Shearer to meet with him in his office. At the time of the call Ken Barber and I were discussing Tuesburg. I told Barber that judging by Shearer's tone of voice the matter he wanted to discuss was serious and probably not pleasant. When I arrived in Shearer's office on the 8th floor, Shearer requested that I close the door. He started the conversation by informing me that he was taking me off the Spanton case so far as my being the sole or primary attorney assigned. He went on to explain that his reasons for doing so were based on O'Connors' statement that he was "upset" and "pissed off" with the outcome of Saldana and my handling of the case. He pointed out that he felt he had to be honest with me since he knew, as well as Collins, that what had occurred in Saldana was not my fault and could not have been avoided. He stated that even

Notes to Secretary:

1. File as is ________; Type up ________ Attorney/Investigator ____________________
2. Note additional pages ________
3. Distribute copies to ____________________

Form OSC-460
[illegible] 8/81

though both he and Collins had expressed their views to O'Connor that they had complete confidence in my ability and their perception that what had occurred in Saldana could not be attributed to me, he nonetheless did not believe Collins would be open and honest with me concerning the matter. He noted that O'Connor felt that more could have been done on my part in the case. In any event, he said it was decided that in light of Saldana, and since Spanton appeared from all indications to be developing into a sensitive case, a lead attorney would be assigned to the case. He noted that he informed O'Connor that I had spent an enormous amount of time on the case and that there was no one who was more familiar with the details as I, and that I should at least be allowed to remain on the case.

Shearer then informed me that I had been placed in a "rehabilitative" status by O'Connor, meaning that I had to more or less prove myself "all over again." He explained that he would do all that he could to "rehabilitate" me although in his view, and apparently Collins' as well, I needed none. He further explained that he is doing only what he had been instructed to do by O'Connor, but that he felt compelled to inform me what had actually led to his actions.

According to Shearer, I would work with Chip Terrell on Spanton and that Terrell would be the lead attorney. He advised that I not mention to Terrell the Saldana case or the reason he was assigned as the lead attorney in Spanton.

During the conversation Stephen McHale entered the office. He stated that he had some general questions about Saldana. I learned for the first time from McHale's comments that he alone, without any imput from me, was preparing Exceptions to the ALJ's recommended decision concerning attorney fees. McHale noted that upon his review of the recommended decision he was puzzled why the former Special Counsel had filed the complaint. Shearer then asked who had conducted the investigation and whether I had had any involvement besides the hearing. I informed him that Dorothy Springfield and I had conducted the investigation and had recommended that no action be taken. I went on to explain that Springfield had independently determined and recommended early on that no further action be taken on the case and that the her decisions and recommendations had been concurred in by her supervisor, a memorandum to that effect being in the file. I also explained that Springfield and I had reported our concerns about proceeding with the case to Jessie James and later to others in the office. I noted that it was James who had assigned me to the case eventhough he too had suggested that the case be closed. I pointed out that the final word that I received was from Collins that I prepare a disciplinary complaint. Shearer expressed his disbelief that the case had initially been recommended for closure, and more disbelief that a complaint was ever filed.

When McHale left the office Shearer asked him to inform Terrell that he wanted to meet with him in his office. When Terrell arrived, we were introduced, after which Shearer explained to him that he had been assigned to the Spanton case as the lead attorney. We then briefed Terrell on the case.

Horace D. Clark JAN 10 1993

EXHIBIT 4

OSC Form 99
Rev. 5/82

OFFICE OF THE SPECIAL
ROUTING SLIP

SPECIAL

Room 818

☐ Kozinski, Alex
☐ Salter, Donna M.

Room 816

☐ Barba, Thomas M.
☐ Bleecker, Kathryn A.
☐ Clark, Horace G.
☐ Collins, Lynn R.
☐ Don, Beth L.
☐ Eddy, Ralph B.
☐ Erck, John R.
☐ Galbreath, Carolyn E.
☐ Gerschaneck, Laura J.
☐ Hall, Mary F.
☐ Harrison, Anna C.
☐ Jones, Sarah V.
☐ Lewis, Henry D.
☑ Mayer, H. Robert
☐ McHale, Stephen J.
☐ Montgomery, Eve
☐ Sakach, Christine A.
☐ Sloan, Mary L.
☐ Stern, Robert H.
☐ Weir, Charles

Room 907

☐ Hemsley, Dena
☐ Kennedy, Ron

Room 918

☐ Caldwell, William E.
☐ Carlson, Walter
☐ Carrick, Patricia R.
☐ Edwards, Deborah
☐ Gaskins, Patricia A.
☐ Glover, M. Marie
☐ Hicks, Carlton
☐ Hollingsworth, J. Fred
☐ Owens, Vivian D.
☐ Womack, Alice R.

Room 916

☐ Barber, Ken E.
☐ Bays, Mary K.
☐ DiJulio, Donald J.
☐ Fletcher, Robin M.
☐ Hamer, Gary K.
☐ Jones, James A.
☐ Mauldin, Linda

Room 916

☐ Oskoui, Ellen M.
☐ Russell, Dolores C.
☐ Springfield, Dorothy J.
☐ Sugiyama, Shigeki J.
☐ Wilkins, Barbara O.

Field and Branch Offices

☐ Dribinsky, Leonard M. (Philadelphia)
☐ Rehberg, Allen W. (Atlanta)
☐ Winzer, P. J. (Dallas)
☐ Donoghue, Robin P. (San Francisco)
☐ Bigger, David (Los Angeles)
☐ Shea, William (Seattle)

☐ Circulate
☐ Your Information
☐ Please Handle
☐ New Case
☐ Note and Dispose Of
☐ Note and File
☐ Note and Return
☐ Take Action By ________

Draft Response ________
For Approval/Clearance 8/23
Approved For Proofing ________
Proofed Type in Final ________
For Your Signature ________
Retype ________ Retype ________
Signed For Proofing ________
Proofed in Final ________
Corrections ________
O.K. to Send ________

Remarks

I have been trying to get this corrective action letter done and out since last October. (Dick Toye had the case, following SF's on-site work, and never finished before leaving us.) I asked LRC to assign an attorney to draft letter report (in June) and Horace Clark did an excellent job. Then it fell through the cracks again.

Irv Kator, Padilla's attorney, told me Fri they had almost reached a settlement, but the deal has fallen through.

This letter may convince EEOC to comply with Bd's initial decision and not pursue their request for reconsideration still pending before the Bd.

Continued on Reverse [ ]

Date 8/23 From SJS

DRAFT

August 25, 1982

The Honorable Clarence Thomas
Chairman
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Re: OSC Case No. 10-1-00863

Dear Mr. Chairman:

The Office of the Special Counsel has conducted a thorough investigation into the circumstances surrounding the reassignment and removal of Sandy Padilla. Based on this investigation, I respectfully recommend that you order Padilla's restoration to the position of Supervisory Equal Opportunity Specialist, GS-160-14, Phoenix District Office, from which she was involuntarily reassigned. I have determined that the reassignment resulted in prohibited personnel practices and, therefore, make this recommendation under authority of 5 U.S.C. § 1206(c)(1)(A). Padilla's reassignment and subsequent removal were taken without sufficient basis and under circumstances which appear to have been for illegitimate reasons.

If the matter cannot be resolved satisfactorily within the time specified, I will be required to file with the Merit Systems Protection Board a request for corrective action pursuant to 5 U.S.C. § 1206(c)(1)(B). I note in this regard that in deciding Padilla's appeal of her removal, the San Francisco Regional Office of the Board reversed the Commission's action and ordered her restoration. Padilla v. EEOC, MSPB No. SF07528110845 (Sept. 29, 1981). However, Padilla's restoration has been held in abeyance pending the Board's consideration of the Commission's request for review of the initial decision. It is my earnest hope that you will accept my recommendations so that the case can be resolved without further formal proceedings.

INTRODUCTION

On February 20, 1981, OPM forwarded a copy of its investigative "Report on Conversion Practices at the Equal Employment Opportunity Commission (EEOC)" to the Office of the Special Counsel. OPM's investigation was conducted as a result of allegations that EEOC had improperly converted the appointments of several employees in the excepted service to appointments in the competitive service or to other "less vulnerable" positions in the excepted service.

Among the several cases cited in the report was that of Sandy Padilla, a former Schedule C employee who had been appointed from an OPM register to a permanent position in the competitive service in September 1980. It was alleged that in appointing Padilla, EEOC bypassed a number of more qualified applicants. Specifically, OPM was concerned that EEOC may not have provided bona fide consideration to Jack Camden, a veteran who was ranked higher than Padilla on the Certificate of Eligibles, and who may have been influenced to withdraw from competing for the position to the advantage of Padilla in violation of 5 U.S.C. § 2302(b)(4), (5)&(6), and Civil Service Rule 4.3 (5 C.F.R. § 4.3).

Based on its investigation, OPM ordered EEOC to provide a full report demonstrating that no attempts were made to influence Camden's withdrawal in order to advantage Padilla's candidacy. If EEOC could not demonstrate that no improprieties surrounded the selection, it was to offer the position to Camden and, if he accepted, to remove Padilla.

FACTS

1. On April 9, 1978, Padilla was appointed Special Assistant to the Executive Director of EEOC, a Schedule C position. While on detail to the Los Angeles Office in February 1980, she learned of the Supervisory Equal Opportunity Specialist position in the Phoenix

District Office from a posted internal vacancy announcement. While still on detail, she applied for the position under merit staffing procedures. Padilla's name was later referred to OPM's Phoenix Area Office for certification. Camden, who at the time did not meet the one year time-in-grade requirement, did not apply under the vacancy announcement. Subsequently, however, he along with several others were certified by OPM for the position. Both Padilla and Camden were ranked by OPM among the three best qualified. However, at the time the selection was made, the top ranked applicant had accepted a position in another agency.

2. When the Certificate of Eligibles for the position arrived in EEOC's Phoenix Office, Inez Alvarez, at the time a Personnel Staffing Specialist, delivered it to the District Director and recommending official, Jesus Estrada-Melendez. She explained the "Rule of Three" to Estrada-Melendez and left the Certificate with him. In addition to those certified for the position by OPM, Estrada-Melendez also considered candidates on the internal merit promotion certificate.

3. Sometime after receiving the Certificate of Eligibles, Estrada-Melendez met with Camden and Alvarez. Camden alleged that during this meeting he was informed by Estrada-Melendez that he was not one of Headquarters' choices. He further stated that Estrada-Melendez advised him that he had the option of either withdrawing from further consideration or remaining on the register from which, if selected, he could be terminated during the probationary period if Headquarters determined that his performance was unsatisfactory.

4. Our investigation has not substantiated Camden's account of the meeting:

> a. Estrada-Melendez stated that during the meeting he informed Camden that he had been certified by OPM as eligible for the position, but that the meeting was neither a job interview nor an offer. He further informed Camden that he was only the recommending official and that final selection would be made by Headquarters. Camden was also advised that if he was selected from the OPM

register he would have to serve a one year probation period. Estrada-Melendez' pending reassignment to the Los Angeles District Office and the fact that he would not be the District Director in the Phoenix Office when the selectee assumed the position, were also discussed. He denied telling Camden that he was not Headquarters' choice for the position or that the meeting had been prompted by Headquarters. He did verify, however, that he asked Camden if, after having been apprised of the facts, he still wished to be considered for the position, but advised him to take his time in making his decision.

b. Alvarez did not corroborate Camden's contention that Estrada-Melendez had informed him during the meeting that he was blocking Headquarters' choice for the position. she noted instead that Camden was informed that Estrada-Melendez was only the recommending official and that Headquarters would make the final selection. She also noted that during the meeting she explained to Camden, in detail, the regulations regarding the probationary period imposed on applicants as opposed to those appointed from an internal merit promotion announcement. She corroborated Estrada-Melendez' statement that after Camden was informed he would have to serve a probationary period, he was asked whether he still wished to be considered for the position.

Alvarez also stated that after the meeting, Camden submitted an Optional Form 5, Inquiry as to Availability, on which he noted that he did not wish to be considered for the position on a career-conditional basis.

c. Beverly Powell, a Supervisory Opportunity Specialist in the Phoenix Office, stated that although she was not present during the meeting, Camden related to her the events which occurred. She stated that Camden informed her that he was told during the meeting there were two applicants on the Certificate who, if recommended by Estrada-Melendez, would be rejected by Headquarters, and that Camden was one. Powell noted further that Camden made no mention of being informed that he was blocking the Certificate or that Headquarters had its choice for the position.

5. Our investigation has disclosed no evidence that anyone solicited, coerced, persuaded, influenced or attempted to solicit, coerce, influence or persuade Camden to decline the position. The evidence does show, however, that by his own admission, Camden declined because he did not want to serve a new probationary period as would have been required pursuant to 5 C.F.R. § 315.801(a)(1) and 315 FPM, subchapter 8-2a. Moreover, Camden stated in his affidavit to an Office of the Special Counsel investigator that he declined to be further considered for the position because of the following combination of factors:

> My own thoughts after the meeting [with Alvarez and Estrada-Melendez] were that I was new to EEOC, having only been with the agency a little over one year. I knew that Estrada-Melendez would be transferring to Los Angeles soon and that I would therefore lose his protection if Headquarters indeed wanted someone else in the job. I had over fifteen years of federal service. I also got the feeling that no matter how well I did in the job, I would be terminated during that one year probationary period without the chance of returning to my former position, so I withdrew.

6. Edward Valenzuela, Acting District Director of the Phoenix Office, EEOC, and Estrada-Melendez' replacement, stated that Camden informed him of his meeting with Estrada-Melendez in which he allegedly told was that he was blocking the OPM certificate for someone Headquarters wanted for the job. He further stated that Camden told him that if he was selected he would have to serve a probationary period.

7. James Biggs, Manager of OPM's Phoenix Area Office, stated that in October 1980, a question arose

regarding the Supervisory EEO Specialist position when Camden returned his written declination on the Optional Form 5. Biggs' office inquired into the declination by contacting Alvarez who reported that Camden had declined because he did not want to serve a probationary period.

8. In December 1980, Biggs was informed by OPM Headquarters that it was reviewing the conversion of a number of Schedule C employees at EEOC, including Padilla, who had been improperly converted to the competitive service. Biggs was specifically asked why Camden had declined the position and was directed to contact Camden regarding the declination. Accordingly, Eileen Peck, a Staffing Specialist in Biggs' office, contacted Camden who advised her that his declination was based on the fact that he would have to serve a one year probationary period, that he was new at EEOC, and that he had completed 15 years of federal service. Biggs, in turn, related this information to Headquarters. Approximately two weeks later, Donald Hoffman of OPM's Western Region, contacted Biggs and informed him that Headquarters had decided that Biggs should again contact Camden and inquire further into the circumstances surrounding the declination.

9. On January 9, 1981, Biggs met with Camden. By his account, the following discussion took place:

> I asked [Camden] who interviewed him for the position. He told me that both Alvarez and Estrada-Melendez interviewed him. He said they told him that the final decision was Headquarters' and that he was not one of the two candidates that Headquarters wanted for the job. He also said that he was told, as a veteran, he was blocking one of those candidates on the Certificate. He said he was told that he could withdraw from consideration or he would have to serve a new one year probationary period if selected . . . I also asked that if the probationary period was not a factor, would he be interested in the job. He replied, probably not, knowing that he was not one of Washington's choices for the position, plus Estrada-Melendez would be leaving soon and it was an unknown quantity as to who would be taking his place.

Biggs stated, however, that Camden made no comment regarding any inducement or coercion. He reported this information to Allen Goldberg of the Compliance Branch in OPM Headquarters and was told that he did not have to interview anyone else regarding the declination. There is no evidence that OPM investigated the matter further.

10. In an April 2, 1981, letter from EEOC's Director of Personnel, Beverly A. Gary, Camden was offered the position and on April 7, 1981, he submitted his acceptance. Thereafter, on April 27, 1981, Camden was notified that his selection had been confirmed and would be effective May 10, 1981. Also on April 27, 1981, Padilla was notified that her appointment in the competitive service was being cancelled and that she would be reassigned to her former Schedule C position from which she would be terminated effective May 9, 1981.

11. A number of options were suggested which would have prevented Padilla's removal, however, EEOC elected to reject those options and proceed with the termination.

12. On May 27, 1981, Padilla appealed her removal to the Merit Systems Protection Board, San Francisco Regional Office, which reversed the removal action on September 29, 1981.

ANALYSIS

Several factors suggest that the cancellation of Padilla's appointment in the competitive service and her subsequent removal were improper:

1. Padilla, on her own volition, applied for the position under appropriate competitive staffing procedures, well in advance of the presidential election.

2. Padilla had no influence in, or control over, the selection process. The top-ranked applicant was offered the position, but declined because she had secured another position elsewhere. The only other applicant ranked higher the Padilla, Camden, also declined. Therefore, Padilla was offered and accepted the position only after the top two candidates had declined. Moreover, had not Camden declined, he most likely would have

been selected. In any event, however, Padilla was reachable for selection because: (a) she was listed among the best qualified; and (b) the two higher ranked candidates declined.

3. OPM (our investigation shows that Robert Drummons, Assistant Director Agency Compliance and Evaluation, appears to be an employee with authority to direct personnel actions) directed corrective action without sufficient grounds:

> a. Neither EEOC's, OPM's nor the Special Counsel's investigations disclosed information that establishes by a preponderance of the evidence that Camden was coerced into withdrawing as a candidate in order to improve Padilla's prospects for an appointment in the competitive service in violation of 5 U.S.C. § 2302(b)(5); nor did these investigations disclose information that establishes that any employee attempted to secure Camden's withdrawal from competition in violation of 5 C.F.R. § 330.601.
>
> b. Because Camden was ranked among the best qualified and was a preference eligible who declined the position, OPM's Phoenix Area Office inquired into his declination; it found nothing irregular. At this point, OPM became aware that the selectee had formerly held a Schedule C position.
>
> c. In conjunction with its investigation into improper conversions of Schedule C employees by EEOC, OPM ordered further inquiry into Camden's declination. Following an additional inquiry, the Phoenix Area Office reaffirmed its earlier determination that no irregularities surrounded the declination.

4. Although OPM did not find improprieties surrounding Camden's declination, it nevertheless ordered corrective action, apparently solely on the basis that Padilla previously served in a Schedule C position. The ordered action occurred while Padilla was still serving a probationary period as provided in 5 U.S.C. § 3321(a)(1).

5. As a probationer, Padilla was technically still competing for employment since she could have been removed during that period without having access to adverse action procedures. Therefore, the adverse action, taken without cause and during the probationary period, obstructed her right to compete for employment and constituted a prohibited personnel practice under 5 U.S.C. § 2302(b)(4).

6. Section 315.803 of title 5, Code of Federal Regulations, provides that an agency shall:

> . . . utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during the period if he fails to demonstrate fully his qualifications for continued employment.

However, there is no evidence of any deficiency in Padilla's performance, conduct or suitability while in the competitive position. There is also no evidence that the removal was based on any conduct which affected her performance or the performance of others. It, therefore, appears that her removal violated 5 U.S.C. § 2302(b)(10).

7. In reversing EEOC's action, the Board's presiding official ruled that Padilla's removal had been based on pre-appointment, non-performance reasons and constituted harmful procedural error. Padilla v. EEOC, supra.

8. When an employee is converted from a competitive to an excepted appointment, or to another appointment under which he will have less rights or benefits, the agency may not make the conversion until the employee has:

> a. been informed of the conditions of employment under the new appointment; and
>
> b. submitted a written statement that he understands he is leaving the competitive service voluntarily to accept an appointment in the excepted service. 302 FPM S2-9 (Inst. 262 May 7, 1981); 296-31 FPM Supp. S1-2 (Inst. 76 February 25, 1980).

9. The Merit Systems Protection Board has ruled that FPM guidance constitutes a civil service rule. *In re Exceptions From Competitive Merit Plan (335 FPM S1-5(c)(1)(b)*, MSPB No. HQ12058110012 (Dec. 1, 1981), slip op. at 2 n.4. Therefore, 302 FPM S2-9 and 296-31 FPM Supp. S1-2 are rules as contemplated by 5 U.S.C. § 2302(b)(11), and implement or directly concern at least the merit system principles at 5 U.S.C. § 2301 (b)(2)&(4). The merit system principles at § 2301 (b)(5), (6)&(8) may also be applicable.

10. Our investigation disclosed the EEOC converted Padilla from a competitive to an excepted appointment against her will and without obtaining from her any statement acknowledging that she was leaving the competitive service voluntarily. It is undisputed that an employee in the competitive service has more rights and benefits than one under a Schedule C appointment. Therefore, Padilla's removal from the competitive service violated 302 FPM S2-9 and 296-31 FPM Supp. S1-2 which directly concern the merit system principles at 5 U.S.C. § 2302(b)(2)&(4), and is a prohibited personnel practice under 5 U.S.C. § 2302(b)(11).

11. After EEOC determined that Padilla's appointment in the competitive service had been improper, it was cancelled in order to "regularize" the Certificate of Eligibles from which she was appointed. Accordingly, she was returned to her former Schedule C position and terminated. Our investigation did not establish that EEOC considered any alternative corrective action other than removal, even though there is evidence that other positions for which she qualified existed in the agency. Placing Padilla in another position for which she was qualified is not only required by 335 FPM, Appendix A, A-4b(2), it would have also been more equitable.

12. It is a prohibited personnel practice to reassign an employee in violation of a rule implementing or directly concerning a merit system principle. 5 U.S.C. § 2302(b)(11). The Board has determined that FPM guidance constitutes a civil service rule. *In re Exceptions From Competitive Merit Plan (335 FPM S1-5(c)(1)(B)*, *supra*. There is no evidence that EEOC complied with 302 FPM S2-9 and 296-31 FPM Supp. S1-2, when it reassigned Padilla to her former Schedule C position.

These civil service rules implement or directly concern the merit system principles that "all employees and applicants for employment should receive fair and equitable treatment in all phases of personnel management without regard to political affiliation," and that "all employees should maintain high standards of integrity, conduct, and concern for the public interest." 5 U.S.C. § 2301(b)(2)&(4). The reassignment violated the above-cited rules and is therefore a prohibited personnel practice. 5 U.S.C. § 2302(b)(11).

CONCLUSION

It is with sincere regret that I bring this matter to your attention. However, the results of our investigation make it necessary to correct the injustice committed against Padilla. Earlier attempts at resolving the matter proved fruitless.

I should point out that implementing my recommendations, in light of our findings, is consistent with the aim and purpose of the Civil Service Reform Act of 1978. Restoring Padilla to the competitive position from which she was reassigned would be in keeping with the goal of the Reform Act and would further maintain merit within the service.

Accordingly, pursuant to 5 U.S.C. § 1206(c)(1)(A), I report these findings to you and recommend you restore Padilla to the position of Supervisory Equal Opportunity Specialist, GS-160-14, Phoenix District Office, with back pay retroactive to the date of her reassignment, attorney fees and expunge all records of the reassignment and removal from all files. Please notify me within 20 days of your receipt of this letter of the action you have taken or will take on my recommendations.

I thank you in advance for your personal attention to this important matter.

Sincerely,

H. Robert Mayer
Acting Special Counsel

HRM:HGC:SJS/mfh
cc: (pursuant to 5 U.S.C. § 1206(c)(1)(A)

Hon. Herbert E. Ellingwood, Chairman
Merit Systems Protection Board

Hon. Donald J. Devine, Director
Office of Personnel Management

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

EXHIBT 5

Memorandum

TO: Lynn R. Collins
Associate Special Counsel
for Prosecution

FROM: Shigeki J. Sugiyama
Associate Special Counsel
for Investigation

DATE: June 15, 1983

RE: Work Performance of Horace G. Clark

This is to provide you my observations concerning the work performance of Horace G. Clark, Attorney, Prosecution Division, with respect to his assignments within my purview.

Horace was detailed to the Investigation Division for approximately 60 days during July - August 1982 to assist in clearing unfinished case assignments left by investigators who had transferred out of OSC. During this period, he also continued his work on litigation matters carried over from his Prosecution Division assignments. Horace also, before the detail, completed work on a corrective action letter, work which had been assigned to an investigator who retired without completing the assignment, then to a field office, which did not accomplish the work as instructed and desired.

In performaing work for the Investigation Division, I found Horace to be consistently thorough and complete in his investigative work products, usually timely (with due regard for the other demands on his work time) and his analysis of factual issues thorough, complete and in keeping with the standards then applied to investigators of the division. He did not hesitate to consult with me on technical questions and his application of such technical matters was on point and correct. As a consequence, I had greater confidence in his work products than I had with the work of certain other investigative staff.

As I noted at the time, I believe Horace did an excellent job in preparing the corrective action letter in the Padilla matter (notwithstanding that it has not been dispatched) given that his instructions were to rely totally on the information of record in the investigative file, even though it was recognized that the file was incomplete. It appears also that his fact-finding in the Sanders matter (which was assigned during his detail to Investigation Division, but was completed after the change in OSC's internal procedures) was quite thorough, complete and on point.

SJS/bow

OFFICE OF THE SPECIAL COUNSEL
U S Merit Systems Protection Board

EXHIBT 6

Memorandum

TO: Lynn R. Collins
Associate Special Counsel
for Prosecution

FROM: HGC Horace G. Clark
Attorney

DATE: May 17, 1982

RE: Whether the Recommendations and Statements Proscribed in 5 U.S.C. § 2302(b)(2) are Limited to Those Made by Senators and Representatives

In the April 13, 1982, Initial Decision in Lacy B. Ward and Renea A. Webb v. U.S. Consumer Product Safety Commission, MSPB Nos. PH07528010360 & PH07528010307, the presiding official dismissed appellants' allegation that a prohibited personnel practice was committed in violation of 5 U.S.C. § 2302(b)(2) when the agency's deciding official solicited and considered the recommendation, records and statements of her executive assistant in her decision to remove them from their position with the agency. The basis for the presiding official's dismissal of the allegation was his interpretation that section 2302(b)(2) was intended to be applicable only to recommendations made by Senators and Representatives, a position not held by the executive assistant. Initial Dec. at 36.

As the presiding official correctly noted, section 2302(b)(2) restates and expands 5 U.S.C. § 3303, which prohibits consideration of recommendations submitted by Senators and Representatives, unless the recommendation relate to character or residence. S. Rep. No. 95-969, 95th Cong., 2d Sess. 20 (1978). Section 3303, entitled "Competitive service; recommendations of Senators and Representatives," is applicable in its restrictions only to recommendations made by Senators or Representatives and provides that:

> An individual concerned in examining an applicant for or appointing him in the competitive service may not receive or consider a recommendation of the applicant by a Senator or Representative, except as to the character or residence of the applicant. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 418.)

In contrast, section 2302(b)(2) provides in part that any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not:

> (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it . . . (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1114.)

Under the maxim *Expressio unius est exclusio alterius* as applied to statutory interpretation, where the persons or class to which the statute refers are designated, there is an inference that all omissions should be understood as exclusions. *Ex Parte McCardle*, 74 U.S. 506 (1868); *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968); *United States v. Aquino*, 338 F. Supp. 1080 (E.D. Mich. 1972). By specifically naming the class, it may be inferred that Congress intended in section 3303 to restrict those recommendations made by Senators and Representatives *only*. On the other hand, Congress did not limit the application of section 2302(b)(2) to any particular class, i.e., "persons furnishing" [the recommendation or statement].

During the House debate on H.R. 11280, Congressman Herb Harris of Virginia offered an amendment to the Committee's Bill. Under Harris' amendment, section 2302 (b)(2) would have explicitly prohibited political recommendations from *Members of Congress*, *their staff*, *White House officials* and *political appointees*. 124 Cong. Rec. H9282-85 (daily ed. Sept. 7, 1978)(statement of Rep. Harris). However, the amendment was overwhelmingly defeated primarily because, as noted by Congressman William Ford, "[the Committee's Bill] already restricts the people who would be covered by the Harris amendment . . ." *Id.* at H9284 (statement of Rep. Ford). Harris' amendment was viewed as a substitute for restriction which had been carefully worked out by the Committee in its original Bill, and although his amendment would have extended the existing class covered under section 3303, the majority of his colleagues were convinced the class should be extended even further. Thus, attempts by Harris and his supporters to limit the coverage of section 2302(b)(2) to a specific class were rejected. In summing up the rejection, Congressman Edward Derwinski asserted that Harris' amendment did not "square with the overall concept of reform," was "unneeded," "unworkable," and "discriminated against Members of Congress and Presidential appointees." *Id.* at H9283 (statement of Rep. Derwinski).

A literal interpretation of section 2302(b)(2) does not restrict its coverage to any particular class; it encompasses recommendations made by "the person furnishing it," thus covering Congressmen as well as others. Further, even though a major concern in enacting the Civil Service Reform Act of 1978 was to ensure the merit of the service by curbing politicization, Congress by no means sought to restrict the application of section 2302(b)(2) to its members. Reflecting the spirit and intent of the Reform Act, employment and promotion, though only two of the personnel actions covered under section 2302 were to be based on merit. It is inconsistent to assume that in enacting Public Law 95-454, Congress was not aware that improper yet influential recommendations by a class other than Senators and Representatives would be equally violative of the spirit and intent of the Reform Act.

It is a basic rule of statutory construction that legislative language will be interpreted on the assumption that the legislature was aware of existing statutes. *Allen v. Brand Central Aircraft Co.*, 347 U.S. 535 (1954). It is equally fundamental that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another. *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971). Therefore, a more cogent interpretation is the assumption that at the time Public Law 95-454 was enacted, Congress was fully aware of the existence of section 3303; that while sufficient to check improper recommendations by Senators and Representatives, section 3303 was inapplicable to other persons not significantly designated in the class; and that section 2302(b)(2) is superfluous if it was intended to restrict recommendations by Senators and Representatives only. An interpretation that section 2302(b)(2) prohibits improper recommendations from Senators and Representatives only is too limited, untenable and unreasonable. Such an interpretation would render that section superfluous in light of the proscription in section 3303, and would be contrary to the spirit and intent of the Reform Act.

Concl

Section 2302(b)(2) prohibits improper recommendations of "any personnel action," while section 3303 is limited to congressional recommendations of the "appointment" of an applicant. Accordingly, a prohibited personnel practice under section 2302(b)(2) would not be limited to an improper recommendation of an applicant for promotion or an appointment; a prohibited personnel practice would also be committed if an improper recommendation resulted in any of the other personnel actions listed in section 2302(a)(2)(A). For example, it could not be reasonably argued that no prohibited personnel practice is committed where Mr. X received a "marginally satisfactory" performance rating based solely on the recommendation of a fellow employee who has neither personal knowledge nor records of X's work performance, ability, aptitude, or general qualifications. Likewise, it could not be maintained that no prohibited personnel practice is committed where X's promotion is based solely on the recommendation of a fellow employee who has neither personal knowledge nor records of X's work performance, ability, aptitude or general qualifications.

The conclusion that section 2302(b)(2) restricts improper recommendations made by Senators and Representatives only is further weakened when it is taken into consideration that that section restricts improper recommendations of "any personnel action." It is unlikely that in drafting section 2302(b)(2), Congress envisioned one of its members recommending that Mr. X be subjected to an action under chapter 75, or that X's performance evaluation under chapter 43 be lowered from "satisfactory" to "unsatisfactory." It is more probable to assume that Congress envisioned one of its members recommending Mr. X's appointment in the competitive service. However, in keeping with its overall concept of merit system reform, Congress extended section 3303 by providing in section 2302(b)(2) for an expanded class and list of personnel actions.

HGC/mfh

The CHAIRMAN. Just a minute. My wife is having a birthday today and some of the staff and I are lunching with her.

Senator Hatch, would you take the hearing——

Senator HATCH. Be glad to.

The CHAIRMAN [continuing]. Up until 1 or near there. We will come back at 2:10 at which time I would like to call on Mr. Kozinski if everything is through. If not, we will finish other witnesses and then take him.

I am also anxious to hear his testimony. So if you will take over the chair.

Senator HATCH [presiding]. Go ahead and complete your testimony.

Mr. COLLINS. Thank you, Senator.

There is one other matter that I would want to make a comment on. That is that there has been an allegation raised, in connection particularly with the *Saldana* case, that decisions by Judge Kozinski on whether or not to prosecute an alleged Hatch Act violation were influenced by the political affiliation of the potential respondent in the case.

I want to go on record here as saying that, to the best of my knowledge and belief, the political affiliation of the parties involved was never a consideration in making a prosecutive decision.

Decisions as to the initiation or declination of prosecution were made on the basis of the evidence of violation and on the basis of recommendations either by myself and/or Mr. Erck and the staff attorneys.

Mr. Erck, by the way, is in New York State on military duty. He telephoned yesterday afternoon. I spoke with him by telephone again this morning.

He did dictate a statement which he asked—and I obtained his permission to—for me to read. If you would like, I would be glad to read that statement into the record on this matter.

Senator HATCH. Without objection, we will permit you to do so.

Mr. COLLINS. It says "Statement of John Erck," spelling E-r-c-k. Mr. Erck says as follows, and I am quoting him now:

> I regret that I am unable to attend this hearing and testify in person concerning Alex Kozinski's qualifications to be a judge on the Ninth Circuit Court of Appeals. I am currently on Reserve duty at Fort Drum, New York and will not return to the Washington, D.C. area until November 2nd.
>
> If I were present, I would testify, under penalty of perjury, that Alex Kozinski was an outstanding Special Counsel. He was demanding, but he was fair.
>
> He set high standards for himself and for everyone who worked for him. In my opinion, the standards were neither impossible nor unreasonable.
>
> He was always available and always eager to teach everyone who demonstrated a willingness to meet his standards. I cannot recall a single time when Alex did not make himself available to discuss legal issues, an office matter or personal concern.
>
> I worked harder for Alex Kozinski than any attorney for whom I have ever worked. I would hasten to add that I learned more and enjoyed my work more than I have before or since.
>
> I would like to comment briefly on his professional ethics. He would not allow attorneys to prepare briefs advancing specious or frivolous arguments, and he would require us to include citations to case authority which was contrary to the position being argued by our office.
>
> He constantly emphasized a high standard of objectivity that he required of a Government attorney.
>
> I was the attorney primarily in charge of Hatch Act enforcement during the time that Alex Kozinski was Special Counsel. I learned early that Alex did not want to know the political party of the respondent in a case being investigated.

> Because he made it clear on so many occasions that he wanted to make decisions regarding prosecutions in Hatch Act cases without knowing the political affiliation of the person being charged, political affiliation was an item of information that was never discussed.
>
> With regard to the case involving Guadalupe Saldana, I recall discussing the fact-finding strategy with the investigator. I do not recall the investigator or anyone else recommending against prosecution.
>
> After the investigation was completed, I discussed the case with Alex and we agreed that the prosecution should go forward. He did not demonstrate any peculiar interest in the facts of the case that would cause Saldana to be singled out for special treatment.
>
> In this case, as in others, Alex was concerned with whether there was sufficient evidence to establish a violation of the law. Saldana's party affiliation never entered the discussion.

I am ending the quotation, now, of the statement by Mr. Erck.

Senator HATCH. Well, thank you.

Mr. COLLINS. Mr. Chairman, I have no other statement to make, and I will be happy to respond to questions if the committee has any.

Senator HATCH. Thank you.

Senator Metzenbaum.

Senator METZENBAUM. Well, I would just ask Mr. Collins: How promptly could you provide us with all of the documents in the *Saldana* case?

Senator HATCH. As I understand it, there will be only one hearing.

Mr. SHORT. There has been no request that records would be made available at the hearing, just to clarify some matters that were outstanding. This would delay the process.

Senator METZENBAUM. I did not ask either of you that. I just asked this witness: How promptly can you supply us with these records?

That is the only question I have asked him.

Mr. COLLINS. Senator Metzenbaum, the decision on supplying records of the Office of the special counsel is not mine alone to make.

Senator METZENBAUM. I did not even ask you that question. How promptly——

Mr. COLLINS. The file is available. I reviewed it yesterday.

My statement about items contained in that file was based on that review.

Senator METZENBAUM. All right.

Then I will say to you, Mr. Collins, that I want those records. Deliver them to the chairman or to the ranking minority member, or deliver them to the staff.

Senator HATCH. Is the file closed?

Mr. COLLINS. Pardon?

Senator HATCH. Is the file closed?

Mr. COLLINS. The file is a closed file.

Senator HATCH. Get the records up here and we will allow Senator Metzenbaum to examine them, subject to the privacy rules and any other rules.

Senator METZENBAUM. Certainly; whatever apply to grand jury matters, but that is not it.

I am going to yield to Senator Levin since we have a roll call.

Senator HATCH. Senator Levin.

Senator **Levin**. Thank you, Mr. Chairman.

Mr. Collins, according to the affidavit of Mr. Clark, you discussed the Saldana matter with him. Do you remember that?

Mr. **Collins**. I am sure that, at some point, I may have discussed the Saldana matter with him. I was the Chief of the Prosecution Division.

Senator **Levin**. Do you remember what his recommendation was in that matter?

Mr. **Collins**. I have no recollection of any recommendation by Mr. Clark other than what appears in the documents that are in the file.

I might add this: had a trial attorney on my staff expressed to me serious reservations about whether he could, in good conscience, go forward with the prosecution, I would either have talked to him about that and done something about it or I might likely have relieved him of that assignment because I would not want to put him in that position.

Senator **Levin**. On page 6 of Mr. Clark's affidavit, he says that he told you the following:

"Lynn, I told you on two occasions that case should never have been filed."

Do you deny that he said that to you?

Mr. **Collins**. I have no knowledge that he ever said those words to me.

Senator **Levin**. Do you deny that he said that to you?

Mr. **Collins**. Yes, sir. I do.

Senator **Levin**. So we have a flat out contradiction here.

Senator **Hatch**. That is the way I interpret it.

By the way, that is the second contradiction given by Mr. Clark.

Senator **Levin**. Yes. Well, it took a couple of questions to get the contradiction clear because the first was that you had no recollection and then, when I pressed you, you said you denied it.

In any event, that is a matter for us to judge.

Senator **Hatch**. Sure.

Senator **Levin**. Then he says that you responded, "Yeah, and I so advised Alex."

Do you deny that you said that to him?

Mr. **Collins**. I deny that I ever said to Alex Kozinski that Horace Clark had reservations about prosecuting the *Saldana* case. That is a second part of his statement about what I said to him on that occasion.

I think the other part was that I had been criticized by the current special counsel for the way that case was handled, which I was and which I rightfully should have been.

Senator **Levin**. I am going back, though, to my question to you. He says that you responded, "Yeah, and I so advised Alex."

Do you deny telling Mr. Clark that?

Mr. **Collins**. Based on—I have no recollection of ever saying that, and based on that I would deny that I said that.

Senator **Levin**. If you have no recollection, then——

Mr. **Collins**. Well, Senator, we are talking about things that happened several years ago. I cannot imagine that I would have said that to him because I do not recall ever speaking to Judge Kozinski about the *Saldana* matter in relation to any problems that staff attorneys or others had with prosecuting the case.

Senator LEVIN. So to try to put your testimony together, the most accurate way you can remember you cannot imagine having told him that.

Mr. COLLINS. That is right. I do not recall and I cannot imagine that I said that to him because I did not talk with Chief Judge Kozinski about that.

Senator LEVIN. Do you know how many months it took to bring this case, the *Saldana* case?

Mr. COLLINS. I do not recall specifically. I remember that there was a recommendation in the Investigations Division to close it in October 1981, but the subsequent memoranda from Mr. Clark and the other investigator, Ms. Springfield, was in December, I believe, of 1981.

I do not recall specifically when the complaint was filed.

Senator HATCH. Senator, you and I have about 2 minutes to get there.

Do you want to have me keep the witness here, or are you through?

Senator LEVIN. I have just a couple more questions.

Senator HATCH. Why don't you see if you can get them done. We will have them call and, hopefully——

Senator LEVIN. Yes, that would be fine.

Senator HATCH. Because I would like to let him go before we leave.

Senator LEVIN. Did it take an unusual amount of time to prosecute that case, to decide to go ahead with it?

Mr. COLLINS. I don't think it necessarily took an unusual time; no, sir.

Senator LEVIN. Do you know whether it took 27 months to bring that case?

Mr. COLLINS. Twenty-seven months from what point, sir?

Senator LEVIN. From the time you first investigated to the time you proceeded with it?

Mr. COLLINS. No, sir. I do not know that that is true. It may be.

Senator LEVIN. But your recollection is it was not an unusual length of time before the case was prosecuted after it was first investigated?

Mr. COLLINS. My recollection is that it did not seem to be an unusual length of time, although it may have been because there was additional investigation done as evidenced by the fact that—and my recollection was, that when the investigation was first accomplished, the investigators assigned to it did not do a very good job of investigating.

Senator LEVIN. And you do not know that the investigators were opposed, at any point, to prosecuting that case?

Senator HATCH. Senator Levin, they are not going to hold.

Mr. COLLINS. No. I have already said that I was never told that by anyone.

Senator LEVIN. You were never aware there was any opposition to the filing of that case.

Mr. COLLINS. Filing that case, that's right.

Senator LEVIN. That's right? Thank you.

Senator HATCH. OK. Thank you.

We will dismiss you, Mr. Collins, and we will go to Mr. Caldwell as soon as we return.

Senator LEVIN. Would Mr. Collins be available for questions to the record, to respond in writing?

Senator HATCH. Yes; if they are in by the end of the day.

Senator LEVIN. Oh, sure.

[A brief recess was taken.]

[Answers to questions follow:]

ANSWERS OF LYNN R. COLLINS TO QUESTIONS FROM SENATOR LEVIN

1. Q. The 10/9/81 memo from Dorothy Springfield to Elliott Davis recommended that the OSC "take no further action on the allegations raised". The complaint in this matter was filed in July, 1982. What happened after the 10-9-81 memo to change the recommendation to close the case? Please be specific. Did Mr. Davis ask that further investigation be conducted? Did any other member of the OSC office ask for further investigation? Who specifically was involved in the decision to continue with the investigation in this matter?

   A. Until I reviewed the file earlier this week, I was not aware of the 10/9/81 memorandum from Dorothy Springfield to Elliott Davis. I have no recollection of who ordered that further investigation be conducted in the case. I do not know whether Mr. Davis asked that further investigation be conducted. I do not know who was involved in the decision to continue with the investigation in this matter.

2. Q. There are two memos entitled "Report of Investigation"; one dated December 24, 1981, and one dated December 30, 1981. The December 24, 1981, memo does not have a third page. The December 30, 1981 memo contains a third page which includes a conclusion, the last sentence of which says: "Therefore, it appears that Saldana's political activity was in violation of 5 U.S.C. 7324." Where is the third page of the December 24, 1981, memo? Did it have a conclusion different from the December 30, 1981, memo?

   A. I do not know the whereabouts of the third page of the December 24, 1981, memo, or whether it ever had a third page. Since this memo was not initialed, I would assume that it was an earlier draft of the December 30, 1981, memo, which appears to have been initialed. I have no knowledge whether the December 24 version ever contained a conclusion.

3. Q. Do Dorothy Springfield and Elliott Davis still work for the OSC? If so, please provide their phone numbers. If not, do you know where they can be reached?

A. Dorothy Springfield still works for OSC and her office telephone number is 653-8944. Mr. Davis no longer works for OSC and I do not know where he can be reached.

4. Q. Please describe the line of authority for approving the Saldana Hatch Act complaint.

A. The normal line of authority for approving Hatch Act complaints was from John Erck to me to Judge Kozinski, although on occasion John Erck presented cases to Judge Kozinski directly for approval. I do not recall being involved in approving the filing of the complaint in the Saldana case.

5. Q. Did Jesse James recommend against filing the Saldana complaint? Did you have any discussions with Jesse James about the Saldana case? In any of those discussions (if any) did you and James discuss the fact that James had reservations about the Saldana case?

A. I have no recollection of Jesse James' recommending that the Saldana complaint not be filed. I recall no conversations with Mr. James about the Saldana case, although there may have been one or more during the normal course of business. I was not aware that Jesse James had reservations about the Saldana case.

6. Q. Mr. Clark, in his affidavit, states that in January, 1982, you assigned him "to prepare a draft complaint" in the Saldana case. What actions precipitated that request on your part? Were you aware at that time that Ms. Springfield, Mr. Clark and Mr. James, on rereview had concluded that a complaint should not be brought?

A. As I testified, it was routine to prepare a draft complaint before deciding whether to prosecute a case. I was not aware that Ms. Springfield, Mr. Clark and Mr. James may have concluded that no complaint should be brought.

7. Q. How many cases do you know of where the investigator's and supervisor's recommendations to close a case were overruled and the case was filed anyway? Please limit your response to Hatch Act cases.

A. I do not recall any such case, although ocasionally there may be differences of opinion among staff as to the merits of particular cases.

8. Q. Why did it take from January, 1982 (the time at which according to Clark's affidavit you requested him to draft a complaint) to July, 1982, to file the complaint? Was such a length of time unusual? During that period of time, did Mr. Clark state to you that the complaint should not be brought?

A. I do not know why the complaint in the Saldana case was not filed until July 1982. I do not know how this might compare with other cases. My recollection is that during the time in question OSC was experiencing rather significant budgetary problems. The initiation of the litigation might have been deferred until the budget situation was clarified. I do not recall that Mr. Clark stated that the complaint should not be brought.

9. Q. Did you have a conversation with Mr. Clark about the Saldana case in early February, 1983? If you did, can you recall the substance of that conversation? Please be as specific as possible.

A. I recall having a conversation with Mr. Clark some time after the Saldana trial, but do not recall whether it was in February 1983. To the best of my recollection, Mr. Clark was concerned about his status in the office as a result of the Saldana case. My recollection is that I assured him that Mr. O'Connor and I did not hold him solely responsible, but also blamed lack of supervision. I do not recall Mr. Clark stating to me that he had previously expressed reservations about the Saldana prosecution. I do not recall making any statement concerning Judge Kozinski.

I declare that the foregoing is true and accurate to the best of my knowledge and belief.

Washington, D.C., November 2, 1985

Lynn R. Collins

LYNN R. COLLINS

Senator **Hatch**. We will call as our next witness Mr. William Caldwell to the witness chair. Where is Mr. Caldwell?

Mr. Caldwell, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. **Caldwell**. I do, sir.

Senator **Hatch**. Thank you, sir. We will turn the time over to you for about 5 minutes.

Mr. **Caldwell**. Thank you.

TESTIMONY OF WILLIAM E. CALDWELL, MANAGING DIRECTOR FOR OPERATIONS, OFFICE OF SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD, WASHINGTON, DC

Mr. **Caldwell**. I would like to establish my qualifications first. I have approximately 25 years in the Government. I began in 1948 as a clerk with the Federal Bureau of Investigation.

Following that was a stint as a counterintelligence investigator, during the end of the occupation of Germany; and then 9 years in private industry.

In 1962, I returned to the Department of Justice. In 1966, Attorney General Katzenbach personally requested me to be detailed to the National Crime Commission, which was an administrative quagmire at the time, and he was very concerned that if it was not straightened out the Crime Commission would not be able to fulfill its functions.

Following that, Attorney General Ramsey Clark personally called me into his office and asked me to assume the administrative responsibilities for the Office of Law Enforcement Assistance, which later evolved into the Law Enforcement Assistance Administration. I was one of the three principal consultants in establishing that organization.

During President Ford's administration, I was asked to come to the Federal Energy Office; again because of the administrative problems encountered in establishing that office at the time of the Arab oil embargo.

I was contacted in 1981 by Judge Kozinski and asked if I would come to the Office of the Special Counsel because, again, there were administrative problems.

I pride myself on being a professional bureaucrat. I do not mean that in a derogatory sense. I have been able to serve my country under a variety of administrations.

I think the fact that I have been asked to come to each job would testify that I had performed satisfactorily prior to each.

With respect to questions before the committee today, I would like to describe the environment I found myself in when I came to the Office of the Special Counsel. It was, in my opinion, a benign organization trapped in a very dynamic atmosphere.

Things were happening. They were administratively tied to the Merit Systems Protection Board which had full responsibility over general ledger accounting, procurement, and a myriad of other administrative functions, that were required to operate the Office of the Special Counsel.

I felt one of my main jobs was to try to stabilize, first of all, the relationship and to get a little more hold on what was happening to the Office of the Special Counsel and began working very closely with the Merit Systems Protection Board. I took sole responsibility for that because I felt if I were going to be responsible for the administrative activities, I wanted to be sure that we were able to accomplish this.

It is the same as any manager; Judge Kozinski, the same. He was ultimately responsible for what happened in the Office of the Special Counsel. I had to answer to him.

If we are talking about his qualifications to be a judge in relationship to his qualifications as a manager, I would have to say that Judge Kozinski was a very accessible manager.

I will echo Mr. Collins' statements, that not only was he accessible to me, but also to my staff, which I think was borne out by Mr. Hollingsworth's statements that he dealt directly with Judge Kozinski on several administrative matters.

I have worked for a variety of managers. All of them were different in their styles and approaches. They all had a goal that they set and I viewed my responsibility as one of helping them achieve that goal.

I must admit I have been in the woodshed with just about every boss I have worked for, but I did not take that personally. I could show you the splinters, but they were the ones who were going to be ultimately held accountable.

I view my job, as a professional bureaucrat, to do my best regardless what the situation is.

With respect to the relationships with the Board, I think I can go directly to one of the points raised by Mr. Hollingsworth with respect to using special counsel money to buy things for the Board.

The normal practice that was in place until the beginning of this last fiscal year was, near the end of each fiscal year——

Senator **Hatch**. Your testimony is up, but I was going to ask that as my first question, anyway. So go ahead and answer it.

Mr. **Caldwell**. OK. At the end of each fiscal year, we would take projections—well, we do that through the year—as to our fund status situation. But, at that time, because the Board had full control over our accounting and procurement, it was a very delicate type of negotiation.

They were doing all sorts of services for us. They had staff time involved in typing up vouchers, processing vouchers, doing warehousing, furnishing warehouse space, furnishing rental space to us; and it was a question of how much do they charge us at the end of each year for the services provided.

We have a very small staff. As I said, it became a very dynamic environment under Judge Kozinski. I believe he was trying to get things moving.

We were tasked sometimes, never impossible. The impossible just took a little longer.

The Board was under the same kind of constraints. We had to work very closely with them so we could agree, at the end of the year, how much we owed them and what they owed us.

Senator **Hatch**. Was it unusual to do this?

Mr. **Caldwell**. That was the routine of the two organizations.

Senator **Hatch**. OK.

Mr. CALDWELL. What they did with our reimbursement was up to them. I do not believe that they ever spent money for anything that wasn't legally permissible.

Senator HATCH. All right. An earlier witness said that Judge Kozinski gave awards to employees in an manner contrary to civil service guidelines, or words to that effect.

Can you shed any light on this? Is that so, or is it not?

Mr. CALDWELL. I think the statement was that he gave awards to people who had unsatisfactory performance appraisals. To the best of my knowledge—again, I did not realize until late last night that I was coming up here—and a quick check, no award was ever given to anybody who had a formal unsatisfactory performance appraisal in their file.

What did happen with one of the employees on the list who worked directly for me, I had considered her performance unsatisfactory for some time before the award ceremony—and I am talking a few months, as my recollection. As a result of my talking with her, she——

She was always able to do it. It was just a matter of motivation. Her performance improved so dramatically that I felt she was entitled to the award.

Senator HATCH. The MSPB and OSC were sister organizations. As I understand it, going back to that other point, you exchanged services routinely; you would settle the books between yourselves; you sometimes reimbursed and helped them, and vice versa.

Is that correct? Is that a fair statement?

Mr. CALDWELL. Well, yes. The reimbursement helped us, it helped them.

Senator HATCH. So this was a legal, it was fully ethical practice. Is that right?

Mr. CALDWELL. Oh, absolutely.

Senator HATCH. That is my understanding.

Now, an earlier witness suggested that some employee awards were distributed in order to deflect congressional criticism. What dictated the timing of those awards, is that accusation true?

Mr. CALDWELL. I cannot comment on that because it is a comment on who is going to make the awards and why they are going to make the awards.

In any agency I have ever worked for, the head of the agency usually determines when there is going to be an award ceremony and in time for justifications to be prepared.

Senator HATCH. OK. One last question.

Do you feel that the office, under Judge Kozinski's jurisdiction or performance, improved?

Mr. CALDWELL. Yes. It was improved over what I had found when I got there.

Senator HATCH. I see.

Mr. CALDWELL. Definitely.

Senator HATCH. All right.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

Relative to those awards, were you asked to recommend certain employees for awards? Is that the way it came about?

Mr. CALDWELL. Every supervisor was requested to recommend people for awards.

Senator LEVIN. How many did you recommend?

Mr. CALDWELL. As I said, I don't recall. I remember two or three [deleted] at that time. There may have been one or two others.

Senator LEVIN. So that you recommended somebody for an award who, two months before——

Mr. CALDWELL. No, sir. No, I did not recommend 2 months before.

Senator LEVIN. No. I am saying 2 months before you made the recommendation that person's work was unsatisfactory to you.

Mr. CALDWELL. Oh, I do not recall whether it was 2 months. I said months before the award ceremony. I was dissatisfied with the performance.

Senator LEVIN. What was wrong with her performance?

Mr. CALDWELL. It was too slow, not responsive. The person had a difficult time determining priorities.

Senator LEVIN. How long had that been true?

Mr. CALDWELL. How long had that been true?

Senator LEVIN. Yes, that you had had those difficulties with that person.

Mr. CALDWELL. Oh, it probably went on for a month, 3, 4 weeks, maybe, 6 weeks before I decided it was necessary to talk with her.

Senator LEVIN. Who was that person?

Mr. CALDWELL. [Deleted.]

Senator LEVIN. Was that someone who worked for you directly?

Mr. CALDWELL. Yes, and she still works for me directly.

Senator HATCH. I think we should be careful asking those kinds of questions.

Senator LEVIN. Well, he mentioned the names already.

Senator HATCH. I am not criticizing you. I am just saying, keep in mind the privacy laws.

Senator LEVIN. He had mentioned a number of names and I had just wondered which one it was.

Senator HATCH. You should not specify the names. That would be simple.

Mr. CALDWELL. Fine.

Senator LEVIN. That would be fine. I would be just as happy if the record were cleared of that.

Senator HATCH. We do not want to have anybody hurt or embarrassed indirectly as a result of this.

Mr. CALDWELL. I am very pleased with her performance. She is a model employee.

Senator LEVIN. I would be very happy to have the record even cleared of the reference to her name.

Senator HATCH. Well, let's do that.

Mr. CALDWELL. Thank you.

Senator HATCH. Let's clear the record.

Senator LEVIN. It is all right with me. I want to be able to identify that person somehow.

So we are talking about a person who had been unsatisfactory for some period of time.

Mr. CALDWELL. Yes.

Senator HATCH. All right.

Senator **Levin**. And then you talked to her, and then for some period of time she was satisfactory. I thought you had said 2 months, but you did not say 2 months?

Mr. **Caldwell**. I said months. I did not recall whether it was 2 months, 3 months, in that context. That has been some time ago.

Senator **Levin**. And then you were asked to recommend people for awards by Mr. Kozinski?

Mr. **Caldwell**. Yes, sir.

Senator **Levin**. And you recommended her.

Mr. **Caldwell**. Yes.

Senator **Levin**. And some others.

Mr. **Caldwell**. Yes.

Senator **Levin**. Everybody that you recommended was given awards?

Mr. **Caldwell**. I believe one of the persons was deleted. There was one that I had recommended that was later scratched from the list.

Senator **Levin**. By you?

Mr. **Caldwell**. Yes.

Senator **Levin**. Scratched by you from the list?

Mr. **Caldwell**. Yes.

Senator **Levin**. All right. Because? Why was that person scratched?

Mr. **Caldwell**. Upon further recollection, I just felt that the performance, although it was good, there was a question in my mind. From the time I had recommended the person until we got to the award ceremony, there were other performance elements.

Senator **Levin**. When are the awards usually made, do you know?

Mr. **Caldwell**. They varied. I believe the awards we are talking about now were in the middle of 1982.

Senator **Levin**. Is there any particular time of the year that awards are made?

Mr. **Caldwell**. That will vary from agency to agency.

Senator **Levin**. Does the award have to be based on some special act of service or contribution by the employee?

Mr. **Caldwell**. There are several types of awards that can be made. One is for sustained superior performance, another is for a special achievement. It depends on the circumstances.

Senator **Levin**. Do all those rewards require some kind of special act by the employee, some special contribution by the employee?

Mr. **Caldwell**. If you are talking about a sustained superior performance over a long period of time, it is many acts over a long period of time that you finally say, hey, this is a real good employee and I want to recognize that performance.

Senator **Levin**. So it is some kind of exceptional performance over a long period of time?

Mr. **Caldwell**. Yes, Senator. That is one type of award.

Senator **Levin**. Well, is there any type of award for a little better performance over a very short period of time?

Mr. **Caldwell**. Yes, there is.

Senator **Levin**. What is the name of that award?

Mr. **Caldwell**. That is called special achievement.

Senator LEVIN. I see. So we give special achievement where performance has been improved for a few months.

Mr. CALDWELL. It could be a few months or a really unusual thing for one week, whatever it is.

Senator HATCH. Let me just point out that all allegations that have been raised in this hearing concerning his activities at the Office of the Special Counsel happened over 3 years ago. In the intervening time, Judge Kozinski has gone through one confirmation to become Claims Court chief judge.

Those allegations did not hamper his confirmation at that time and nobody ever thought they would. Furthermore, he has now gone through another detailed hearing into these issues, on July 17, in connection with this nomination.

These are not new allegations. They have been explored a number of times. The revisitations of these issues have not uncovered anything of consequence that could be a reason to not commend Judge Kozinski for this position.

We appreciate you coming, Mr. Caldwell, and——

Senator LEVIN. May I ask one more question?

Senator HATCH. Sure.

Senator LEVIN. Mr. Chairman, thank you.

It has been alleged by Mr. Hollingsworth that these awards were not preceded by the required justification.

Were these awards preceded by the required justification?

Mr. CALDWELL. To the best of my knowledge, we always require justification before the awards.

Senator LEVIN. Was there written justification?

Mr. CALDWELL. There should be written justification in the files.

Senator LEVIN. Was there in these cases?

Mr. CALDWELL. To the best of my knowledge, there was justification before we did it.

Senator LEVIN. Was there written justification in the file prior to your giving these awards, recommending these people?

Mr. CALDWELL. I don't know of any case where there was not.

You are asking me to go back 3 years ago.

Senator LEVIN. You can say you don't remember. That is fair enough.

Mr. CALDWELL. I don't remember. I really don't.

Senator LEVIN. That's fine. I am always happy to get "I don't remember" except where it is from somebody who just constantly says they don't remember, and that is not you. So I am happy to have "I don't remember". OK.

Senator HATCH. Thank you, Senator Levin.

Senator LEVIN. That is better than I thought I was going to get.

Senator HATCH. OK. Thank you so much, Mr. Caldwell.

Our last witness before we call on Judge Kozinski is William K. Olivier.

Mr. Olivier, we would love to have you come forward at this time.

I am running very short of time. I should be at a meeting right now, but I want to finish these witnesses so all we have left to do, then, will be Judge Kozinski.

Mr. Olivier, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. OLIVIER. I do.

Senator HATCH. Thank you, sir.

We will be happy to give you 5 minutes, but if you can be a little shorter I would appreciate it just so we can ask any questions we have.

Mr. OLIVIER. Thank you, Senator.

TESTIMONY OF WILLIAM K. OLIVIER, ATTORNEY, NEWPORT BEACH, CA

Mr. OLIVIER. My name is William K. Olivier. I was the attorney in charge of the San Francisco Field Office of the Office of the Special Counsel from October 1979 until May 1982.

I served under three separate special counsels: Patrick Swigert, Mary Eastwood, and Alex Kozinski. During that period of time, I enjoyed a good working relationship with all of the special counsels.

I think my best working relationship was with Alex Kozinski, himself. In fact, it was an excellent working relationship.

I have talked with the other field office chiefs—P.J. Winzer and Lenny Gribinski—and they have also echoed my sentiments regarding their working relationship with Alex as an excellent one.

I would like to address myself to a few comments that were made earlier today during this testimony as far as management of the office.

In addition to a law degree, I have a master's degree in judicial administration. I have served as a management consultant to Federal judges for about 3 years while working with the administrative office of the U.S. courts, as well as being in charge of the San Francisco Field Office of the Office of Special Counsel. I believe I am qualified to exercise an opinion as to Judge Kozinski's management ability, and I think he is an excellent manager.

I did leave the Office of the Special Counsel while Judge Kozinski was in charge. I advised him, as soon as he took over the Office of the Special Counsel, of my intentions to leave the office. It had nothing to do with Alex Kozinski whatsoever.

In fact, I stayed longer with the Office of the Special Counsel because of Alex Kozinski than I would have otherwise. It was a pleasure and a privilege to work for Alex Kozinski and I would work for him again.

Some of the comments earlier in the testimony today regarded morale of the office. I would say that, in my experience, morale during Mary Eastwood's tenure was the lowest in the Office of the Special Counsel while I was there.

I am not sure it had anything to do with Mary Eastwood so much as circumstances of the office; and the criticism of the office as being ineffective was widespread and brought by Congresswoman Patricia Schroeder as well as others.

This criticism of the office generally, as well as the office's inability to secure any successes with the Merit Systems Protection Board, since decisions had come down against us, had a large amount to do with the dissatisfaction and frustration of the staff, and the consequent low morale of the staff.

Prior to Alex Kozinski even coming to the office I had many of my staff members talk to me about leaving the Office of the Special Counsel and pursuing some other careers; and these are very dedicated individuals.

In working with Judge Kozinski, I found that his judgment and his decisions were well reasoned. He often required extensive reasons for us to pursue things. If I made a recommendation to him, he would always examine me very carefully on it and explore all avenues before he made a decision.

In my experience in working with him, everything he did was well reasoned and well thought out. He was a very caring individual and he thought very much about the morale of the staff as well as the care of the staff in pursuit of their jobs.

The problems I had with the office—and I did have some problems with the office—were prior to Judge Kozinski's joining the office, and they were with high-level litigators in the office such as Jesse James. I had recommended cases to the office for litigation and they were rejected, I felt without good reason.

In one case, I had a conversation with Jesse James about a case being prosecuted that I had referred to his office and he gave me no reason for rejecting it. In a telephone conversation, I asked him to put his reasons in writing and send them to me so I could close the case, and he sent me a message saying that "Pursuant to our telephone conversation and the reasons stated therein, I am rejecting the case." No reason whatsoever.

That is the kind of decisionmaking that was being done prior to Judge Kozinski taking over as special counsel.

I think Judge Kozinski's tenure as Special Counsel was a very positive force and, as Senator Hatch commented earlier, the criticism that he was making to the office was intended to be constructive criticism, and I took it well. I am surprised that other people did not take it as well as I did.

As far as his critiquing on writing, he did not critique my writing very much as far as negative criticism. He did give me some positive feedback on my writing.

In retrospect or to counter that, prior to Alex Kozinski being special counsel I had no feedback whatsoever, either positive or negative, from Mary Eastwood on anything with regard to running the San Francisco field office. I had a friendly working relationship with Mary Eastwood, but I simply had no feedback whatsoever from the headquarters.

It seemed like the field offices were being just entirely closed out of operations in Washington so that we were kind of islands out there by ourselves. We ran our office, we did our investigations, we recommended things to be prosecuted in Washington, and that was where it was left.

I believe that Alex Kozinski's tenure as special counsel was in need of a positive aggressive approach, which he did bring to the office, and I was glad to have him as special counsel during that time.

Senator **Hatch**. Thank you so much.

Senator Levin, do you have any questions?

Senator **Levin**. Just a few questions. I am sorry, I did not catch your name.

Mr. OLIVIER. William Olivier.

Senator LEVIN. Olivier.

Mr. Olivier, I understand you headed up the San Francisco regional office. Is that right?

Mr. OLIVIER. That's right.

Senator LEVIN. Was that an important office?

Mr. OLIVIER. Was it an important office?

Senator LEVIN. Do you consider that to have been an important assignment?

Mr. OLIVIER. Yes, sir. It was the largest field office, covered the greatest geographical area, largest staff, and the highest caseload.

Senator LEVIN. Mr. Collins testified—I think it was him—this morning that Judge Kozinski's criticisms appeared to many to be harsh.

Would you agree with that, that they appeared to many to be harsh? Putting aside your own assessment.

Mr. OLIVIER. I heard comments from other staff members that his criticisms were harsh. They did not appear to me to be harsh, either the criticisms he made of others or the criticisms he made of our office.

Senator LEVIN. Would you subscribe to that statement, that his criticisms appeared to many to be harsh? Would you agree with that statement?

Mr. OLIVIER. No, I would not. I think his criticisms were well taken at all times.

Senator LEVIN. So you don't even agree with Mr. Collins since you are supporting Judge Kozinski in that regard.

Thank you very much.

Senator HATCH. Well, thank you.

I would just like to say this: Do you feel you have become a better attorney as a result of your working relationship with Mr. Kozinski?

Mr. OLIVIER. Yes, I do.

Senator HATCH. Do you feel that the office was improved? I think your testimony has indicated that you feel there was an upward improvement of the whole office and the whole organization.

Mr. OLIVIER. I do.

Senator HATCH. Do you feel that anybody outworked Judge Kozinski, or do you feel that he set the proper standards and examples for others?

Mr. OLIVIER. I think he set good standards for others.

Senator HATCH. Did he demand anything of the other employees that he did not demand of himself.

Mr. OLIVIER. Not to my knowledge.

Senator HATCH. Earlier, the committee discussed the veracity of Judge Kozinski's opinion that he enjoyed a "good working relationship" with his staff. You, as a former member of that staff, share that opinion.

Is that correct?

Mr. OLIVIER. Yes, I do.

Senator LEVIN. You did not know of any problems that he had with any members of the staff?

Mr. **Olivier**. I had no personal knowledge of any problems he had. He had no problems with any members on my staff nor with me that I know of.

Senator **Hatch**. We appreciate you coming, Mr. Olivier. I think your testimony has been very helpful here.

Mr. **Olivier**. Thank you.

Senator **Hatch**. I believe it has been a very interesting hearing. Thank you for coming.

I have grave difficulty, after having been here, seeing why we need to have this hearing, but perhaps we will wait until 2:00.

We are going to recess until 2:00. At that point, we will call on you, Judge Kozinski. You will be the concluding witness.

We intend to conclude your testimony today, subject to written questions. I presume that Senator Levin will ask any questions he wants to today, but subject to the one point of written questions to Mr. Collins and the Saldanna file being brought up here.

With that, we will recess until 2:00.

[The committee stood in recess until 2:00 this same day.]

The **Chairman**. The committee will come to order.

Judge Kozinski, will you come up, please, and be sworn?

Do you swear your testimony here will be the truth, the whole truth and nothing but the truth, so help you God?

Judge **Kozinski**. Yes, sir.

The **Chairman**. Have a seat.

Judge **Kozinski**. Thank you.

The **Chairman**. Do you want to make any statement first or do you just want to subject yourself to questions?

Judge **Kozinski**. Mr. Chairman, I have no statement to make. I would be pleased to respond to any questions.

The **Chairman**. All right. You can respond to questions. Then, before you leave, if you want to answer any of these statements that have been made, you have a chance to do so.

The file is here of the *Saldana* case I believe Senator Metzenbaum requested. So we will turn these over to him, now.

Senator **Metzenbaum**. I thank you, sir.

You should know, Mr. Chairman, that in your absence I asked Mr. O'Connor to come to the desk. Mr. O'Connor is the special counsel of the Merit Systems Protection Board.

I asked him if he would obtain for us promptly, so that we not delay this matter, the files concerning the 22 awardees. Mr. O'Connor indicated, very graciously, he would attempt to do that and will report back to us when he can, but I wanted this to be a part of the record.

The **Chairman**. Yes.

Do you wish to go ahead and question?

Senator **Metzenbaum**. Yes, I do.

TESTIMONY OF ALEX KOZINSKI, DESIGNEE FOR U.S. CIRCUIT COURT JUDGE FOR THE NINTH CIRCUIT

Senator **Metzenbaum**. Judge Kozinski, did you personally send out copies of a radio editorial which discussed the Government Accountability project as sponsored by the Institute for Policy Studies, which in turn has ties to a Middle East group, which in turn again praised the brutal massacre of athletes at Munich?

Judge KOZINSKI. Yes, sir.

[Information follows:]

EXHIBIT 2

NEWSRADIO
WEEI 590 AM

4450 Prudential Tower
Boston, Massachusetts 02199
Phone: (617) 262-5900

EDITORIAL

WEEI Radio editorials express the views of the station's management on matters of interest to the community we serve. WEEI Radio welcomes an exchange of opinion on important issues and will give responsible persons with opposing viewpoints an opportunity to be heard. We welcome your comments on these and other WEEI Radio editorials.

[illegible]
President

General Manager, WEEI Radio

SUBJECT: The Nomination of Judge Alex Kozinski

BROADCAST: September 9, 1985: 4:12 AM 7:39 AM 11:42 AM 4:39 PM
September 10, 1985: 6:39 AM 1:35 PM 5:39 PM

This week the Senate Judiciary Committee is scheduled to vote on the nomination of Judge Alex Kozinski to the Federal Appeals Court. Judge Kozinski, 35, has had a meteoric career. He graduated first in his law school class at UCLA and later clerked for Chief Justice Warren Burger.

Judge Kozinski has built an impressive reputation on the insightfulness and scholarship of his decisions and on his understanding of jurisprudence. He is also an effective administrator. Since 1982 he has been Chief Judge of the U.S. Claims Court. There he has raised the level of professionalism and reduced the backlog of cases. For these reasons the Kozinski nomination has drawn support from legal scholars of ranging ideological perspectives.

Opposing confirmation is an organization called the Government Accountability Project, which is sponsored by the Institute for Policy Studies (IPS). IPS is a revolutionary group hostile to the U.S. and with ties to terrorist groups such as the PLO and the Middle East Research and Information Project or MERIP. MERIP is perhaps best known for its leaflet after the massacre of Israeli olympic athletes in Munich, praising "the achievements of the Munich action."

This takes on added significance in that Alex Kozinski is Jewish and still speaks with a slight Rumanian accent.

IPS types have spent a lot of money lobbying against confirmation; but we hope this radical opposition fails. Good judicial appointments are rare enough, and certainly we should permit no sabotage by those who support terrorism and anti-semitism. We urge the Senators to confirm Judge Kozinski.

I'm Avi Nelson, Editorial Director, WEEI.

Senator METZENBAUM. Are you aware of GAP's current relationship with the Institute?

Judge KOZINSKI. I have learned recently that they are no longer formally affiliated with the Institute for Policy Studies.

Senator METZENBAUM. But you sent that out. There is pretty strong language in that editorial. Let me read it to you. This is the editorial which you sent out.

How many of these did you send out, incidentally?

Judge KOZINSKI. To my knowledge, Senator Metzenbaum, one, perhaps two.

Senator METZENBAUM. To whom?

Judge KOZINSKI. Would you like names, sir?

Senator METZENBAUM. Yes.

Judge KOZINSKI. I sent one copy, I am certain, to David Ifshin, an attorney here in Washington. I am not certain whether or not I sent a second copy to a gentleman by the name of Paul Borman, who is a nonlawyer in Michigan.

Senator METZENBAUM. In that radio news editorial, the following is to be found: First of all, it talks about the Senate Judiciary Committee being scheduled to vote on your nomination. It talks about your impressive reputation.

Then it goes on to say, "Opposing confirmation is an organization called the Government Accountability Project, which is sponsored by the Institute for Policy Studies, IPS. IPS is a revolutionary group hostile to the U. S. and with ties to terrorist groups, such as the PLO and the Middle East Research and Information project, or MERIP.

"MERIP is perhaps best known for its leaflet after the massacre of Israeli Olympic athletes in Munich praising the achievements of the Munich action." That's the end of the quote.

Further quote from the article: "This takes on added significance in that Alex Kozinski is Jewish and still speaks with a slight Rumanian accent. IPS types have spent a lot of money lobbying against confirmation, but we hope this radical opposition fails.

"Good judicial appointments are rare enough and certainly we should permit no sabotage by those who support terrorism and antisemitism. We urge the Senators to confirm Judge Kozinski. I am Avi Nelson, Editorial Director of WEEI."

What was your purpose in sending that out to, you said, Mr. Ifshin and Mr. Borman?

Judge KOZINSKI. Senator, I said I remember sending it to Mr. Ifshin. I do not recall whether I sent it to Mr. Borman. It is conceivable I might have and I, therefore, stated it for the record.

The reason to send it to Mr. Ifshin is that Mr. Ifshin had telephoned me—first of all, Mr. Ifshin is a personal friend. He is not an attorney that practices before the claims court.

He is somebody who was kind enough to confer with me and give me advice in the confirmation process. He happens to be an attorney with a law firm with which I, myself, was associated many years ago for a brief period.

Mr. Ifshin called me one day and told me that he had learned that Senator Levin had some concerns about my nomination, and he stated that Senator Levin had been given materials by GAP and that he, David Ifshin, had stated to Senator Levin's person or staff, or to Senator Levin, himself—it was not clear to me—that he thought there was a connection between GAP and IPS.

He asked me what I knew about that. I told him that as far as I knew the two organizations were affiliated. He asked me whether there was anything in writing I had that might identify that relationship. I said, "I think so." I was at home when he called me. I said I would look it up and if I did I would send him those materials at his request.

While we were talking—well, that's what brought about my sending it to Mr. Ifshin.

Senator METZENBAUM. First of all, you had not checked the facts because the facts are not accurate as to the relationship between GAP and the Institute. Is that not correct?

Judge KOZINSKI. Sir?

Senator METZENBAUM. Isn't the relationship between GAP and that Institute a long-gone one and no longer a fact, the Institute for Policy Studies?

Judge KOZINSKI. I have since learned that they so claim.

Senator METZENBAUM. That they are so claiming?

Judge KOZINSKI. That's right.

Senator METZENBAUM. You did not see fit to check it before you sent out that which has to be considered somewhat of a smear piece?

Judge KOZINSKI. No, sir. I had no reason to believe they were no longer affiliated. When I dealt with GAP, it was always on their stationery and all their materials it was clearly stated: "The Government Accountability project of the Institute for Policy Studies." That was during the time when I served as special counsel.

It would never enter my mind that that relationship might have changed. I took it for granted.

Senator METZENBAUM. Did you know that Good Housekeeping magazine, well respected, conservative, in April 1985 had a list of things to do and not to do when blowing the whistle? The second thing they mentioned was "Contact the Government Accountability project."

Judge KOZINSKI. I learned that yesterday, Senator Metzenbaum.

Senator METZENBAUM. And you know that Congresswoman Pat Schroeder has written a letter to the chairman indicating her working relationship with GAP, and that that relationship has been a good one and she says it is an organization for which she had respect?

Judge KOZINSKI. I do not specifically remember such a letter, but I am, of course, aware that Congresswoman Schroeder has a working relationship with GAP.

Senator METZENBAUM. So when you wrote to Mr. Ifshin, you said to him, "If Carl is really concerned, he might find this interesting reading." You were saying that he ought to take a look at the radio editorial that is, at the minimum, misleading and, at a maximum, a red-baiting editorial.

Judge KOZINSKI. Among the many materials I sent. As I recall, the letter contained three other categories of materials which I had enclosed in my materials to Mr. Ifshin; and the reference was to all of the above materials, including, of course, all enclosures.

Senator METZENBAUM. Do you believe it appropriate for a chief judge of the U.S. claims court to use the stationery of that court to be sending letters out to others actually lobbying on your own behalf?

Judge KOZINSKI. Senator Metzenbaum, I don't think there is anything prohibited about it. I am obviously in a situation where some questions have been raised about it. It might have been better that I had not done so.

Senator METZENBAUM. Well, you responded to Senator Thurmond, finally, Mr. Chairman, Senator Levin raises a concern about my use of official stationery to write letters ". . . impuning persons questioning my qualifications and urging recipients to lobby on my behalf." That's a quote, beginning with the word "impuning."

Your language: "I am aware of no letter fitting this description and the records that I have reflect none."

Well, let me ask you: You wrote to Robin Stone Einbinder in Flushing, NY, "Dear Robin: Thank you for your New Year greeting, in particular for your fabulous and very generous letter to Senator Thurmond. As you probably know by now, it helped. I made it through the Judiciary Committee with a unanimous vote. I am still having some tsuris on the floor. Carl Levin, in particular, is said to have the ear of GAP and their friends, but with the help of people like you we shall overcome that, too. Give my best to Stewie and the children, and let's keep in touch. Sincerely, Alex Kozinski".

For the edification of those who don't understand the word "tsuris," it is a Jewish word for trouble.

Then you wrote another letter to H. G. Sparrow III—Dickenson, Wright, Moon, VanDuesen and Freeman, Detroit—"Dear Mr. Sparrow: Thank you for coming to my rescue once again. I am confident that your letter was very helpful in giving Senator Levin a perspective on my performance at the claims court. I wish I could report that I had been voted out by the Senate, but that is not the case. Everything is still on hold with no end in sight. I will keep you posted. Once again, many thanks."

And, of course, the letter to David Ifshin.

Did you write any other letters besides those and the one to Mr. Borman?

Judge KOZINSKI. No, sir.

Excuse me, sir. When you say, did I write any other letters, I have written many other letters on many other subjects.

Senator METZENBAUM. No, I am talking about this one.

Judge KOZINSKI. I simply wanted to clarify, you meant——

Senator METZENBAUM. Concerning your nomination.

Judge KOZINSKI. Letters concerning my nomination?

Senator METZENBAUM. Or impuning the GAP or questioning Senator Levin's concerns or any other member of this committee's concerns? Any other letters concerning your nomination.

Judge KOZINSKI. It's difficult to say off the top of my head, Senator. I have provided all letters that contained Senator Levin's name because that was the request given to me.

Without a search of my files, it would be difficult to say with any particularity. I don't, off the top of my head, recall any other instance where I wrote a letter on——

Senator **Metzenbaum** You are telling us under oath that to the best of your recollection there were no other letters? Are you saying to us under oath that, to the best of your recollection, there were no other letters?

Judge **Kozinski**. When you say "no other letters", you have to be more particular.

Senator **Metzenbaum**. No other letters pertaining to your nomination as a member of the circuit court of appeals.

Judge **Kozinski**. Oh, I am sure there were other letters pertaining to my nomination as a member of the circuit court of appeals. For example, there were people who had written to me and said, congratulations on your nomination. Please let me know what your status is, and I wrote back.

There have been other instances where—I mean, I'm sure there are letters pertaining to my nomination that——

Senator **Metzenbaum**. How about letters where you are asking people to involve themselves in getting you confirmed?

Judge **Kozinski**. To the best of my recollection, there are no others, Senator Metzenbaum.

Senator **Metzenbaum**. The Mary Eastwood case. In your October 17 letter to the chairman and Senator Biden you discussed that case claiming that she had repudiated charges of wrongful discharge and bypassed her chance to make her case.

Yet you failed to disclose that she dropped her charges in return for a slight adjustment of salary and payment of attorneys' fees. She told us this morning she received $22,000 settlement plus $10,000 in legal fees.

Are those the correct figures? Somebody back there is shaking his head no. Am I wrong on the facts?

Judge **Kozinski**. I have no idea, myself, Senator.

Senator **Metzenbaum**. I am correct in the figure, yes.

Judge **Kozinski**. I have no doubt that you are, Senator.

Senator **Metzenbaum**. Why did you not tell the committee about that?

Judge **Kozinski**. Well, let me explain, if I may.

As you are aware, Senator Metzenbaum, my letter of October 17, 1985 was a response. It was response to a letter written earlier by Senator Levin to the committee. It is an October 8 letter.

At page 8 of that letter Senator Levin stated the following: "Ms. Eastwood, herself," and this is the third paragraph from the bottom that I am reading.

Senator **Metzenbaum**. OK.

Judge **Kozinski**. "Ms. Eastwood, herself, was terminated by Judge Kozinski after being isolated by him from the rest of the staff and ordered to accept reassignment out of town. Her appeal of the termination was settled in her favor, however, after Mr. Kozinski left office."

Now, I took no issue with that statement. That was a statement that was presented to the committee and I had no quarrel with it. I simply added two facts:

The first one, that she had repudiated her charges as part of the settlement; the second one, that she did not get her job back permanently.

When taken together with Senator Levin's statement—which, again, I did not dispute—my statement simply completed the record.

Senator METZENBAUM. What you said was, "In September 1982 on the eve of trial Ms. Eastwood dropped her appeal and abjured her allegations that the Office of the special counsel, the special counsel or any employee of the Office of the Special Counsel engaged in any wrongdoing. By repudiating her charges, Ms. Eastwood bypassed the opportunity to make her case fully and fairly in open court and, if successful, to permanently get her job back."

Now, you know, Judge Kozinski, that there is a rule of law that the failure to disclose all of the facts under certain circumstances is tantamount to a misrepresentation in and of itself.

Judge KOZINSKI. Absolutely.

Senator METZENBAUM. In this case, were you not guilty of that failure to disclose all of the facts in not telling Senator Thurmond that the woman got $2,000 in back pay and $10,000 in legal fees?

Judge KOZINSKI. No, Senator Metzenbaum; I felt I was completing the record.

Senator Levin's statement obviously disclosed to the committee that she had gotten a lot. She won the appeal, Senator Levin said, which was settled in her favor.

I did not dispute that. I did not say it was not settled in her favor. I took that as a given.

I simply added two facts: one fact being that she had abjured her charges, the second was that she did not get her job back permanently.

The CHAIRMAN. Senator Metzenbaum will finish and then we will recess until I get back here.

Senator METZENBAUM. Did you defend your nondisclosure to Senator Levin by claiming that your role as an advocate for your confirmation justified withholding unflattering evidence about your nomination?

Judge KOZINSKI. No, Senator Metzenbaum. I don't think that is a fair characterization of what I said.

Senator METZENBAUM. What did you say?

Judge KOZINSKI. Well, it was very early in the morning and I hope I can repeat what I said.

Senator METZENBAUM. What time in the morning was it?

Judge KOZINSKI. It was 8:30. I am not a morning person, sir. I go very late at night, but I like to sleep in, usually.

What I stated was—the question, I believe, Senator Levin asked me is whether my characterization was fair. What I said to him are that standards of fairness depend on the context and the type of document.

If this were a judicial opinion, I would, of course, have to disclose the evidence on both sides, set it forth in the same document, and then reach a conclusion. I felt that this was not that kind of document, that this was an advocatorial document: that allegations had been made to him and, through him, to the committee, and that the purpose of my letter was to respond and add such facts as I thought would give a clearer, fuller, more accurate and, yes, more favorable picture of the situation to me——

Senator **Metzenbaum**. More favorably.

Judge **Kozinski**. Of course. [continuing.] Taking as given that what Senator Levin had said and what I had not disputed would stand unrebutted.

Senator **Metzenbaum**. Do you really believe that when somebody comes before this committee or the U.S. Senate for confirmation, that that person appearing before us comes in an advocacy position, and that he or she has the right to withhold some of the information or to present it in the most favorably light?

Or do you think that the appropriate procedure is to present the facts as they are and not try to gild the lily?

Judge **Kozinski**. There are many parts to your statement, Senator Metzenbaum. It is difficult to answer yes or no.

I think that one has to be fair with the committee. I think one has to be honest with the committee. One has to disclose any fact that the committee is not otherwise aware of that might be relevant.

The Mary Eastwood appeal has been a matter of public record. All those documents have been a matter of public record.

It was clear to me that Senator Levin had either talked to Ms. Eastwood or was otherwise fully advised of the situation and, through him, the committee had been fully advised of the situation.

I am simply pointing out, as I said, the parts of the record I thought might have been overlooked that might have been favorable to me.

Senator **Metzenbaum**. We must recess this hearing until the chairman reconvenes it.

Judge **Kozinski**. Thank you, sir.

[A brief recess was taken.]

Senator **Hatch** [presiding]. Let's reconvene the committee. We will turn to you, Senator Levin.

Judge, we will continue the questioning.

Senator **Levin**. Judge Kozinski, you said that you have no quarrel with the statement in my letter to Senator Thurmond in which I indicated that Ms. Eastwood prevailed in her appeal. You said two or three times today that you have no quarrel at all with that statement.

Yet in your answer to my letter, you wrote Senator Thurmond that Ms. Eastwood dropped her appeal and she repudiated her charges.

Now, do you see anything at all inconsistent, on the one hand, between my letter which says that she prevailed on her appeal, with which you have no quarrel, and your letter in which you say she dropped her appeal and repudiated her charges? You see no inconsistency there?

Judge **Kozinski**. I see some inconsistency. What I stated was that insofar as my response did not take issue with your statement, it remained unrebutted.

Senator **Levin**. Well, you said you had no quarrel with my statement that she prevailed on her appeal.

Judge **Kozinski**. That's right. I mean, I may have said that.

Senator **Levin**. Today.

Judge **Kozinski**. I guess I said that. Yes.

Senator LEVIN. Well, if you have no quarrel with the statement that she prevailed on her appeal, why did you represent to the committee in your letter to Senator Thurmond that she dropped her appeal and repudiated her charges, if there is an inconsistency which you now acknowledge there is?

Judge KOZINSKI. Well, I have no quarrel with the proposition that she prevailed. I have a quarrel with the proposition that she had a complete and unmitigated victory.

What I pointed out was that while she had a victory, her victory was a limited one.

Senator LEVIN. Is that what you said in your letter?

Judge KOZINSKI. That is what I am saying now.

Senator LEVIN. Is that what you said in your letter?

Judge KOZINSKI. Obviously not.

Senator LEVIN. Now, relative to the radio editorial, which has been discussed by Senator Metzenbaum—well, before I go to that, I want to go to just one other aspect of the Mary Eastwood case which troubles me a great deal.

That is your statement to Senator Thurmond in the letter of October 17th that, "For reasons never fully explained, Ms. Eastwood chose not to go to San Francisco, abandoning the responsibilities entrusted to her."

Do you think that's a fair characterization of her memo to you, dated February 16, 1982, in which she said that "Over the weekend, I gave considerable thought to your plan to move me to San Francisco to head the western regional offices. I have lived in Washington for almost 27 years. Most of my friends and part of my family live here. I, therefore, do not wish to leave here"?

Judge KOZINSKI. You have a question?

Senator LEVIN. Yes. My question was do you think that is a fair characterization of her memo of February 16th?

Judge KOZINSKI. I was not characterizing her memo of February 16th.

Senator LEVIN. Well, that memo was to you. Did you receive that memo?

Judge KOZINSKI. I must have.

Senator LEVIN. You don't doubt that memo said what I just said it said.

Judge KOZINSKI. I have no doubt, Senator Levin.

Senator LEVIN. Didn't she explain to you in this memo why she did not want to go to San Francisco?

Judge KOZINSKI. You have read the memo and the memo appears to contain an explanation. I was simply working——

Senator LEVIN. Well, if the memo contains an explanation and you read it and you remember receiving it, why did you tell the committee that "For reasons never fully explained, she chose not to go to San Francisco"?

Judge KOZINSKI. I did not say I remembered receiving it. I said I no doubt received it.

I, in fact, have no specific recollection of receiving it.

I was working from memory and I was simply stating, Senator Levin, that I did not feel entirely satisfied that the reasons she gave were the full reasons she had. Had I remembered the memo, had I had the memo to look at when I gave my response, I might have phrased things differently.

Senator LEVIN. What were you dissatisfied about relative to her explanation? You seem to remember you were dissatisfied. You don't remember getting the explanation, which apparently is satisfying.

Judge KOZINSKI. Senator, I don't want to quibble with you at all. I remember her general reasons, the general reasons Ms. Eastwood gave for not going to San Francisco.

Senator LEVIN. You did remember that when you wrote the memo.

Judge KOZINSKI. I do remember the general reasons. I also remember not being fully satisfied, in my own mind, that those were all of the reasons.

Senator LEVIN. Do you remember why?

Judge KOZINSKI. There were a couple of reasons why. For one thing, Ms. Eastwood, after she left, chose to take an appeal—or after her termination—and there was a lot of press coverage of the event.

I did not think that was an accident and I thought, perhaps, part of the reason for refusing the assignment might have been to spark controversy. I did not know. I simply felt that might be a possibility.

More specifically, the assignment to San Francisco is, by all standards, a plum to most attorneys. I understood that Ms. Eastwood had some family in the Bay area and I just did not—I did not feel fully satisfied in my mind.

Senator LEVIN. What made you think that part of the reason for refusing the assignment was to gain publicity? Because there was coverage of her lawsuit?

Is that just a hunch or was there some evidence, or what?

Judge KOZINSKI. It is a hunch. You asked me my reasons. I wanted to be fully candid with you.

I did not put them on the record. I certainly, if not asked, would not have said something like this to anybody.

But I am here to tell the truth and you asked me why I had doubts. I am expressing to you my doubts.

Senator LEVIN. No, but I have a problem——

Judge KOZINSKI. I have no evidence to support that. Hunches are like that.

Senator LEVIN. No, I am not talking about your testimony here. I am talking about your letter addressed to Senator Thurmond in which you volunteered the following statement: "For reasons never fully explained, Ms. Eastwood chose not to go to San Francisco, abandoning the responsibilities entrusted to her," shortly after you told Senator Thurmond that she had dropped her appeal and repudiated her charges.

I don't think that is at all a fair representation to the committee of what you knew; and if it's a hunch, you should say it's a hunch.

If you have no evidence, you should say it. You say now you don't have any evidence and yet you represent to the Senate Judiciary Committee something upon which you have no evidence.

I don't think that's appropriate. I cannot say it any more bluntly or directly to you than to put it that way.

Now, on the radio editorial—you have indicated that you sent this editorial to one or two people, you are not sure how many.

Would you acknowledge that this editorial impugns persons who are questioning your qualifications?

Judge Kozinski. I would have to look at it.

Senator Levin. Well, let me read the operable paragraph.

> Opposing confirmation is an organization called the Government Accountability Project, which is sponsored by the Institute for Policy Studies. IPS is a revolutionary group hostile to the United States and with ties to terrorist groups such as the PLO and the Middle East Research Information Project, or MERIP. MERIP is perhaps best known for its leaflet after the massacre of Israeli Olympic athletes in Munich praising the achievements of the Munich action.

My question to you is: Do you believe that editorial impugns persons that are questioning your qualifications?

Judge Kozinski. The paragraph talks about organizations and groups. It does not mention specific persons.

Senator Levin. So you are then saying that, in your judgment—and we are asking here for judgment—that editorial does not impugn persons questioning your qualifications.

Judge Kozinski. I thought you were asking me a question of fact, Senator.

Senator Levin. Now I am asking you for your judgment.

Judge Kozinski. Oh, I think by implication if there are negative things said about a group, then all those affiliated with the group would be included by inference.

Senator Levin. Well, then, why did you say you are aware of no letter fitting the description that I put in my letter, that you "* * * wrote letters on U.S. Claims Court stationery impugning persons questioning your qualifications"?

Is that because it was an enclosure and not because it was incorporated in the body of your letter, or what?

Judge Kozinski. Well, there are a couple of reasons. One of them is the full statement, the full description, is if I remember correctly—and perhaps I should read it rather than——

Senator Levin. Well, let's take it one by one.

Judge Kozinski. Yes.

Senator Levin. You do agree that at least your judgment is that that editorial, in effect, impugns persons questioning your qualifications?

Judge Kozinski. Would you repeat the question?

Senator Levin. Is it your judgment that, in effect, that editorial impugns persons that are questioning your qualifications?

Judge Kozinski. I think, in effect, it does.

Senator Levin. So that part of my statement you would agree with.

Judge Kozinski. Right.

Senator Levin. That you did write letters on U.S. Claims Court stationery impugning persons questioning your qualifications.

Judge Kozinski. I did not. I enclosed to a letter——

Senator Levin. That's the distinction. You did not write——

Judge Kozinski. That is a distinction.

Senator Levin [continuing]. The letter, it was the enclosure you sent with your letter.

Judge Kozinski. Right.

Senator LEVIN. So when you send out an enclosure which impugns people's qualifications, you don't think that that is considered as part of the letter which people receive.

Judge KOZINSKI. Senator, this editorial contains five paragraphs,—one, two, three, four, five—the two first of which say very positive things about me. I must tell you that what struck me about the editorial was the nice things it said about me.

I certainly do not mean to adopt every statement in every article I have ever sent with a letter. In fact, I have sent out articles that were highly critical of me and I would hope that when I do that it is understood that I am not endorsing those highly critical comments.

Senator LEVIN. I am not asking whether the editorial is totally negative about an organization. I am just simply asking you whether or not that editorial—I think you have answered the question—in fact, impugns the motives, in fact, of people who oppose you.

I think you said yes.

Then my question is: Then when I said, in my letter to Senator Thurmond, that you wrote letters on U.S. Claims Court stationery impugning persons questioning the qualifications, as I understand it your answer is:

"Ah, but that was not me, it was the editorial I enclosed."

Is that your answer?

Judge KOZINSKI. That is part of the answer.

Senator LEVIN. Did you, in these letters, urge recipients to lobby on your behalf?

Judge KOZINSKI. Which letter are you referring to?

Senator LEVIN. In any of these letters that Senator Metzenbaum read to you.

Judge KOZINSKI. I believe none of them.

Senator HATCH. But, Senator, what if he had? I mean, what difference would that make?

Senator LEVIN. He represented to the committee that he did not do something he did. That is the difference.

Senator HATCH. I see.

I mean, I don't think there would be anything wrong. I have yet to see one of these judgeship nominees that hasn't talked to somebody.

Senator LEVIN. I am not getting into that question at all.

Senator HATCH. Yes. OK.

Senator LEVIN. The question is whether or not he has represented to the committee, as he did, that "There are no letters that fit this description."

Senator HATCH. All right.

Senator LEVIN. The question is: Take a look at these letters. Decide for yourself. Do these letters fit that description, and their enclosures?

You can, like all of us, reach your own judgment as to whether or not those letters fit that description. I think they do and you may reach an opposite conclusion.

There may be nothing wrong with those letters fitting that description. That is your point. But whether they fit that description or not is a very, very different point and one which is critical in terms of how candid Judge Kozinski is with the members of this committee and the Members of the Senate.

Did you know the person who wrote this editorial or delivered this editorial, Avi Nelson?

Judge KOZINSKI. I have met Mr. Nelson.

Senator LEVIN. Did you discuss with Mr. Nelson your nomination prior to this editorial being aired on September 9, 1985?

Judge KOZINSKI. I discussed with him certain aspects of my nomination at an earlier date.

Senator LEVIN. When you say that you have met Mr. Nelson, is this something which is a one-time thing, you met him once?

Judge KOZINSKI. Prior to today, I had only met him once, yes.

Senator LEVIN. Is there some relationship that he has with a member of your staff or somebody who works for you?

Judge KOZINSKI. As I stated to you last week, he is married to Laura Nelson who works for me.

Senator LEVIN. Just so the record is clear, the person who delivered this editorial is married to a person who works for you, and you discussed with him some aspects of your nomination prior to this editorial being delivered.

Is that a fair summary of where that is?

Judge KOZINSKI. I think so.

Senator HATCH. We will need to recess for a vote at this time.

[A brief recess was taken.]

Senator HATCH. Senator Levin, let's go.

Do you have any estimate about how much longer you will be questioning Judge Kozinski?

Senator LEVIN. Perhaps a half hour.

Senator HATCH. All right.

The reason I am a little upset is because I just found out that they are now asking for all the records of everybody who got an award. When is this going to end?

You know, there comes a point when you just have to say what's right and what's wrong. Now, I think you have been asking good questions, and I want you to answer them.

How much do you have to pillory these people? That is for things that were known when he was confirmed a number of years ago.

I just don't understand it myself. I would not have ordered it.

Senator LEVIN. I think it would be fair if Senator Metzenbaum were here.

Senator HATCH. Well, OK. I did not know whether it was you or Senator Metzenbaum. What are you going to do, strip the whole Federal Government blind of every document to see if you can find something that you cannot?

Senator LEVIN. I think I can tell you what was asked for, but I think it would be better that Senator Metzenbaum also be here because I think his recollection is a little more precise as to what it was.

As I understand it, the issue here is whether or not there were awards which were given to employees who had previously received demerits in their records and who were known as having problems, that were problem employees, shortly after a newspaper article.

I believe the request was for the files of those employees so that we could see whether or not the sudden merit badges that they got came at a particular point in time right after that newspaper article, and whether it was inconsistent with other things in the file.

Senator HATCH. OK.

Mr. O'Connor, where are you?

Mr. O'CONNOR. Right here, sir.

Senator HATCH. Would you come up here for a second, please?

Senator LEVIN. Well, I think it would be unfair for Senator——

Senator HATCH. Let me just take a second. I will make sure Senator Metzenbaum has this.

Just stand right there. I just want to see what is going on here. I have a couple of questions I want answered because I think we have to stop this.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. O'CONNOR. I so swear.

Senator HATCH. Now, with deference from you, Senator, if you will yield to me just for a few minutes. Would you be kind enough to do so? You don't have to.

Senator LEVIN. My only suggestion is that since both Senator Metzenbaum and I had conversation, but since Senator Metzenbaum is the Senator who——

Senator HATCH. Well, but let me just ask. Of course, I will——

Senator LEVIN. If I could just finish because you asked me what my reaction was to it.

Senator HATCH. Yes. Sure.

Senator LEVIN. As I remember this, Senator Metzenbaum asked you to come forward.

Mr. O'CONNOR. That's right.

Senator LEVIN. I think that in fairness to Senator Metzenbaum he should be here during this conversation.

Senator HATCH. Well, I think it would be wonderful if he was here during this conversation.

Senator LEVIN. Pardon?

Senator HATCH. But he is not here. I just want to ask some questions and then Senator Metzenbaum can ask him anything he wants to.

TESTIMONY OF WILLIAM O'CONNOR, SPECIAL COUNSEL OF THE OFFICE OF SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

My question is this: What difference does it make if somebody was awarded an award a number of years ago for something that, in my opinion, does not even directly relate to this?

What difference does it make if somebody was awarded an award that you and I might disagree on whether he deserved it or not?

Mr. O'CONNOR. Well, sir, if I were the supervisor who was in the position of making the decision——

Senator HATCH. Would that violate civil service law?

Mr. O'CONNOR [continuing]. About who got an award, what I would do would be pass on the award recommendation of my subordinate supervisor, which is what Judge Kozinski would have properly done.

Senator HATCH. Sure.

Mr. O'CONNOR. Now, I have been both a subordinate supervisor and supervisor at the head of an agency, and when you receive a recommendation from a subordinate supervisor it may be for a special achievement award. That could be someone who was incompetent at something they had done before, but had later done a really excellent and outstanding job that one wanted to reward.

Senator HATCH. And you could do that if you wanted to——

Mr. O'CONNOR. You could do that.

Senator HATCH [continuing]. Even though they were incompetent before.

Mr. O'CONNOR. You could.

Senator HATCH. Even though they were unsatisfactory before.

Mr. O'CONNOR. You could, if you are talking about special achievement. Now, if you are talking about sustained superior performance awards, that is a different kind of award.

Senator HATCH. Well, is that part of the problem here? Do you know, Senator Levin, whether that was part of it?

Senator LEVIN. I can just read from the affidavit, here, which I think Mr. O'Connor——

Am I pronouncing your name correctly?

Mr. O'CONNOR. Yes, sir.

Senator LEVIN [continuing]. Said he was going to check out. The affidavit of Mr. Hollingsworth read as follows:

> Some of the very same employees who received these 30 awards and promotions had previously received unsatisfactory performance appraisals by Mr. Kozinski. Others, including some who worked for me, had well known performance shortcomings.
>
> None of these announced awards had been preceded by the required justification. I cannot account for Mr. Kozinski's action except to remember how the press and congressional sources were criticizing him for negative treatment of his staff.

Senator HATCH. Now, assuming that that is all true, would that stop Judge Kozinski from giving a special performance award.

Mr. O'CONNOR. If what the Senator read was correct—that is, that there was no justification——

Senator HATCH. Oh, yes.

Mr. O'CONNOR [continuing]. For any award being given, then you could not give an award.

Senator HATCH. But the only persons who would know that would be the employee and Judge Kozinski.

Mr. O'CONNOR. The employee, the line supervisor, if you will, and the superior supervisor. Judge Kozinski would have been the superior supervisor.

Senator HATCH. So, really, the only two people who would have known would have been the employee, who would have loved to have gotten the award regardless, and Judge Kozinski, who made the award.

Mr. O'CONNOR. He might not know. Judge Kozinski might very well have been totally insulated.

Senator HATCH. Well, he could have just followed the advice of his subordinate supervisors.

Mr. O'CONNOR. I do that all the time, Senator.

Senator HATCH. Sure.

Mr. O'CONNOR. I mean, I do not look at the file to see whether Tom, Dick, Harry, Mary, or Sally has been good or bad. If their supervisor says to me, "This person ought to be awarded and I am going to give four awards and I have five recommendations," I will talk to the supervisors and give the best four.

I don't go back and look at their files.

Senator HATCH. I see. Well, what if Judge Kozinski made a mistake? What if the supervisor recommended to him or what if he just, on his own, made an award and it was not justified?

What is the civil service requirement?

Mr. O'CONNOR. If he made an award, that was not justified——

Senator HATCH. I mean, assuming the worst.

Mr. O'CONNOR. I don't think he could give an award that was not justified if he decided to give it. That fact that he decided to give it justifies.

Senator HATCH. I would think anybody sitting here would conclude the same. How are you going to prove otherwise even if he wanted to do that, which I don't think anybody can truly allege?

Now, maybe whoever made that affidavit felt that the awards were not given to worthy recipients, but they are not the ones who make the decisions, right?

Mr. O'CONNOR. Well, the head of the agency makes that decision and whether the paperwork is timely or not timely. Sometimes it occurs, Senator, that the paperwork lags the event.

Senator HATCH. Yes.

Mr. O'CONNOR. I have seen that occur and I have seen people have that problem.

Senator HATCH. Well, this is, frankly, what is bothering me. I don't blame anybody for doing everything they can to make sure that any judgeship nominee is fit for public office.

With all of the accolades given to this man by people with whom he worked, you have few who don't like him.

Mr. O'CONNOR. Well, I have not ever discussed with Judge Kozinski about the giving of awards, sir. It seems to me that that is the sort of thing you do in the course of managing an agency.

I have done it about every 6 months since I went there 3 years ago and I have no idea how many awards it totals to, but I suspect that it runs about 15 or 20 every time. I really have never looked at the files.

So if he has done it wrong, I have been acting on some of the same supervisors, I have probably done it wrong, too. But I kind of doubt that.

I don't think they would lie to him, I doubt they lied to me.

Senator HATCH. All right.

The reason I am getting upset about it is because, by a vote of 17 to zero, we will put you out of the committee. You have been held on that calendar now for two solid months.

None of these witnesses came in and made these complaints notwithstanding their numerous opportunities to do so, and some of them have not come in today.

Now, all of a sudden, we get into these peripheral issues that, even if mistakes were made, should not make any difference. I am wondering what is going on here. That is the thing that is bothering me.

I would like for you to stay if you can, in case Senator Metzenbaum has any questions for you.

Mr. O'CONNOR. Yes, sir.

Senator LEVIN. But the question is whether or not those files reflect the justifications required by the rules.

Senator HATCH. What if they do or don't?

Senator LEVIN. That is the only question. He can find out.

Senator HATCH. What if they do or don't? How pertinent is it?

Senator LEVIN. It may affect some judgments. It may not affect your judgment. I can understand.

Senator HATCH. Well, let's assume that he had bad judgment 4 years ago. I mean, so what? He has been 3 years of extensive good, meritorious service as a top judge in the claims court.

Senator LEVIN. If that were the only——

Senator HATCH. When do you get——

Senator LEVIN. If that were the only issue, Senator Hatch, I would tend to agree with you.

Senator HATCH. OK, then we are in agreement.

Senator LEVIN. But it is not the only issue.

Senator HATCH. I understand.

Senator LEVIN. It is one of many, many issues which are being raised and I am not sure what——

Senator HATCH. Yes, and I have not seen one yet that has been a very substantive issue.

Senator LEVIN. You have not been here all day, the entire day.

Senator HATCH. I have heard a lot of it. From what I have been told, none of the issues raised in my absence were very substantive.

Mr. O'CONNOR. With respect, gentlemen, the file is not going to give you the answer.

Senator HATCH. That is for sure.

Senator LEVIN. Is that what you told Senator Metzenbaum?

Mr. O'CONNOR. I said I would get the files.

Senator LEVIN. Did you tell him that the file would not give him the answer to that question?

Mr. O'CONNOR. No, he did not ask. But listening to you that is obviously——

Senator LEVIN. Well, if somebody asks you for a file because they are after information to see whether or not the documentation there will have the justification which is required, apparently, by law and you are saying that he did not ask whether or not it contained it?

He just asked for the file on the assumption it contained it.

Mr. O'CONNOR. If a Senator of the United States in committee convened says to Bill O'Connor, "Get a file," I will get the file.

Senator LEVIN. You did not know that is why he wanted the file.

Mr. O'CONNOR. I beg your pardon?

Senator LEVIN. You did not understand that is why he wanted the files?

Mr. O'CONNOR. I understood he wanted to look at the files, sir. Of course.

Senator LEVIN. You did not understand that he wanted the files because he thought the justification would be in those files?

Mr. O'CONNOR. And it may well be——

Senator HATCH. All right.

Mr. O'CONNOR [continuing]. It may well not be, too.

Senator HATCH. Let me interrupt here.

I have one of those files: special achievement award for blank. There is a justification in here, and this was the one name that was mentioned earlier.

> During the final 12 weeks of fiscal 1981, blank was intensely involved with preparation for OSC's move to 1120 Vermont Avenue. She prepared requisitions and purchase orders for procurement of supplies and equipment which had been delayed pending conformation of the special counsel.
>
> She diligently coordinated all requisitions and made sure that they were prepared in a timely fashion. She followed up on all orders, checking with vendors so that deliveries would be promptly made.
>
> Because of her work with the vendors, little follow up was required by management to assure that the equipment and supplies were delivered on time.

I presume that is what is in every one of these files. The last part says:

"I am pleased to be able to recommend blank for a Special Achievement Award."

I appreciate your being here, for helping us and for getting these files. We do almost anything for our colleagues on this committee, but I think there ought to be some substance.

I think it is incumbent upon them to bring out some substance and some substantive criticisms if they are going to make this kind of an effort.

I am not meaning to demean the effort, but I have not heard what I would consider to be an adequate criticism to stop this man from being a Federal Judge in light of all the overwhelming testimony that is in favor of him.

Mr. O'CONNOR. May it please the committee——

Senator HATCH. There is always somebody going to be irritated.

Mr. O'CONNOR [continuing]. The word "none" appeared in the communication that I heard read and referenced by Senator Levin a moment ago: none of them incorporated justification.

You have just read, Senator Hatch, from something that I can pull out of the [deleted] file. In the [deleted] file, there was a justification.

So the affidavit is, at least, incorrect about one of them so the "none" is wrong. Now, there may be justification in 4 or 6 or 10.

I have made an analysis of who we presently have on board whose files you may have and it is less than half of the people who were awarded at that time.

Senator HATCH. Well, my point is that even if there were mistakes made, they are irrelevant to this particular matter.

Mr. O'CONNOR. Well, they were not necessarily his.

Senator HATCH. That is right, but even if they were his it is irrelevant, as far as I'm concerned.

Mr. O'CONNOR. Well, I will grant you that it would be of limited relevance under any condition.

Senator HATCH. I would say so.

Mr. O'CONNOR. Unless it is attributed to him, you cannot do it.

Senator HATCH. Because you would have to say he made a mistake without having any way of proving it. Let's get to the relevance of what we are talking about here today and let's see if there is anything that might cause Members of the U.S. Senate to not vote for Judge Kozinski.

I have not heard anything yet.

But let's go back to Senator Levin. Please stay just in case Senator Metzenbaum has any questions.

Senator LEVIN. Let me ask Mr. O'Connor a question.

Senator HATCH. Sure.

Senator LEVIN. Do you know whether or not that piece of paper which Senator Hatch just read was in the file or was prepared preceding the announcement of that award?

Mr. O'CONNOR. No, I don't, Senator.

Senator LEVIN. Well, then, how can you say this affidavit is erroneous when this affidavit said, "None of these announced awards had been preceded by the required justification"?

Mr. O'CONNOR. Because the required justification——

Senator LEVIN. Do you know whether that affidavit is incorrect?

Senator HATCH. Let him answer the question.

Mr. O'CONNOR. Yes, sir. I will have to say it is.

Senator LEVIN. In other words, you know that it did precede.

Mr. O'CONNOR. No, sir. Let me answer the question you asked first, if you will.

The question, sir, is whether the justification preceded. Now——

Senator LEVIN. The required justification.

Mr. O'CONNOR. The required justification can be oral as long as it is reduced to writing and is set forth in the appropriate way.

Senator LEVIN. I don't doubt that.

Did it precede it? Do you know whether the justification in that particular case preceded the announcement of the award? Do you know that?

Mr. O'CONNOR. I know that that would be what Mr. Caldwell testified to this morning; yes, sir. I heard it.

Senator LEVIN. In that particular case?

Mr. O'CONNOR. He is talking about [deleted]. Yes, I know [deleted]. She has gotten other awards, too.

Senator LEVIN. Can you tell from the reading of that document that Senator Hatch read that the award in that case was preceded by the required justification? Can you tell by the reading of that document?

Sir, can you tell from the reading of that document whether or not——

Mr. O'CONNOR. The justification preexisted the award; yes, sir.

Senator LEVIN. Can you tell from the reading of that document——

Mr. O'CONNOR. Sure, because the events to which the document adverts occurred before the award. What is being done is she is being written up for doing good work, a specific activity of moving an office from point A to point B.

That took place and that's the justification. That had already happened.

Senator HATCH. Well, the document does——

Mr. O'CONNOR. The specification occurred whatever date it is.

Senator HATCH. The document is dated August 9, 1982. It says, at the beginning, "During the final 12 weeks of fiscal year 1981, [deleted] was intensely involved * * *"

My only point, Senator Levin, is——

Senator LEVIN. I would like to get on with Judge Kozinski.

Senator HATCH. Yes. continue with your questioning.

Senator **Levin**. I think that is a very valid request——

Senator **Hatch**. Well, I don't.

Senator **Levin** [continuing]. Where there is an affidavit here under oath that there was a motive for suddenly reversing a long series here of condemnatory actions on the part of this Special Counsel. That is the allegation.

Senator **Hatch**. All right. Let's go on.

Senator **Levin**. I will——

Senator **Hatch**. I don't agree with that.

Senator **Levin** [continuing]. But to put it in context, suddenly after a newspaper article criticizing him for his handling of employees there is, very suddenly, without justification that is required, merit awards being given to 40 employees who in many cases—as a matter of fact—had been condemned prior to this, had been criticized for their work effort.

Senator **Hatch**. This case is the only one mentioned, Senator Levin and there was justification for it.

Senator **Levin**. Now, all I am saying is that that becomes a very valid request. Let's take a look at the file, that's all the request is.

Senator **Hatch**. Go ahead.

Senator **Levin**. Now, I would like to get back to Judge Kozinski, but——

Senator **Hatch**. Go back to Judge Kozinski.

Senator **Levin** [continuing]. We can carry this on——

Senator **Hatch**. Will you please stay, Mr. O'Connor?

Mr. **O'Connor**. Yes, sir.

Senator **Hatch**. Thank you.

Senator **Levin**. Now, I indicated, Senator Hatch, that I thought my questioning of Judge Kozinski would take an additional half hour.

Senator **Hatch**. Sorry to interrupt you.

Senator **Levin**. No, that's OK. I don't mind.

Senator **Hatch**. The more I see of it, the more upset I am.

Senator **Levin**. Well, I am sure that different people view this testimony and these documents and affidavits in very different ways. I just want to let Senator Simon know whenever he is prepared, I would be happy to yield to him.

Senator **Simon**. Two minutes.

Senator **Levin**. OK.

TESTIMONY OF ALEX KOZINSKI, DESIGNEE FOR U.S. CIRCUIT COURT JUDGE FOR THE NINTH CIRCUIT—RESUMED

Senator **Levin**. Judge Kozinski, Jesse James' affidavit states that he resigned because he could not become a participant—I'm quoting here:

> * * * in what I believed were prohibited personnel practices carried out in our office and I disagreed with the management style of Judge Kozinski.
>
> Increasingly I saw what I believed were prohibited personnel practices taken against staff members almost daily. Resignations were higher than they had ever been and they were linked closely to the employee abuses made by Mr. Kozinski or under his direction.

One case that he refers to on page 5 is as follows:

> In another situation involving another elderly employee who had more than 25 years of Government service, he, too, was forced out of the office. It began when Mr.

Kozinski requested the employee and I meet with him to discuss the employee's performance.

During the meeting, Mr. Kozinski became very loud, caustic and threatening in tone. The employee listened without comment. After the meeting, the employee requested sick leave and left the office.

The next day the employee called me on the telephone and requested use of sick leave, which I granted. At the time, the employee had an excess of 300 hours of sick leave.

During the telephone conversation, the employee stated that he was suffering from hypertension and a severe heart condition, and his doctor had instructed him not to return to work because of the stressful conditions which the employee reported existed within the office. According to the employee, his doctor had instructed him not to return to work until he, the doctor, gained control of his hypertension and could then treat his heart condition.

Mr. Kozinski was later advised of this conversation and shortly thereafter he, Mr. Kozinski, began to question whether the employee was actually ill. During this period, as immediate supervisor I had several telephone conversations with the employee and I became convinced the employee was ill.

Within 2 to 3 weeks of the employee leaving the office, Mr. Kozinski held a meeting to discuss the employee's absence. In attendance at the meeting was the Associate Special Counsel, a representative from OSC's Administrative Division, and myself.

Mr. Kozinski began the meeting by stating that he did not believe the employee was ill and that he, therefore, proposed to remove the employee immediately. I suggested that Mr. Kozinski could not terminate the employee if the employee was truly ill. I also suggested that if Mr. Kozinski did not believe the employee was ill, he should require the employee to take a fitness for duty physical prior to proposing any personnel action.

Mr. Kozinski agreed and instructed the Administrative office to issue a letter to the employee ordering him to take a fitness for duty physical immediately. The letter requiring the fitness for duty physical contained a listing of about three or more OPM-approved doctors for the employee to select from.

After a few telephone conferences with the employee and the doctor's office, the employee selected one of the recommended doctors and scheduled an appointment.

Because of the employee's condition, the physical was to be given in two parts over a two week period of time. On the date of the first part of the test, I called the doctor to learn of the results and to assure that he would submit a written report to the office.

I was advised that the employee's condition was severe, that there was no need for the second part of the test, that the employee's condition was such that he should be hospitalized, and that if the employee returned to the stressful conditions of our office he could die.

With that information, I requested the doctor to provide a written opinion and I advised Mr. Kozinski and the Associate Special Counsel of the doctor's comment. I assumed the matter was closed.

However, to my surprise a few days after the arrival of the doctor's letter, I received a telephone call at home from the Associate Special Counsel for Prosecution. In that telephone conversation, the Associate Special Counsel informed me that Mr. Kozinski had requested that he call me and asked if I would call the employee and advise him that Mr. Kozinski was thinking of removing him.

I was told that, by doing so, the employee might resign his position.

I told the Associate Special Counsel that I would not be a party to such an action.

[Information follows:]

EXHIBIT 4

From the September 20, 1985 Affidavit of
Mr. Jesse James

"Examples of Mr. Kozinski's abuses include the following: At the time of Mr. Kozinski's confirmation as Special Counsel, the Office of Special Counsel employed, as a clerk-typist, an elderly female employee who had been a loyal and dedicated federal employee in excess of twenty years. Prior to Mr. Kozinski's arrival, the employee had been hospitalized for several months after learning that she had cancer. Her condition was such that we were uncertain whether she would live or ever return to work. However, to our surprise, she regained her strength and managed to return to the office just about the time of Mr. Kozinski's confirmation. About three or four weeks after his confirmation, Mr. Kozinski summoned me and at least one or two individuals from the OSC Administrative Division and informed us that he was going to terminate the elderly employee. When I questioned the basis for the termination, Mr. Kozinski claimed that the employee was not performing her duties. I found that difficult to believe, because I knew what assignments she had received and was uncertain whether such a small number of assignments were sufficient to form a basis for termination. Further, the employee only performed duties as required by the staff attorneys she worked for. Because of her illness and age, she was slower and not as proficient as younger secretaries. But I did not feel her performance was such that it warranted removal. This was especially true because it was generally well known that she planned to retire shortly. When I determined that Mr. Kozinski was determined to terminate the employee, I questioned the basis for the termination and I suggested that he wait until the employee retired. Because no one in attendance at the meeting was certain when the employee would retire, I was asked to find out and to advise Mr. Kozinski. Upon checking with fellow employees, I learned that the employee planned to retire in October of 1981. This meant that Mr. Kozinski only had to wait two months and the employee would voluntarily leave the office. I subsequently advised Mr. Kozinski of my finding and he indicated that he would take no further actions. However, a few weeks later (some time during the first week of September), while I and all professional staff members were attending a training course, Mr. Kozinski circulated throughout the office one of his famous memos in which he stated that on that day, he was saying goodbye to the employee and he thanked her for her extensive number of years of government service. Prior to receiving the memo, there were no formal nor informal discussions with the elderly employee about leaving the office. She had made no formal statements about leaving at that time. When the employee received Mr. Kozinski's memo, she got up, placed her USC government identification on her typewriter, walked out of the door and never returned to the office. When the employee's husband called and raised questions about Mr. Kozinski's actions, he claimed it was all a mistake.

In another situation involving another elderly employee, who had more than 25 years of government service, he too was forced out of the office. It began when Mr. Kozinski requested that the employee and I meet with him to discuss the employee's performance. During the meeting, Mr. Kozinski became very loud, caustic and threatening in tone. The employee listened without comment. After the meeting, the employee requested sick leave and left the office. The next day, the employee called me on the telephone and requested use of sick leave, which I granted. At the time, the employee had in excess of 300 hours of sick leave. During the telephone conversation, the employee stated that he was suffering from hypertension and a severe heart condition and his doctor had instructed him not to return to work because of the stressful conditions which the employee reported existed within the office. According to the employee, his doctor had instructed him not to return to work until he (the doctor) gained control of his hypertension and could then treat his heart condition. Mr. Kozinski was later advised of this conversation and shortly thereafter, he (Mr. Kozinski) began to question whether the employee was actually ill. During this period, as immediate supervisor, I had several telephone conversations with the employee and I became convinced that the employee was ill.

Within two to three weeks of the employee leaving the office, Mr. Kozinski held a meeting to discuss the employee's absence. In attendance at the meeting was the Associate Special Counsel, a representative from OSC's Administrative Division and myself. Mr. Kozinski began the meeting by stating that he did not believe the employee was ill and that he therefore proposed to remove the employee immediately. I suggested that Mr. Kozinski could not terminate the employee if the employee was truly ill. I also suggested that if Mr. Kozinski did not believe the employee was ill, he should require the employee to take a fitness for duty physical prior to proposing any personnel action. Mr. Kozinski agreed and instructed the Administrative Office to issue a letter to the employee ordering him to take a fitness for duty physical immediately.

The letter requiring the fitness for duty physical contained a listing of about three or more OPM approved doctors for the employee to select from. After a few telephone conferences with the employee and the doctor's office, the employee selected one of the recommended doctors and scheduled an appointment. Because of the employee's condition, the physical was to be given in two parts over a two week period of time, On the day of the first part of the test, I called the doctor to learn of the results and to assure that he would submit a written report to the office. I was advised that the employee's condition was severe, that there was no need for the second part of the test, that the employee's condition was such that he should be hospitalized and that if the employee returned to the stressful conditions of our office, he could die. With that information, I requested the doctor to provide a written opinion and I advised Mr. Kozinski and the Associate Special Counsel of the doctor's comments.

I assumed the matter was closed. However, to my surprise, a few days after the arrival of the doctor's letter, I received a telephone call at home from Associate Special Counsel for Prosecution. In that telephone conversation, the Associate Special Counsel informed me that Mr. Kozinski had requested that he call me and ask if I would call the employee and advise him that Mr. Kozinski was thinking of removing him. I was told that by doing so, the employee might resign his position. I told the Associate Special Counsel that I would not be a party to such an action. The Associate Special Counsel stated that Mr. Kozinski would be most appreciative if I would assist him. I then stated that the only telephone call I would make would be to the employee to inform him of our conversation and Mr. Kozinski's attempt to force him to resign. With that comment, we ended our conversation. I immediately telephoned the employee and advised him of my conversation with the Associate Special Counsel and what I believed was an attempt to force him to resign. I later telephoned the Associate Special Counsel and advised him of my discussions with the employee and his statement that he could not be forced to resign. That following Monday, as I passed Mr. Kozinski in the hallway, he expressed appreciation f

Senator **Levin**. Now, did those events occur as described in that affidavit?

Judge **Kozinski**. I do not have the specific recollection that Mr. James states in this affidavit. It would be helpful to me, Senator Levin, if I could see a copy of that affidavit since it's a lengthy one.

Do you happen to have a copy for me to look at?

Senator **Levin**. Yes.

Judge **Kozinski**. May I?

Senator **Levin**. We will be happy to give you a copy. You have not seen that affidavit before? You are not familiar with these allegations?

Judge **Kozinski**. I have seen the affidavit before. It would be useful for me to have it as I am speaking to you, if you could.

[Document proffered to the witness.]

Senator **Levin**. Those events happened as alleged in that affidavit?

Judge **Kozinski**. All I can say, Senator Levin, is I have no recollection which is inconsistent with Mr. James' version of the events. On the other hand, there are many facts he states for which I could not swear one way or the other.

Senator **Levin**. Just for the record, the court, relative to this gentleman whose name was Neff, stated on a request for a temporary restraining order the following:

> If the Government is small enough to, you know, just line itself in this type of situation and stake out a war against this gentleman, if they wanted to do it let them do it. I think it is absolutely incredible to do something that way.

The court went on to say—and I requested this transcript because it had not been made part of the record at the time of the hearing, the prior hearing of Judge Kozinski, and I was curious as to what this Federal judge said in the Neff matter when Neff appealed the events.

This Federal judge said, "There is no discernible valid, legitimate acceptable governmental interest in doing anybody this way."

I guess Senator Simon would be the one, but I would like to ask that this transcript, or these portions of this transcript of this Federal court relative to the treatment by the office of Mr. Neff be made part of the record.

Senator **Simon**. That will be entered in the record.

[Aforementioned follows:]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PHILLIPPE M. NEFF,)
)
PLAINTIFF,) CIVIL ACTION NO. 82-158
)
VS.)
)
HONORABLE ALEX KOZINSKI,)
SPECIAL COUNSEL, ,)
)
DEFENDANT.)

TUESDAY, JANUARY 19, 1982
WASHINGTON, D. C.

THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING ON MOTION FOR TEMPORARY RESTRAINING ORDER BEFORE THE HONORABLE WILLIAM B. BRYANT, UNITED STATES DISTRICT JUDGE, AT 11:00 A.M.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

DAVID H. SHAPIRO, ESQUIRE.

ON BEHALF OF THE DEFENDANT:

JUDITH BARTNOFF, ESQUIRE.

* * * * *

VERNELL A. MARSHALL
OFFICIAL COURT REPORTER
ROOM 6820 U. S. COURT HOUSE
WASHINGTON, D. C. 20001

PROCEEDINGS

(11:00 A.M.)

THE DEPUTY CLERK: CIVIL ACTION 82-158, NEFF VERSUS KOZINSKI; IDENTIFY YOURSELF TO THE COURT AND FOR THE RECORD, PLEASE.

MR. SHAPIRO: YOUR HONOR, MAY IT PLEASE THE COURT, DAVID SHAPIRO. I REPRESENT PHILLEPE NEFF, PLAINTIFF IN THIS ACTION. THIS MORNING, YOUR HONOR, WE ARE BEFORE THE COURT ON PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER.

YOUR HONOR, THE FACTS OF THIS CASE ARE RATHER STRAIGHTFORWARD. MR. NEFF WAS, UNTIL OCTOBER 17TH OF THIS PAST YEAR, A TRIAL ATTORNEY WITH THE OFFICE OF SPECIAL COUNSEL, PART OF THE MERIT SYSTEMS PROTECTION BOARD. THE MAN HAS OVER 25 YEARS OF FEDERAL SERVICE, CONTINUOUS FEDERAL SERVICE. HE SERVED WITH THE CIVIL SERVICE COMMISSION PRIOR TO THE ORGANIZATIONAL CHANGES RESULTING FROM THE CIVIL SERVICE REFORM ACT.

MR. NEFF SUFFERED MANY YEARS WITH HYPERTENSION. SINCE 1976, HE'S ALSO HAD ANGINA PECTORIS AND SINCE THE SPRING OF THIS PAST YEAR, THESE CONDITIONS WERE EXAGGERATED BY WORK PRESSURE. DURING THE SUMMER, AS WE NOTE IN OUR STATEMENT OF FACTS, DURING THIS PAST SUMMER, MR. NEFF WAS CALLED IN TO SEE THE SPECIAL COUNSEL AND HE HAD AN INCREASE IN THE ANGINA PECTORIS AND WAS VERY UNCOMFORTABLE. HE LEFT WORK THAT DAY AND DID NOT RETURN, FEARING THE LOSS OF ANNUAL LEAVE, BECAUSE OF THE USE-OR-LOSE PROVISION.

THE COURT: HE TOOK ANNUAL LEAVE?

MR. SHAPIRO: HE TOOK ANNUAL LEAVE.

THE COURT: -- UP TO A POINT AND THEN HE HAD TO GO AND TAKE SICK LEAVE?

MR. SHAPIRO: ACTUALLY, IT WAS QUITE THE OPPOSITE. HE FEARED -- AND THIS INDICATES HIS EXPECTATION TO RETURN TO WORK -- HE FEARED THAT HE WOULD LOSE ANNUAL LEAVE. SO HE DID TAKE IT BECAUSE, YOU KNOW, HE HAD TOO MUCH TO CARRY INTO THE NEW LEAVE YEAR. HE TOOK IT.

THE COURT: I UNDERSTAND.

MR. SHAPIRO: HE TOOK THE ANNUAL LEAVE, WENT TO THE DOCTOR WHO PROVIDED THE LETTER INDICATING HE WAS SICK AND HE WENT ON SICK LEAVE.

THE AGENCY, BOTH BEFORE AND AFTER HE WENT ON SICK LEAVE, TRIED TO GET HIM TO PUT IN FOR DISABILITY RETIREMENT.

THE COURT: HOW OLD IS THE MAN?

MR. SHAPIRO: MR. NEFF IS JUST SIXTY NOW. SO HE WAS JUST FIFTY-NINE DURING THIS PERIOD. HE JUST BECAME SIXTY THIS MONTH.

THE COURT: ALL RIGHT.

MR. SHAPIRO: HE WAS --

THE COURT: I READ YOUR PAPERS AND I PRESUME YOUR CHRONOLOGICAL REPORT, THAT IS THE NATURAL STATE OF WHAT HAPPENED TO HIM?

MS. BARTNOFF: YES, YOUR HONOR, IT IS. IT IS MY UNDERSTANDING, I BELIEVE HE BECOMES SIXTY IN THREE DAYS.

THE COURT: BUT THE CHRONOLOGY, WHAT HAPPENED TO HIM, HIS ILLNESS, AND THAT TYPE OF THING?

MS.BARTNOFF: I THINK THAT IS EXACTLY RIGHT.

THE COURT: WELL, LET ME ASK YOU THIS QUESTION. THE AGENCY HAS INITIATED SOME PAPERS, SOME INVOLUNTARY, UNDER PRESSURE, HE APPLIED FOR EARLY RETIREMENT?

MR. SHAPIRO: NOT AT ALL, YOUR HONOR. THE SITUATION WITH RESPECT TO THAT IS THIS. HE DID NOT APPLY FOR DISABILITY RETIREMENT PRIOR TO BEING DISCHARGED.

THE COURT: THEY NOTIFIED HIM HE WAS TERMINATED?

MR. SHAPIRO: ON THE 16TH, THEY SAID,"YOU'RE FIRED, EFFECTIVE THE 17TH OF OCTOBER," AND THEY TERMINATED HIM FOR SPECIFICALLY DISABILITY BECAUSE HE WAS DISABLED.

NOW WHEN THEY ADVISED HIM EARLIER TO APPLY FOR DISABILITY RETIREMENT, TWO THINGS ARE IMPORTANT: ONE, HE EXPECTED TO COME BACK TO WORK. MOREOVER, WHEN HE TOOK A FITNESS-FOR-DUTY EXAM, WHICH WAS THE SECOND DOCTOR'S OPINION --

THE COURT: HE GOT 235-OVER-130?

MR. SHAPIRO: -- THE DOCTOR --

THE COURT: HE COULDN'T WORK NOW, BUT HE WAS POTENTIALLY REHABILITABLE?

MR. SHAPIRO: RIGHT. HE NEEDED TREATMENT AND HAD TO BRING HIS HYPERTENSION UNDER CONTROL BECAUSE THE HYPERTENSION WAS THE RESULT OF THE PRESSURE OF THE WORK. IT WAS THE CLASSIC SITUATION FOR THE USE OF SICK LEAVE TO GET BETTER.

AND SO MR. NEFF DID NOT APPLY FOR THE DISABILITY RETIREMENT, WHICH IS THAT YOU ARE OUT ON RETIREMENT. MOREOVER YOUR HONOR, WHEN THE AGENCY WAS ADVISING HIM, AND SO ON, TO APPLY FOR DISABILITY RETIREMENT, THEY NEVER ONCE, NOT ONCE, ADVISED HIM THAT HE WOULD BE ABLE UNDER DISABILITY RETIREMENT TO RUN OUT HIS SICK LEAVE ACCOUNT. IN OTHER WORDS, UNDER DISABILITY RETIREMENT, AS OUR PAPERS SUGGEST, UNDER THE MANDATORY POLICIES OF THE OFFICE OF PERSONNEL MANAGEMENT WHICH GOES BACK QUITE A DISTANCE, BACK TO THE 60'S, THE CIVIL SERVICE COMMISSION AS THE RESULT OF A COMMISSION MINUTE, AN EMPLOYEE AT THE EMPLOYEE'S OPTION, HE CAN USE HIS SICK LEAVE IN ONE OF TWO WAYS --

THE COURT: WELL, HAS HE INITIATED ANY PROCEEDINGS FOR DISABILITY RETIREMENT?

MR. SHAPIRO: NOT FOR DISABILITY RETIREMENT. HE HAS NOW JUST THIRTY DAYS AFTER HIS TERMINATION, HE APPLIED FOR A DISCONTINUED SERVICE ANNUITY. NOW HE IS ENTITLED TO THAT BECAUSE HE HAS SO MANY YEARS IN AND HE IS OVER THE AGE OF 55.

I MEAN, AFTER YOU HAVE TWENTY-FIVE YEARS OVER THE AGE OF FIFTY-FIVE, YOU CAN GET EARLY RETIREMENT IF THE JOB IS ABOLISHED, IF YOU HAVE TO LEAVE WORK FOR OTHER THAN DISCIPLINARY REASONS. AND THAT IS THE SITUATION THAT MR.NEFF FOUND HIMSELF IN.

THE COURT: THAT AMOUNTS TO EARLY RETIREMENT?

MR. SHAPIRO: THAT'S RIGHT, NOT ON THE BASIS OF

DISABILITY, BUT ON THE BASIS OF DISCONTINUED SERVICE. THAT IS A SEPARATE EARLY-OUT PROVISION. BUT UNDER EITHER,IF HE WAS ON THE JOB,HE WOULD BE ABLE TO RUN OUT HIS SICK LEAVE; BUT HE WASN'T ON THE JOB. NOW WHY DID IT APPLY AFTER THE FACT, WHEN HE WAS NOTED TO APPLY BEFORE --

THE COURT: WELL, LET ME ASK YOU THIS. IF I WORK FOR AN AGENCY AND I HAVE OODLES OF SICK LEAVE AND ANNUAL LEAVE, AND EVERYTHING ELSE; I GET SICK AND UNDER THE CIRCUMSTANCES, I CAN BE RETIRED ON DISABILITY.

MR. SHAPIRO: THAT'S CORRECT, YOUR HONOR.

THE COURT: I DON'T TAKE ANY STEPS IN THAT DIRECTION BECAUSE I HOPE TO GET BETTER AND I'VE GOT -- HOW MANY MONTHS IS 1700 HOURS OF SICK LEAVE?

MR. SHAPIRO: IT'S A -- A YEAR BY HOURS IS 2 THOUSAND, 80-SOME. SEVENTEEN HUNDRED WOULD BE, OH, ABOUT TWO MONTHS SHY, ABOUT TEN MONTHS OF SICK LEAVE.

THE COURT: ABOUT TEN MONTHS. SO I DON'T INITIATE ANY PROCEEDINGS FOR RETIRING, CAN THE AGENCY FIRE ME?

MR. SHAPIRO: LET ME PUT IT TO YOU THIS WAY, YOUR HONOR. YOU DON'T HAVE AN ABSOLUTE RIGHT UNDER ANY CIRCUMSTANCES TO USE YOUR SICK LEAVE. YOU HAVE TO SHOW THAT YOU ARE SICK.

THE COURT: I UNDERSTAND THAT. LET'S PUT IT TO YOU THIS WAY. I'M SICK, NO QUESTION ABOUT MY BEING SICK. I'VE GOT A YEAR OF SICK LEAVE AND I'VE GOT A DOCTOR'S CERTIFICATE EVERY FRIDAY MORNING TO SUPPLY TO SUPPORT THE FACT THAT I AM SICK

AND I CAN'T WORK. THE AGENCY, I ASSUME, NEEDS THE WORK TO BE DONE. I UNDERSTAND THAT IF I APPLY FOR RETIREMENT AND RIDE OUT MY SICK LEAVE, I UNDERSTAND THAT THE AGENCY CAN HIRE A REPLACEMENT. IS THAT RIGHT?

MR. SHAPIRO: THAT'S CORRECT.

THE COURT: THE AGENCY CAN HIRE SOMEBODY TO SUPPLANT ME; IS THAT RIGHT?

MS.BARTNOFF: YOUR HONOR, THAT'S RIGHT,BUT THEY HAVE TO PAY BOTH OF THEM. THEY HAVE TO PAY SICK LEAVE, PAY SICK LEAVE AND SALARY FOR ONE.

THE COURT: OF COURSE, THEY DO, BUT THE POINT I'M MAKING IS THEY CAN, AT LEAST, GET SOMEBODY TO DO THE WORK.

MS.BARTNOFF: IF THEY HAVE THE MONEY TO PAY FOR IT.

THE COURT: WELL, LET ME ASK YOU THIS -- (ADDRESSING OTHER COUNSEL) SIT DOWN.

MR. SHAPIRO: WHY DID THEY FIRE HIM?

THE COURT: ON THE FACE OF IT, THIS LOOKS LIKE -- IT LOOKS LIKE A RAW DEAL. NOW WHY DID THEY FIRE HIM?

MS.BARTNOFF: YOUR HONOR,THEY FIRED HIM BECAUSE HE WAS UNABLE TO RETURN TO WORK -- CLEARLY, ON DISABILITY. VERY SUCCINCTLY, THEIR BUDGETARY SITUATION WAS SUCH THAT THEY COULD NOT AFFORD HIM. IT WAS A VERY SMALL AGENCY, UNDER A HUNDRED EMPLOYEES. THEY HAD JUST RECEIVED SIXTEEN WORK ASSIGNMENTS AND THE BUDGETARY NEEDED THE WORK TO BE DONE AND COULD NOT AFFORD TO KEEP HIM ON SICK LEAVE, PAYING HIS SICK LEAVE AND PAY SOMEONE

ELSE TO COME IN AND TAKE HIS PLACE.

THE SIMPLE REASON WHY THIS OCCURRED WAS BECAUSE OF BUDGETARY CONSTRAINTS THAT WERE IMPOSED ON THE AGENCY.

THE COURT: NOW WAIT A SECOND, IF HE HAD APPLIED FOR RETIREMENT, HE HAS A RIGHT TO RIDE OUT HIS SICK LEAVE.

MS.BARTNOFF: THAT'S RIGHT, YOUR HONOR.

THE COURT: AND THEN YOU WOULD HAVE HAD TO HIRE SOMEBODY, WOULDN'T YOU?

MS.BARTNOFF: THAT'S RIGHT, YOUR HONOR, AND THIS WAS ONE OF THOSE UNUSUAL CIRCUMSTANCES WHERE DESPITE -- AND WE HAVE AN AFFIDAVIT THAT WE JUST HAD TYPED THIS MORNING,BUT THAT WE CAN PROVIDE TO THE COURT -- BUT DESPITE THE FACT THAT IT WOULD HAVE BEEN AN EXPENSIVE OPERATION, THE AGENCY DID ENCOURAGE THE PLAINTIFF TO APPLY FOR DISABILITY RETIREMENT. AND YOUR HONOR IS QUITE CORRECT THAT HAD THE PLAINTIFF APPLIED FOR RETIREMENT, HE WOULD HAVE BEEN ENTITLED TO RIDE OUT HIS SICK LEAVE.

HOWEVER, WHAT THE PLAINTIFF IS ARGUING THIS MORNING IS THAT THE AGENCY ESSENTIALLY BECAUSE THE PLAINTIFF WAS DISABLED AND WAS SOMEONE WHO WAS CONCEIVABLY ELIGIBLE FOR DISABILITY RETIREMENT -- I UNDERSTAND ELIGIBLE WITH 25 YEARS OF SERVICE AND HE HAD OVER TWENTY YEARS OF SERVICE -- THE PLAINTIFF IS ARGUING THAT IF HE IS ELIGIBLE FOR DISABILITY RETIREMENT, THE AGENCY'S ONLY OPTION IS TO APPLY FOR DISABILITY RETIREMENT FOR HIM AND NOT TO TERMINATE HIM FOR DISABILITY.

HOWEVER, YOUR HONOR, THE COMPTROLLER GENERAL'S DECISION THAT THE PLAINTIFF CITES AS WELL AS THE FEDERAL PERSONNEL MANUAL PROVIDE THAT THE ONLY CIRCUMSTANCE UNDER WHICH THE AGENCY IS REQUIRED TO APPLY FOR DISABILITY RETIREMENT, RETIREMENT FOR SOMEONE WHO IS DISABLED, IS A CIRCUMSTANCE WHERE THE PERSON HAS A MENTAL DISABILITY AND THE REASON FOR THAT. AND I WOULD LIKE TO PROVIDE THE COURT WITH THOSE.

THE PLAINTIFF CITES TWO COMPTROLLER GENERAL DECISIONS THAT WERE ATTACHED TO HIS MEMORANDUM. COPIES OF THESE HAVE ALREADY BEEN PROVIDED TO PLAINTIFF'S COUNSEL. FIRST OF ALL, THIS COMPTROLLER GENERAL DECISION IS RELIED ON ESSENTIALLY BY THE PLAINTIFF. THIS DECISION EXPLAINS THAT THE PURPOSE OF THAT SPECIAL REQUIREMENT FOR MENTAL DISABILITY IS THAT THE AGENCY -- IF SOMEONE IS MENTALLY DISABLED, THE AGENCY HAS AN OBLIGATION TO SECURE AND PRESERVE ANY BENEFITS THAT MIGHT ACCRUE TO THAT EMPLOYEE. AND ACCORDINGLY, THE AGENCY IS REQUIRED TO APPLY FOR DISABILITY FOR HIM. BUT IN THIS CIRCUMSTANCE --

THE COURT: WELL, IF HE IS NOT MENTALLY DISABLED, THE AGENCY ISN'T LICENSED TO ROOK HIM OUT OF HIS BENEFITS, IS HE?

MS.BARTNOFF: WELL, YOUR HONOR, WE DON'T BELIEVE THAT THE AGENCY HAS ROOKED HIM OUT OF HIS BENEFITS, AS I CAN EXPLAIN. IF HE HAD BEEN MENTALLY DISABLED, THE AGENCY WOULD NOT HAVE BEEN ABLE TO TERMINATE HIM FOR DISABILITY. THE AGENCY WOULD HAVE BEEN ABLE TO APPLY FOR DISABILITY FOR HIM. HE DID NOT WANT THE

AGENCY TO APPLY FOR DISABILITY FOR HIM. HE SPECIFICALLY STATED THAT TO THE AGENCY AND HE ALSO DIDN'T WANT TO APPLY FOR DISABILITY, HIMSELF, ALTHOUGH SUCH AN APPLICATION WOULD HAVE PROVIDED THE PLAINTIFF WITH THE OPTION TO RIDE OUT THE OPTION WITH HIS RETIREMENT BENEFITS. WHAT HAPPENED NOW -- AND LET ME INTERCEDE. THIS MAN, THE PLAINTIFF, IS A FEDERAL PERSONNEL LAWYER, GS.-14, WHOSE JOB WAS A FEDERAL EMPLOYMENT SPECIALIST WITH, FIRST, THE CIVIL SERVICE COMMISSION AND THEN OTHER FEDERAL AGENCIES INVOLVED IN EMPLOYMENT. AND SECONDLY -- AND LET ME GIVE THE COURT THESE TWO AFFIDAVITS, ONE OF THE AFFIDAVITS IS OF LYNN COLLINS, WHO WAS HIS SUPERVISOR, AND THE OTHER IS THE AFFIDAVIT OF THE ACTING DIRECTOR OF OPERATIONS MANAGEMENT FOR THE SPECIAL COUNSEL'S OFFICE. AND BOTH OF THESE AFFIDAVITS HAVE BEEN PROVIDED TO THE PLAINTIFF JUST BEFORE YOUR HONOR CAME ON THE BENCH.

THE PLAINTIFF WAS OFFERED COUNSELLING ABOUT HIS VARIOUS OPTIONS IN THIS CIRCUMSTANCE BEFORE HE WAS TERMINATED. IN FACT, THE AGENCY EVEN SENT -- BECAUSE THE AGENCY HAD TROUBLE KEEPING HIM,THEY SENT HIM A TELEGRAM ASKING HIM TO COME IN FOR COUNSELLING AND HE CALLED BACK AND SAID, "I DON'T HAVE ANY REASON TO COME IN FOR COUNSELLING." AND AGAIN, THIS WAS DONE BEFORE THE DECISION WAS MADE TO TERMINATE HIM BY THE AGENCY. HE REFUSED.

SO THERE IS THE CIRCUMSTANCES AND THAT IT'S NOT TO THE PLAINTIFF WASN'T AFFORDED WITH EVERY COUNSELLING THAT WAS

AVAILABLE; BUT AT THIS POINT, WHAT THE PLAINTIFF APPARENTLY WANTED WAS TO BE ABLE TO RIDE OUT HIS SICK LEAVE BEFORE HE TOOK RETIREMENT. THE RETIREMENT OPTION THAT WAS BEING URGED ON THE PLAINTIFF BY THE AGENCY WAS THE DISABILITY RETIREMENT OPTION THAT WOULD, IN FACT, HAVE PERMITTED THE PLAINTIFF TO RIDE OUT HIS SICK LEAVE. THE PLAINTIFF CHOSE NOT TO DO IT. AS A RESULT WHEN THE PLAINTIFF WAS TERMINATED, HE WAS STILL ELIGIBLE TO APPLY FOR DISABILITY RETIREMENT, OR TO APPLY FOR DISCONTINUED SERVICE ANNUITY, WHICH IS ONLY AN OPTION AVAILABLE TO YOU IF YOU QUALIFY AND IF YOU HAVE BEEN TERMINATED.

WHATEVER ANNUITY --

THE COURT: YOU CAN APPLY FOR DISABILITY RETIREMENT AFTER THEY FIRE YOU?

MS. BARTNOFF: YES, YOU CAN. IN FACT, IF THEY WANT TO FIRE YOU AND YOU APPLY FOR DISABILITY RETIREMENT BEFORE THAT ACTION BECOMES EFFECTIVE, THE ACTION TO FIRE YOU IS HELD IN ABEYANCE WHILE YOUR DISABILITY RETIREMENT ACTION IS PENDING.

THIS PLAINTIFF, BY THE WAY, IS SOMEWHAT IN A DIFFERENT CATEGORY FROM SOME OTHER PLAINTIFFS BECAUSE THIS PLAINTIFF IS A SCHEDULE A EMPLOYEE. SO HE WAS NOT IN THE COMPETITIVE SERVICE. HE WAS NOT PREFERENCE ELIGIBLE. SO AS A RESULT, SOME OF THE PROTECTIONS WHICH WOULD OTHERWISE APPLY DID NOT APPLY.

SO HE WAS ENTITLED TO ADVANCED NOTICE THAT HE WAS GOING TO BE TERMINATED, ALTHOUGH GIVEN --

THE COURT: ONE DAY?

MS. BARTNOFF: WELL,GIVEN INFORMAL NOTICE BEFORE THEN OF THE FACT THAT IF HE DIDN'T WANT TO RETIRE ON DISABILITY, THAT THE CIRCUMSTANCES OF THE AGENCY WERE SUCH THAT THE AGENCY WOULD HAVE TO SEEK ACTION AGAINST HIM.

BUT THE ANNUITY THAT HE RECEIVES WHEN HE RETIRES WHEN HE GETS THE APPLICATION THAT IS NOW PENDING, OR IF HE HAD APPLIED FOR DISABILITY RETIREMENT, WHICH HE DIDN'T DO, BUT IF HE HAD, THE ANNUITY THAT HE RECEIVES ACCOUNTS FOR UNUSED SICK LEAVE.

NOW IT IS TRUE THAT IF HE HAD APPLICED FOR DISABILITY RETIREMENT, HE WOULD HAVE BEEN ABLE TO RIDE OUT HIS SICK LEAVE SO THAT ANY PORTION --

THE COURT: BUT HE DOESN'T HAVE TO RIDE OUT HIS SICK LEAVE. HE CAN HAVE THE REST OF IT.

MS. BARTNOFF: HE DOESN'T HAVE TO; IT'S HIS OPTION.

THE COURT: BUT HE WON'T LOSE THE MONETARY BENEFITS BECAUSE THEY WILL HAVE BEEN FORWARDED INTO HIS ANNUITY ACCOUNT.

MS. BARTNOFF: I BELIEVE HE WILL ARGUE -- I AM ALWAYS RELUCTANT TO ARGUE WHAT THE OTHER SIDE WOULD ARGUE. BUT HE WANTED TO STAY ON SICK LEAVE AS LONG AS POSSIBLE BECAUSE ON SICK LEAVE, HE GETS PAID MORE; BECAUSE ON SICK LEAVE, HE GETS PAID HIS REGULAR SALARY, BASICALLY, RATHER THAN THE AMOUNT OF THE ANNUITY, EVEN IF THE ANNUITY IS INCREASED BY THE SICK LEAVE.

THE COURT: AND WHAT HAPPENS TO THE OTHER BENEFITS, LIKE INSURANCE, AND THAT KIND OF THING, WHEN YOU --

MS. BARTNOFF: AS I UNDERSTAND IT -- I HAVE BECOME AN OVERNIGHT EXPERT. THIS CASE WAS FILED YESTERDAY AFTERNOON. AS I UNDERSTAND IT, WHEN HE IS TERMINATED, HE HAS THE OPTION OF PICKING UP INDIVIDUALLY HIS MEDICAL INSURANCE AND FEDERAL EMPLOYEE'S LIFE INSURANCE, AND SO ON, AND HE WAS ADVISED OF THIS. AND I BELIEVE THEY ARE ALSO ATTACHED TO THE PLAINTIFF'S MEMORANDUM.

WHEN HE APPLIES FOR RETIREMENT OF WHATEVER SORT AND THE RETIREMENT APPLICATION IS APPROVED, THEN ANY ADJUSTMENT IN IT AND THE DIFFERENCE BETWEEN WHAT THE INDIVIDUAL POLICY COSTS HIM, AFTER HE WAS TERMINATED, AND WHAT HE WAS PAYING BEFORE, THOSE AMOUNTS ARE ADJUSTED AFTER RETIREMENT IS APPROVED.

SO THE REAL QUESTION HERE IS SIMPLY THE QUESTION OF SICK LEAVE AND IT IS OUR POSITION THAT THE AGENCY WAS NOT REQUIRED TO WAIT OUT HIS SICK LEAVE BEFORE IT TERMINATED HIM FOR DISABILITY; THAT THE AGENCY WAS PERMITTED TO TERMINATE HIM FOR DISABILITY. AND THE FACT THAT HE WAS DISABLED DID NOT REQUIRE THE AGENCY TO APPLY FOR DISABILITY RETIREMENT FOR HIM AND IN A CIRCUMSTANCE WHERE HE WAS NOT MENTALLY DISABLED.

HE HAD THE OPTION OF FILING FOR DISABILITY RETIREMENT AND THAT OPTION WOULD HAVE PERMITTED HIM TO RIDE OUT HIS SICK LEAVE AND HE CHOSE NOT TO DO IT, YOUR HONOR; BUT THAT OPTION WAS AVAILABLE TO HIM BEFORE THE AGENCY TERMINATED HIM.

THERE IS ONE OTHER POINT I WANT TO MAKE AND THAT IS, THE AGENCY -- AND IT IS REFLECTED IN THE LETTER THAT WAS ATTACHED

TO THE PLAINTIFF'S MEMORANDUM, AS WELL AS IN THE AFFIDAVITS WHICH WE HAVE FILED -- THE AGENCY WAS AWARE THAT THE PLAINTIFF WAS ELIGIBLE FOR OPTIONAL RETIREMENT WHEN HE REACHED THE AGE OF SIXTY. I BELIEVE THAT WE -- IT IS OUR POSITION THAT HE WAS ELIGIBLE FOR OPTIONAL RETIREMENT WHEN HE REACHED SIXTY AFTER TWENTY YEARS OF SERVICE AND HE HAD ENOUGH SERVICE THAT WHEN HE REACHED SIXTY, HE COULD RETIRE. I BELIEVE THE DATE IS JANUARY 22.

THE COURT: OF THIS YEAR?

MS. BARTNOFF: YES, IN THREE DAYS. I MAY BE OFF BY A DAY, BUT IT IS THIS MONTH.

THE AGENCY OFFERED THAT THE PLAINTIFF WOULD STAY ON THE ROLLS UNTIL THE DATE WHEN HE WAS ELIGIBLE FOR OPTIONAL RETIREMENT AND THAT THE PLAINTIFF AT THAT TIME COULD CHOOSE WHETHER HE WANTED TO FILE FOR DISABILITY RETIREMENT, OR FOR OPTIONAL RETIREMENT, AND THE PLAINTIFF CHOSE NOT TO DO THAT, EITHER.

NOW WE HAVE OTHER ARGUMENT TO MAKE THAT INVOLVES JURISDICTIONAL QUESTIONS AND SO ON, YOUR HONOR, BUT IN TERMS OF THE FACTS AND THE LAWS AS APPLIED TO THE FACTS, THE PLAINTIFF APPEARS TO BE MAKING TWO CONTENTIONS: FIRST, THAT THE AGENCY WAS REQUIRED TO FILE FOR DISABILITY RETIREMENT FOR THE PLAINTIFF, AND IT IS OUR POSITION THAT WHEN THEY ARE WITHOUT A MENTAL DISABILITY, THAT IS NOT REQUIRED. AND SECONDLY, THAT THE PLAINTIFF WAS ENTITLED TO HIS SICK LEAVE AND --

THE COURT: HE IS ENTITLED TO WHAT?

MS. BARTNOFF: ENTITLED TO RIDE OUT HIS SICK LEAVE. AND WE SUBMIT THAT THAT IS ONLY IF THE PLAINTIFF HAS APPLIED FOR DISABILITY RETIREMENT. WE WOULD POINT OUT, ALSO, THAT THE PLAINTIFF HAS ATTACHED TO HIS MEMORANDUM A LETTER. IT'S FPM-- PARDON ME FOR A MOMENT.

IT IS FPML 630-29, WHICH IS ATTACHED TO THE PLAINTIFF'S MEMORANDUM, AND THAT LETTER AND IN PARTICULAR THAT PLAINTIFF POINTS TO PARAGRAPH 7(C) OF THAT LETTER IN SUPPORT FOR THE PROPOSITION THAT THE PLAINTIFF WAS ENTITLED TO RIDE OUT HIS SICK LEAVE. THAT PARAGRAPH DOESN'T SAY THAT. WHAT THAT PARAGRAPH SAYS IS --

THE COURT: IF HE TAKES THE RETIREMENT --

MS. BARTNOFF: WHAT THAT PARAGRAPH ACTUALLY SAYS, YOUR HONOR, IS THAT IF HE APPLIES FOR RETIREMENT --

THE COURT: EITHER DISABILITY, OR OTHERWISE?

MS. BARTNOFF: YES. IF HE APPLIES FOR RETIREMENT AND IF HE CAN'T WORK WHILE THE APPLICATION IS PENDING, HE IS ENTITLED TO THE SICK LEAVE WHILE THE APPLICATION IS PENDING AND THAT WOULD APPLY FOR OPTIONAL RETIREMENT, OR FOR DISABILITY RETIREMENT.

IN ADDITION, AS THE PLAINTIFF CITES, SUBCHAPTER 10-11 OF THE FEDERAL PERSONNEL MANUAL PROVIDES THAT SOMEONE WHO APPLIES FOR DISABILITY RETIREMENT IS ALLOWED TO RIDE OUT HIS SICK LEAVE. BUT BASICALLY, THERE ARE SPECIAL PROTECTIONS FOR

SOMEONE WHO APPLIES FOR DISABILITY RETIREMENT AND IN ADDITION, YOU ARE ENTITLED TO SICK LEAVE WHEN YOU CAN'T WORK WHILE THE APPLICATION IS PENDING.

I THINK THE DISTINCTION, YOUR HONOR, IS IF THE PLAINTIFF HAD DECIDED FOR OPTIONAL RETIREMENT, ONCE HE WAS ELIGIBLE, HE WOULD BE ENTITLED TO SICK LEAVE DURING THE PENDENCY OF THAT APPLICATION, WHICH ISN'T NEARLY AS LONG AS DISABILITY, WHICH TAKES FOUR OR FIVE MONTHS. BUT THE OPTIONAL, YOU WOULD BE PERMITTED TO RIDE OUT YOUR SICK LEAVE. IT IS NOT A REQUIREMENT IN THE OPTIONAL RETIREMENT; IT IS ONLY IN DISABILITY RETIREMENT. THAT IS SOMETHING AVAILABLE TO THE PLAINTIFF, WHICH HE CHOSE NOT TO DO.

THE COURT: ANOTHER QUESTION. IF I WORK FOR AN AGENCY, I GET SICK WITH TEN MONTHS OF SICK LEAVE. I CAN'T DO THE WORK. IT'S OBVIOUS I'M NOT GOING TO BE ABLE TO DO THE WORK FOR FOUR OR FIVE MONTHS. THE AGENCY WOULD HAVE A RIGHT TO TERMINATE ME?

MS. BARTNOFF: YES, SIR. THE AGENCY HAS A RIGHT TO TERMINATE YOU, YOUR HONOR, UNLESS THE REASON THAT YOU ARE DISABLED IS FOR MENTAL DISABILITY AND EVEN IF YOUR DISABILITY IS A MENTAL DISABILITY AND IF YOU HAVE WORKED FOR THE AGENCY 25 YEARS, WHICH YOU CLEARLY WOULD HAVE THAT MUCH SICK LEAVE --

THE COURT: TAKING STEPS AT A TIME.

MS. BARTNOFF: IF YOU'VE GOT A MENTAL DISABILITY, THE AGENCY CAN'T TERMINATE YOU FOR DISABILITY; IT HAS TO APPLY FOR

DISABILITY RETIREMENT FOR YOU. BUT IF YOUR DISABILITY IS NOT A MENTAL DISABILITY, THEN THE AGENCY CAN FIRE YOU.

NOW NORMALLY, IF YOU ARE A COMPETITIVE SERVICE EMPLOYEE, OR IF YOU ARE SOMEONE WHO IS ELIGIBLE FOR OTHER KINDS OF PREFERENCES, THAT SOME OTHER FORMAT WOULD APPLY TO YOU, YOU CAN CHALLENGE THAT FIRING AS AN ADVERSE PERSONNEL ACTION BEFORE THE MERIT SYSTEMS PROTECTION BOARD.

PLAINTIFF ACKNOWLEDGES THAT THAT IS NOT AVAILABLE TO HIM BECAUSE HE IS NOT A PREFERENCE ELIGIBLE EMPLOYEE IN THE EXCEPTED SERVICE AND THEREFORE, HE CAN'T GO TO THE MERIT SYSTEMS PROTECTION BOARD. HE COULD, HOWEVER, GO TO -- AND THIS IS PART OF THE PROBLEM. THIS KIND OF ACTION COULD BE CHALLENGED AS A PROHIBITED PERSONNEL PRACTICE, WHICH IS SOMETHING LESS, AND SUCH A CHALLENGE WOULD GO TO THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD. PLAINTIFF CHOSE QUITE CORRECTLY TO TAKE IT TO THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD, ALSO THE DEFENDANT IN THIS CASE.

HOWEVER, WE SUBMIT THAT THE FACT THAT THE SPECIAL COUNSEL IS DEFENDANT DOESN'T MEAN THAT THE PLAINTIFF DOESN'T HAVE RIGHTS BEFORE THE SPECIAL COUNSEL FOR PURPOSES OF INVESTIGATING HIS PROHIBITED PERSONNEL PRACTICE AND EVEN IF THE SPECIAL COUNSEL, HIMSELF, FOR EXAMPLE, HAD TO RECUSE HIMSELF FROM THE INVESTIGATION, OR HAD TO HIRE SOMEONE OUTSIDE TO INVESTIGATE PLAINTIFF'S COMPLAINT, PLAINTIFF HAS FULL RIGHTS

BEFORE THE SPECIAL COUNSEL WITH REGARD TO THE CLAIM OF PROHIBITED PERSONNEL PRACTICE, WHICH THE SPECIAL COUNSEL HAS ADVISED HIM OF AND WHICH HE HAS CHOSEN NOT TO SUE ON. BUT WE ARE CONCERNED, YOUR HONOR, THAT THE COMPLAINT IN THIS ACTION AND THE MEMORANDUM SUBMITTED BY THE PLAINTIFF CITES AS A JURISDICTIONAL BASIS FOR THE CLAIM SIMPLY THE DECLARATORY JUDGMENT ACT.

THE COURT: THE WHAT?

MS. BARTNOFF: 228-2201 AND 2202, INDEED ON THE QUESTION OF JURISDICTION. BUT NOWHERE IN THE COMPLAINT IS THERE ANY FEDERAL STATUTE THAT IS CITED WHICH CREATES THE CAUSE OF ACTION THAT WOULD GIVE THIS COURT JURISDICTION.

AND I'D LIKE TO REFER THE COURT TO TWO CASES IN PARTICULAR: TO JUDGE GASCH'S OPINION IN THE CASE OF CUTTS VS. FERRIS; AND TO JUDGE OBERDORFER'S OPINION IN THE CASE OF ABODACA (PHONETIC SPELLING) VS. GOVERNMENT PRINTING OFFICE. BOTH RELY ON THOSE CASES AND IN THOSE CASES IN PARTICULAR, BOTH COURTS REACHED THE CONCLUSION THAT THE CIVIL SERVICE COMMISSION'S FORMAT DOES NOT CREATE A PRIVILEGED RIGHT OF ACTION.

WE ARE NOT QUITE SURE WHAT THE RIGHT OF ACTION IS THAT THE PLAINTIFF IS CLAIMING. PRESUMABLY, IT IS THE RIGHT OF ACTION THAT ARISES UNDER THE FEDERAL PERSONNEL MANUAL, BUT NOTHING IS CITED HERE THAT SUGGESTS THE FEDERAL PERSONNEL MANUAL CREATES A PRIVATE RIGHT OF ACTION AND THE CUTTS CASE WOULD SUGGEST THAT IT DOESN'T.

IN ADDITION, BOTH THE CUTTS CASE AND ABODACA CASE INVOLVE SECTION 2302 OF THE CIVIL SERVICE FORMAT WHICH IS THE PROHIBITED PERSONNEL PRACTICE, CLAIMING THAT THERE IS NO PRIVATE RIGHT OF ACTION. OTHER SECTIONS WOULD APPLY TO PLAINTIFF IF HE CHOSE TO MAKE HIS CLAIM TO THE SPECIAL COUNSEL, WHICH HE CHOSE NOT TO DO.

NOW WE ALSO ARE CONCERNED, YOUR HONOR, THAT THERE IS NO REAL IRREPARABLE INJURY HERE.

THE COURT: THAT'S WHAT I'M CONCERNED ABOUT. YOU RAISE SOME JURISDICTIONAL PROBLEMS, BUT THE BOTTOM LINE IS YOU'RE TALKING ABOUT MONEY AND YOU ARE TALKING ABOUT ON THE MERITS OF WHATEVER JUDGE ROBINSON DOES TO IT, YOU SHAKE YOUR HEAD --

MS. BARTNOFF: NOT AT ALL, YOUR HONOR. LET ME FIRST ADDRESS THIS QUESTION IF IRREPARABLE HARM.

WE WERE NOT COMING TO COURT, BUT OUR LETTER SUGGESTS THAT WE WOULD COME TO COURT -- THAT IS THE LETTER ATTACHED AND WRITTEN BY THE SPECIAL COUNSEL HERE --

THE COURT: I DIDN'T UNDERSTAND YOU.

MS. BARTNOFF: WE WERE NOT COMING TO COURT. WE HAD MADE A JUDGMENT NOT TO COME TO COURT BECAUSE OF THE PROHIBITION OFFERED BY SAMPSON V. MURRAY THAT ALL WE'RE TALKING ABOUT IS MONEY; IT'S ALL REMEDIAL AFTER THE FACT AND AS OUTLINED IN THE LETTER, HAD DECIDED NOT TO COME TO COURT. HE TOOK THAT ADVICE, BUT SEVERAL THINGS HAPPENED. THE FIRST ONE IS WE APPLIED FOR RETIREMENT FOR HIM AND WE DID THAT BECAUSE WE HAD

TO PROTECT -- THE PLAINTIFF, HERE, HAD TO PROTECT HIMSELF IN TERMS OF ULTIMATE MEDICAL CARE AND SOME INCOME. SO WITHIN THIRTY DAYS OF HAVING LEFT HIS POSITION, BEING TERMINATED FROM HIS POSITION, HE DID APPLY FOR DISCONTINUED SERVICE ANNUITY. FINE -- AND WE WOULD FIGHT OUT IN VARIOUS FORMATS THE QUESTION OF WHETHER HE WAS ENTITLED TO SICK LEAVE AND THERE WOULD BE NO NEED TO COME TO COURT.

BUT THEN WE DISCOVERED A COURT OF CLAIMS DECISION AND THIS COURT OF CLAIMS DECISION, THE TAYLOR CASE WHICH WE CITE IN OUR BRIEF, SUGGESTS THAT IF HE OBTAINS RETIREMENT, WHICH HE HAS EVERY REASON TO EXPECT THAT HE WILL BECAUSE HE IS ENTITLED TO IT UNDER DISCONTINUED SERVICE ANNUITY PROGRAM, ONCE HE GETS THAT RETIREMENT, THE COURT OF CLAIMS HAS HELD THAT THAT IS A VOLUNTARY ACT. THE ACT OF APPLYING FOR RETIREMENT IS A VOLUNTARY ACT. EVEN IN CIRCUMSTANCES LIKE THIS, WE FEARED, IT'S HARDLY VOLUNTARY. HE'S FORCED INTO IT BY DESPARATE CIRCUMSTANCES. THAT'S VIEWED AS A VOLUNTARY ACT AND IF IT IS A VOLUNTARY ACT, THAT MOOTS ALL THE QUESTIONS OF HIS SICK LEAVE AND WHETHER HE WAS ENTITLED TO SICK LEAVE AND HE CAN'T GET REMEDIATION AFTER THE FACT.

SO, YES, IT IS A QUESTION OF MONEY, BUT IT IS IRREPARABLE LOSS IF THE PLAINTIFF GETS WHAT HE ABSOLUTELY NEEDS UNDER THE CIRCUMSTANCES, THE RETIREMENT, BECAUSE THEN HE CANNOT CONTINUE TO FIGHT THE RIGHT TO THIS MONEY UNDER THE COURT OF CLAIMS DECISION. YOU SEE IT MOOTS OUT HIS CLAIMS TO THE SICK

LEAVE AND SO IN THIS PARTICULAR CASE, AND THIS IS NOT YOUR TYPICAL CIRCUMSTANCES, SAMPSON IS INAPPLICABLE; OR VIEWED ANOTHER WAY, IT IS SIMPLY APPLICABLE BECAUSE IN SAMPSON, THE SUPREME COURT INDICATES IN THE RUN-OF-THE-MILL CASES THE INITIAL CLAIMS CAN BE REMEDIED AFTER THE FACT BECAUSE WE ARE ONLY TALKING ABOUT MONEY. BUT THE COURT RECOGNIZES THAT THERE MAY BE CASES WHERE A PRELIMINARY INJUNCTION, OR TRO WILL LIE WHERE THE HARM IS IRREPARABLE. AND THIS, BECAUSE OF THE COURT OF CLAIMS DECISION, WE FEARED IS PRECISELY THAT SORT OF SITUATION NOT LIKELY TO HAPPEN ANY DAY, BUT IT HAPPENED HERE.

SO HE GETS WHAT HE NEEDS IN THE INTERIM, THE RETIREMENT. THEN UNDER THE COURT OF CLAIMS DECISION, HE CAN'T GET REMEDIATED AT A LATER DATE. HIS HARM, THE DAMAGE DONE TO HIM BY STRIPPING HIM OF THE SICK LEAVE IS IRREPARABLE AND YET HE IS FORCED TO MAKE IT IRREPARABLE BY APPLYING FOR THIS RETIREMENT. SO THIS IS CLEARLY IRREPARABLE HARM HERE BECAUSE IF HE GETS WHAT HE NEEDS, HE LOSES HIS RIGHT TO CHALLENGE WHAT WE ARE CHALLENGING HERE TODAY AND THAT DECISION TO GRANT HIM HIS RETIREMENT COULD COME OUT ANY DAY.

THE COURT: WELL, THE WHOLE POINT IS THAT HE DOESN'T WANT TO RETIRE IN ANY CIRCUMSTANCE.

MR. SHAPIRO: WELL, LET ME PUT IT TO YOU THIS WAY. I DON'T THINK THAT'S RIGHT. THE COUNSEL'S ARGUMENT HAS A CERTAIN APPEAL, I RECOGNIZE THAT, BUT THERE IS ONE FACT THAT IS COMPLETELY MISSING FROM THAT ARGUMENT AND THAT FACT IS

ABSOLUTELY TRUE AND IT'S PROVEN IN THEIR AFFIDAVITS AND BY THE PAPERS THAT WE HAVE SUBMITTED AND THAT IS THIS: THEY URGED HIM TO TAKE DISABILITY RETIREMENT, BUT THEY NEVER, NOT ONCE, INFORMED HIM THAT UNDER DISABILITY RETIREMENT, HE WOULD HAVE AN ABSOLUTE RIGHT TO RUN OUT HIS SICK LEAVE.

NOW HOW CAN I SAY THAT THAT IS CLEAR, NOT ONLY FROM OUR PAPERS, BUT FROM THEIR PAPERS. YOU SEE, WHAT THEY DID WAS THEY SLIPPED HIM A MICKY HERE.

THE COURT: WHAT DO YOU MEAN,"SLIPPED HIM A MICKY"?

MR. SHAPIRO: THEY TOLD HIM --

THE COURT: THEY ASKED HIM TO COME DOWN FOR COUNSELLING.

MR. SHAPIRO: TWO DAYS BEFORE THEY FIRED HIM, THEY SENT HIM A TELEGRAM.

THE COURT: THAT'S PLENTY OF TIME, ISN'T IT?

MR. SHAPIRO: THE MAN WAS DESPARATELY ILL, OFF ALREADY FOR THREE OR FOUR MONTHS. THEIR OWN FITNESS-FOR-DUTY EXAM INDICATED, AS DONE BY DR.WEINTRAUB, THAT HE WAS DESPARATELY ILL.

THE COURT: WHAT ABOUT THE OFFER THAT HE STAY UNTIL HE'S SIXTY?

MR. SHAPIRO: THAT IS PRECISELY THE POINT. THAT IS HOW IT SHOWS THAT -- WHY THEY WERE SO VERY INSINCERE ABOUT WHAT THEY DID TO HIM.

THE COURT: WHAT ARE YOU TALKING ABOUT?

MR. SHAPIRO: FOLLOW THIS, IF YOU WOULD, YOUR HONOR.

THEY URGED HIM TO TAKE DISABILITY RETIREMENT. THEY NEVER TELL HIM THAT HE CAN RUN OUT HIS SICK LEAVE ACCOUNT. YET THE AFFIDAVIT OF MR. COLLINS SAID, "HE TOLD ME THAT HE WAS GOING TO FIGHT ANY ATTEMPT TO STRIP HIM OF HIS SICK LEAVE." HE WANTED TO RUN OUT OF SICK LEAVE. DID ANYONE TELL HIM, "IF YOU WANT TO TAKE THE DISABILITY, YOU HAVE A RIGHT TO DO THAT. . . BUT THEY DIDN'T DO SO.

THE COURT: BUT I DON'T UNDERSTAND YOU. THIS MAN, HE IS A LAWYER; HE IS IN THE OFFICE THAT DEALS WITH EMPLOYEES' RIGHTS, ISN'T HE?

MR. SHAPIRO: AS MR. COLLINS POINTS OUT IN HIS AFFIDAVIT, YES, HE IS A LAWYER, BUT HE HAS DEALT FOR YEARS BOTH NOW CURRENTLY HIS LAST POSITION AND FOR SOME TIME WITH THE CIVIL SERVICE COMMISSION WAS IN ONLY ONE AREA, THE HATCH ACT. AND MR. COLLINS MAKES THAT CLEAR IN HIS AFFIDAVIT THAT HE FUNCTIONED IN THE AREA OF HATCH ACT INVESTIGATIONS AND PROSECUTIONS.

THE COURT: HE KNOWS OF SOME OF THE TYPE OF COUNSELLING PRIOR TO RETIREMENT, DOESN'T HE?

MR. SHAPIRO: I HAVE NO IDEA. HE KNOWS I'M NOT AT ALL CERTAIN THAT HE WAS ENTITLED TO THAT. BUT THE POINT IS THIS. THE GOVERNMENT ARGUES THEY OFFERED HIM A DEAL. THEY URGED HIM TO RETIRE ON DISABILITY AND DIDN'T MENTION HIS RIGHTS TO HIM. JUST OFFERED HIM A DEAL. WHAT WAS THE DEAL? WHY DID COUNSEL STAND HERE AND SAY THAT? WHAT DOES IT SAY

IN THE PAPERS. THEY SAID, "WE'LL KEEP YOU ON SICK LEAVE UNTIL YOU ARE READY FOR ELIGIBLE RETIREMENT." "WE'RE TERMINATING YOU OUT BECAUSE YOU ARE SICK." DON'T YOU SEE. READ THESE THINGS TOGETHER. THEY NEVER TELL HIM HE IS ENTITLED TO CERTAIN THINGS. THEY KNOW. THEY WANT TO WRITE OUT HIS ACCOUNT. MR. COLLINS SAYS IN HIS AFFIDAVIT THAT HE WANTS TO USE HIS SICK LEAVE. THEY TELL HIM ABOUT DISABILITY RETIREMENT, BUT THEY DON'T TELL HIM HE CAN RIDE OUT HIS SICK LEAVE, IF HE DOES TAKE IT. THEN THEY SAY, "WE'LL OFFER YOU A DEAL. WE'LL GIVE YOU UNTIL JANUARY 23RD, WHEN YOU ARE SIXTY, AND WE WILL GIVE YOU SICK LEAVE UNTIL THEN, AND THEN YOU RETIRE."

THE COURT: LET ME ASK YOU THIS. THIS MATTER WILL BE HEARD ON PRELIMINARY INJUNCTION IN THE NEAR FUTURE. NOW THE TRO IS TO DO WHAT?

MR. SHAPIRO: WE WANT HIM BACK ON THE ROLLS, ASSIGNING LEAVE CAPACITY. THAT WAY IF HE GETS THAT --

THE COURT: JUDGE ROBINSON CAN DO THAT ON THE 5TH.

MR. SHAPIRO: HE CAN DO IT ON THE 5TH, BUT IT MAY BE TOO LATE.

THE COURT: WHY?

MR. SHAPIRO: HERE IS WHY WE NEED THE TRO. IF HE GETS BACK ON THE ROLLS TODAY, WE CAN TELL THE OFFICE OF PERSONNEL MANAGEMENT TO STOP PROCESSING HIS RETIREMENT PAPERS. KEEP THEM FROM PROCESSING THE PAPERS. HE IS SECURE THEN; HE GETS HIS SALARY. HE IS ON THE ROLLS SO HE HAS LIMITED

BENEFITS SO THAT HE DOESN'T HAVE A DESPARATE NEED FOR RETIREMENT IMMEDIATELY AND HE DOESN'T NEED THE RETROACTIVITY IN TERMS OF THE HEALTH PERIOD, FOR THIS PERIOD, BECAUSE HE'S COVERED.

ALL RIGHT, ONCE HE HAS THAT, THEN HOWEVER THINGS GO, WE CAN TELL HIM JUST HOLD UP UNTIL THE COURT RULES ON THE PRELIMINARY INJUNCTION AND HE IS PROTECTED FOR THIS PERIOD. IF WE DON'T DO THAT, IF THIS COURT DENIES HIM THE TRO JUST FOR THIS SHORT TIME, HERE'S WHAT WE RISK AND THIS PRESENTS IRREPARABLE INJURY.

IF BETWEEN NOW AND THE 5TH, OR WHENEVER JUDGE ROBINSON RULES AFTER THE 5TH ON THE PRELIMINARY INJUNCTION, HE SHOULD GET HIS RETIREMENT DISCONTINUED SERVICE. HE SHOULD BE GRANTED IT UNDER THAT TAYLOR DECISION. THEN OUR ENTIRE RIGHTS TO THE BACK-SICK LEAVE AND THE FORWARD-SICK LEAVE IS GONE, OR MAY BE GONE, AND I CAN'T -- I MEAN, IT IS AN INARGUABLE POINT. THAT IS GONE, BUT THIS IS THERE NOW. HE WOULD BE IN A STICKY SITUATION WHERE HE WAS ENTIRELY RIGHT, OR ENTIRELY WRONG. HE CANNOT BRING IT UP THAT HE VOLUNTARILY SOUGHT RETIREMENT.

THE HARM IS DESPARATE TO US FOR THE REASONS I'VE STATED. WHAT IS THE HARM TO THE GOVERNMENT IF YOU JUST ISSUED A TRO FOR THIS PERIOD? ARE THEY GOING TO LOSE SOMETHING? YES, THEY LOSE PAY. IF THEY ULTIMATELY PREVAIL ON THE QUESTION THAT HE WAS NOT ENTITLED TO SICK LEAVE, HOWEVER, THEY ARE SECURE. WHY ARE THEY SECURE? HE GETS A RETIREMENT CHECK EVERY MONTH. AT SOME POINT, THEY ARE HOLDING THE MONEY. THEY ARE

ULTIMATELY SECURE. AND SINCE, IF HE IS ON SICK LEAVE, IF THEY REALLY WANT TO HIRE ANOTHER WORKER DURING THIS TIME PERIOD -- THEY PROBABLY ALREADY HAVE -- THERE IS NO INJURY TO THE GOVERNMENT. THERE IS ULTIMATELY THE POSSIBILITY OF IRREPARABLE INJURY TO THE PLAINTIFF IF THE TRO DOES NOT ISSUE AND WE THINK UNDER THESE CIRCUMSTANCES THAT THE PUBLIC INTEREST STRONGLY FAVORS THE ISSUING OF A TRO.

NOW WHY DO I SAY THAT? PUT YOURSELF IN THIS POSITION. SICK LEAVE HAS BEEN HELD TO BE A RIGHT OF EMPLOYMENT. IT'S JUST AS MUCH A RIGHT OF EMPLOYMENT AS THE PAY THAT YOU EARN. NOW THIS MAN WORKED FOR 27 YEARS FOR THE GOVERNMENT. HE DOES WHAT THE GOVERNMENT URGES ITS WORKERS TO DO; HE COLLECTS HIS SICK LEAVE. HE DOESN'T TAKE A SAY OFF EVERY TWO WEEKS. HE COLLECTS HIS SICK LEAVE, WHICH IS WHAT THE GOVERNMENT WATNS. HE KEEPS WORKING AND NOW HE HAS WHAT WE ALL FEAR, A DESPERATE ILLNESS. HE GETS VERY SICK. HE GOES OFF ON SICK LEAVE TO USE THIS COLLECTED ALREADY-EARNED AND PAID-FOR RIGHT. THE AGENCY DOESN'T TELL HIM -- HE WANTS TO RUN THAT OUT. THE AGENCY DOESN'T TELL HIM HE CAN. THEY URGE HIM TO TAKE DISABILITY RETIREMENT. THEY OFFER HIM A DEAL, HAVING HIM THINK HE CAN'T RUN IT OUT UNDER DISABILITY RETIREMENT AND THEN WHEN HE REJECTS THE OFFER, TWO DAYS LATER THEY FIRE HIM. NOT THAT "YOU WILL BE FIRED IN TWO WEEKS. . ." NOT GIVING HIM ANY CHANCE AT ALL TO PUT HIS HOUSE IN ORDER. NOTHING LIKE THAT. I WOULD SAY, YOUR HONOR, THIS SHOWS THE ATTITUDE OF THE AGENCY

AND MR. KOZINSKI. AND I FURTHER STATE WITHOUT EQUIVOCATION AS WE DID IN OUR BRIEF, THAT HE WAS ENTITLED JUST TO BE ADVISED TO DO WHAT THEY KNEW HE WANTED TO DO; THAT HE COULD HAVE TAKEN DISCONTINUED SERVICE, OR DISABILITY, AND RUN HIS ACCOUNT OUT.

THE FPM, THE MINUTE AND THE COMPTROLLER GENERAL DECISIONS ARE AUTHORITIES ON THIS POINT, THAT HE WAS ENTITLED TO THIS BENEFIT AND BY SURREPTITIOUS ACTIONS, THE GOVERNMENT, SPECIFICALLY THE SPECIAL COUNSEL, STRIPPED HIM OF THIS.

AND WHY DID THEY DAY THEY DID IT? THE COURT ASKED THE QUESTION "WHY DID YOU DO IT?" AND THEY SAID "WE DON'T HAVE THE MONEY." THAT'S LIKE SAYING, IF YOU WORK FOR TWENTY YEARS AND YOU ARE DUE A PAYCHECK, THE GOVERNMENT CAN TELL YOU, "WELL, I'M SORRY, THESE ARE DIFFICULT TIMES. YOU CAN'T GET IT." MR. NEFF BOUGHT AND PAID FOR SICK LEAVE -- RIGHT -- WITH 27-ODD YEARS OF WORK. SAYING THAT "WE DON'T HAVE THE MONEY TO HIRE SOMEBODY ELSE TO DO YOUR JOB WHILE YOU'RE ON SICK LEAVE" IS NO EXCUSE NO MATTER HOW SMALL THE AGENCY IS.

MORE IMPORTANTLY, THIS CLAIM OF NO MONEY -- AND THEY DIDN'T HAVE THE MONEY TO PAY BOTH, ONE THE SICK LEAVE AND THE OTHER ONE, IT FURTHER SUPPORTS THE WHOLE SCHEME INVOLVED HERE. YOU CAN SEE IT HAPPENING WITH WHAT THEY DIDN'T TELL HIM; WHAT THEY URGED HIM TO DO; WHAT THEY OFFERED HIM AND THEN WHAT THEY ULTIMATELY DID. YOU SEE ALL MONEY. THEY WERE TRYING TO GET RID OF HIM SO THEY WOULDN'T HAVE TO PAY SICK

LEAVE AND THEY USED A VARIETY OF UNDERHAND MEANS TO DO THIS, RELIEVING THIS MAN ON A ONE DAY'S NOTICE, WHICH WAS FORCING HIM TO DO THE VERY ACTION HE CHALLENGES HERE, STRIPPING HIM OF HIS RIGHTS AND THAT IS, APPLYING FOR RETIREMENT.

SO THE TRO, IF THE FPM EMPLOYMENT RIGHTS, IF EARNINGS ARE TO MEAN ANYTHING, IT'S A VERY SMALL THING, WE ASK THIS COURT TO USSE THE TRO. AS I'VE SAID, THE GOVERNMENT IS COMPLETELY SECURE BECAUSE IT IS HIS ULTIMATE RETIREMENT FROM WHICH THEY CAN GET THE MONEY ULTIMATELY IF THEY DO PREVAIL ON THIS QUESTION OF SICK LEAVE.

IN THE INTERIM, WE ARE EXHAUSTING OUR REMEDIES UNDER THE HANDICAPPED PROVISION BEFORE THE AGENCY. THEY HAVE ACCEPTED THE COMPLAINT.

THE COURT: WHAT?

MR. SHAPIRO: WE FILED A HANDICAPPED DISCRIMINATION COMPLAINT AND WE ARE CURRENTLY, AS I SAID IN OUR COMPLAINT, WE ARE CURRENTLY EXHAUSTING OUR REMEDIES UNDER THAT, BUT IT WILL ALL COME TO NOUGHT UNDER THE TAYLOR CASE, UNLESS THIS COURT ACTS TO PUT HIM BACK UNDER THIS SMALL PROTECTION DURING THE PERIOD IN QUESTION. AND THAT IS WHAT THIS ENTIRE MATTER IS ABOUT -- A SMALL PROTECTION TO GIVE THIS EMPLOYEE THE RIGHT TO CHALLENGE WHAT THEY HAVE DONE HERE BY OBVIOUSLY UNDERHANDED MEANS. IF THE COURT FAILS TO ACT, YOUR HONOR, YOU WILL BE MOOTING OUT THIS CHALLENGE AND WE WILL NEVER GET A HEARING ON THE MERITS.

THE COURT: IN A HEARING ON THE MERITS, YOU ASK THE COURT TO DECLARE WHAT?

MR. SHAPIROP IN TERMS OF A TRO, YOUR HONOR, WE ASK THAT THE COURT ORDER THE AGENCY TO PUT HIM BACK ON THE ROLLS UNTIL -- FOR THE TEN-DAY PERIOD, OR UNTIL SUCH TIME AS I GET -- IT'S MORE THAN TEN DAYS AT THIS POINT.

WHEN I SAY THE COURT CONSIDER THE CASE ON THE MERITS FROM THE TRO ASPECT, THAT MEANS UNTIL THE COURT CAN TAKE THE MATTER UP. NOW THE COURT CAN ONLY ISSUE THE TRO FOR TEN DAYS. I'M AWARE OF THAT, FOR THE COURT INDICATED FEBRUARY 5TH, WHICH IS JUST TEN DAYS FROM NOW; JUST OVER TEN DAYS FROM NOW. IF THE COURT CAN ISSUE THE TRO AND THEN THE COURT CAN ADD TO IT AN ADDITIONAL TEN DAYS TO ACCOUNT FOR THE HEARING SITUATION, THAT'S ALL WE'RE ASKING OF THIS COURT AT THIS TIME.

MS. BARTNOFF: YOUR HONOR, IF I MAY BE HEARD ON SOME OF WHAT COUNSEL --

MR. SHAPIRO: HE'S NOT GOING TO COME BACK TO WORK. HE'S SICK. HE'S GOING TO STAY OUT ON SICK LEAVE, BUT HE WILL BE ENTITLED TO THESE PROTECTIONS FOR THIS TIME PERIOD, UNTIL HE CAN CHALLENGE THE ACTIONS OF THE AGENCY AND THIS SCHEME CAN BE PRESERVED.

THE COURT: YOU SAY HE IS NOT GOING TO COME BACK TO WORK?

MR. SHAPIRO: HE'S SICK. HE JUST HAS TO BE BACK ON THE ROLLS.

THE COURT: YOU DON'T CONTEMPLATE HIM COMING BACK TO WORK?

MR. SHAPIRO: NO, YOUR HONOR, JUST BEING BACK ON THE ROLLS.

THE COURT: WAIT A SECOND. YOU MEAN HE IS GOING TO RETIRE?

MR. SHAPIRO: ULTIMATELY, YOUR HONOR. I THINK THAT IS WHAT WILL HAPPEN. NOW ULTIMATELY, WHICH IS DOWN THE ROAD, BUT HE WANTS TO PLAN FOR THIS AND HE WAS NEVER GIVEN AN OPPORTUNITY TO DO IT. BUT MORE IMPORTANTLY --

THE COURT: WELL, WHAT I DON'T UNDERSTAND -- WHAT APPLICATION IS PENDING NOW FOR HIM?

MR. SHAPIRO: FOR RETIREMENT,DISCONTINUED SERVICE RETIREMENT AND ANNUITY.

THE COURT: NOW HE CAN'T RIDE OUT HIS SICK LEAVE ON THAT.

MR. SHAPIRO: HE CAN'T? THEY DIDN'T GIVE HIM THE OPPORTUNITY TO BECAUSE THEY KICKED HIM OFF THE ROLLS. IF THEY HAD TOLD HIM HE COULD UNDER DISABILITY RETIREMENT, EITHER ONE, HE WOULD HAVE BEEN ABLE TO DO SO. THE GOVERNMENT ARGUES TO THE CONTRARY, BUT YOUR HONOR ON PAGE 6 OF OUR BRIEF, WE QUOTE EXACTLY WHAT THE FPM-LETTER SAYS ON THAT SUBJECT.

THE COURT: WELL, LET ME ASK YOU THIS QUESTION -- I GUESS THIS IS A TOUGH QUESTION FOR YOU. HE CLAIMS HE DOESN'T KNOW. HE CLAIMS HE DOESN'T KNOW WHAT HIS RIGHTS ARE.

HE KNOWS WHAT HIS RIGHTS ARE -- NOW YOU-PEOPLE HAVE FIRED HIM. NOW IS HE AVAILS HIMSELF OF HIS RIGHTS AND ELECTS TO RIDE OUT HIS SICK LEAVE, WHY CAN'T YOU-PEOPLE LET HIM DO THAT?

MS. BARTNOFF: YOU MEAN IF HE HAD --

THE COURT: I MEAN, IF HE HAD --

MS. BARTNOFF: HE'S NOW TERMINATED. HE IS NOT AN EMPLOYEE.

THE COURT: YOU CAN'T RESCIND THAT?

MS. BARTNOFF: THE AGENCY DOESN'T WANT TO AT THIS POINT. BASICALLY, THE AGENCY GAVE HIM HIS CHOICE.

THE COURT: HE CLAIMS HE DIDN'T KNOW HE COULD RIDE OUT HIS SICK LEAVE. ARE YOU PEOPLE TRYING TO SAVE MONEY?

MS. BARTNOFF: OH, I THINK THAT AT THIS POINT, IT WOULD BE VERY HARD FOR ANYBODY IN THE GOVERNMENT TO SAY THAT THEY ARE NOT SAVING MONEY. OBVIOUSLY, THE CONCERN IS TO SAVE MONEY.

CAN I POINT OUT A FEW THINGS. FIRST OF ALL, IT WAS INCORRECT THAT HE WAS OFFERED THE CHOICE IN A TELEGRAM SEPTEMBER 18TH AND THE DECISION WAS MADE ON OCTOBER --

THE COURT: REGARDLESS OF THAT, THE GOVERNMENT IS BIG. HERE'S A MAN WHO IS SICK WITH HYPERTENSION, RUNNING AT 230/135. HALF THE TIME, HE'S PROBABLY UNDER HEAVY MEDICATION AND HE'S FRUSTRATED AND IT LOOKS UNBECOMING FOR THE GOVERNMENT TO GRIND HIM UP IN THIS BUSINESS. IF HE WANTS TO RETIRE AND HE WANTS TO AVAIL HIMSELF OF HIS SICK LEAVE --

MS. BARTNOFF: HE DIDN'T WANT TO RETIRE, YOUR HONOR.

THE COURT: BUT HE WANTS TO NOW, BUT HE DOESN'T WANT TO LOSE HIS SICK LEAVE AND THE GOVERNMENT -- REALLY, I MEANS IS IT THAT MUCH MONEY? YOU CAN'T BALANCE THE BUDGET WITH 1700 HOURS OF SICK LEAVE. IT'S AN INDIVIDUAL WHO NEEDS HIS MONEY.

MS. BARTNOFF: LET ME MAKE CLEAR, YOUR HONOR, THAT HIS SICK LEAVE, AS I UNDERSTAND IT, ANYWAY, HIS SICK LEAVE THAT HE HAS LOST WOULD BE ACCOUNTED FOR IN THE ANNUITY THAT HE GETS ON RETIREMENT. SO HE ISN'T TOTALLY LOSING IT. HE ISN'T GETTING AS MUCH MONEY AS HE MIGHT GET OTHERWISE. BUT HIS SICK LEAVE IS ACCOUNTED FOR. IT IS SOMEWHAT PECULIAR, WE BELIEVE. WE HAVE BEEN ACCUSED OF TRYING TO GET RID OF HIM. HE WOULDN'T EXERCISE THE VERY OPTION WHICH ENTITLED HIM TO SICK LEAVE AND WE ENCOURAGED HIM TO TAKE IT AND HE CHOSE NOT TO TAKE IT.

THE COURT: WHAT'S THAT?

MR. BARTNOFF: THE OPTION, THE AGENCY ENCOURAGING HIM TO TAKE THE DISABILITY RETIREMENT. THAT OPTION IS THE OPTION THAT WOULD HAVE PERMITTED HIM TO RIDE OUT HIS SICK LEAVE. HE SAYS HE DIDN'T KNOW. WHEN THEY TRIED TO TELL HIM, HE DIDN'T WANT TO LISTEN.

THE COURT: SO NOW YOU'RE MAD~~E~~ WITH HIM AND YOU WANT TO TURN THE SCREWS ON.

I'M GOING TO -- I DON'T THINK IT'S RIGHT. I JUST

DON'T THINK IT'S RIGHT AND YOU CAN TALK ABOUT ALL YOUR JURISDICTION, AND EVERYTHIN ELSE, IF YOU WANT TO TALK ABOUT IT; TAKE IT TO THE COURT OF APPEALS. IF THE GOVERNMENT IS SMALL ENOUGH TO, YOU KNOW, JUST LINE ITSELF IN THIS TYPE OF SITUATION AND STAKE OUT A WAR AGAINST THIS GENTLEMAN -- IF THEY WANTED TO DO IT, LET THEM DO IT. I THINK IT IS ABSOLUTELY INCREDIBLE TO DO SOMETHING THAT WAY.

MS. BARTNOFF: YOUR HONOR, I'M -- WE ARE NOT SURE IT REALLY IS --

THE COURT: I'VE GIVEN YOU AN OPPORTUNITY. I'VE LISTENED TO YOU. YOU'VE TOLD ME EXACTLY WHAT HAPPENED. BUT WHEN THE SMOKE SETTLES, THE SMOKE CLEARS AWAY AND THE DUST SETTLES ON THIS BUSINESS, YOU HAD A MAN WHO'S GIVEN 25 YEARS OF SERVICE TO THE GOVERNMENT. HE IS SICK 235-OVER-130-- IT'S A WONDER HE'S ALIVE. HE MAY NOT WHERE -- IS HE MOBILE?

MS. BARTNOFF: HE IS, YOUR HONOR.

THE COURT: HE MAY BE DEAD NOW.

MS. BARTNOFF: I BELIEVE, IN FACT, THAT THE DOCTOR SUGGESTED THAT HE GO TO THE HOSPITAL.

THE COURT: THERE IS NO QUESTION OF MALINGERING? WE DON'T HAVE THAT? -- BUT HERE HE IS. HE CAN'T WORK. HE'S GOT A HEART CONDITION AND 235-OVER-130 AND WE TOLD HIM HE COULD DO THIS AND HE DIDN'T DO THIS -- WELL, LET ME ASK YOU THIS. YOU ASKED HIM TO DO THESE THINGS. SOMEBODY SPECIFICALLY TOLD HIM HE COULD RIGHT IT OUT?

MS. BARTNOFF: I DON'T KNOW THAT. I DON'T BELIEVE SO.

THE COURT: NOW YOU'VE PRESSED HIM AND PRESSED HIM.

MS. BARTNOFF: WITH ALL DUE RESPECT, YOUR HONOR, MY IMPRESSION FROM READING THE MEMORANDUM AND CONVERSATIONS, HE WAS NOT REALLY INTERESTED IN SO MUCH BEING TOLD. HE DIDN'T WANT TO HAVE TO MAKE A CHOICE ABOUT WHAT TO DO UNTIL AFTER HIS SICK LEAVE WAS EXPIRED. SO HE REALLY DIDN'T WANT TO TAKE ABOUT IT.

THE COURT: HE DIDN'T WANT TO TALKE. THE MAN IS SICK.

MS. BARTNOFF: I UNDERSTAND.

THE COURT: HE'S SICK. HE DOESN'T WANT TO QUIT. HE DOESN'T WANT TO WORK. HE DOESN'T KNOW WHAT HE WANTS TO DO, BUT --

MS. BARTNOFF: THAT MAY BE TRUE, YOUR HONOR --

THE COURT: YOU-PEOPLE WERE IN THE POSITION TO FORCE THE ISSUE WITH HIM, WHEN YOU OUGHT NOT TO HAVE FORCED THE ISSUE WITH HIM IN A FASHION TO HIS DISADVANTAGE FROM ANY SCORE. I MEAN, THE GOVERNMENT, -- THERE IS NO DECERNIBLE VALID, LEGITIMATE ACCEPTABLE GOVERNMENTAL INTEREST IN DOING ANYBODY THIS WAY. A MAN WITH 235-OVER-130, HE'S ALMOST PRIMA FACIE MENTALLY INCAPACITATED.

THAT KIND OF BUSINESS DISTURBS ME, ALONG WITH THE MEDICATION THAT HE MUST BE UNDER, THERE IS A THIN LINE BETWEEN SOMEBODY MENTAL AND WHERE THE GOVERNMENT HAS TO DO

SOMETHING ABOUT THIS FELLOW. YOU KNOW, HE DOESN'T HAVE TO BREAK EGGS.

MS.BARTNOFF: I DON'T THINK HE WAS EVEN CHALLENGING THAT. OF COURSE, HE ISN'T ALLEGING IT. I AM JUST TELLING YOU THE FACTS OF THE MATTER ARE THAT WHEN SOMEBODY HAS TWO -- CAN I ALSO SUGGEST THAT, AS I AM SURE YOUR HONOR DOES SUSPECT, IT DOESN'T BELIEVE THAT THE TAYLOR CASE IN THE COURT OF CLAIMS --

THE COURT: YOU KNOW WHAT, THIS CASE OUGHT NOT TO GO ANY FURTHER. OF COURSE, YOU-PEOPLE OUGHT TO DO THE RIGHT THING. THAT'S WHAT YOU OUGHT TO DO.

MS. BARTNOFF: MAYBE THAT'S SOMETHING MR. SHAPIRO AND I CAN TALK ABOUT FURTHER AFTER THE HEARING AND WE WELL DO ITTHEN.

THE COURT: WELL, YOU HAD BETTER TALK ABOUT IT AND LET ME KNOW ABOUT IT BY THREE, OR FOUR O'CLOCK. THIS DOESN'T LOOK GOOD. I AM SURPRISED THAT THE GOVERNMENT WOULD WANT TO BE ALIGNED WITH THIS KIND OF BUSINESS. THIS IS WHAT YOU'D CALL CHRONIC.

MR. SHAPIRO: THANK YOU, YOUR HONOR.

THE COURT: THIS COURT STANDS RECESSED UNTIL RETURN OF COURT. I'M GOING TO LUNCH. LET ME KNOW BY 2:30.

MR. SHAPIRO: BY 2:30, YOUR HONOR.

(SUBJECT PROCEEDINGS WERE CONCLUDED
AT 12:30 P.M.)

CERTIFICATE OF REPORTER

THE ABOVE AND FOREGOING TYPEWRITTEN RECORD IS HEREBY CERTIFIED BY THE UNDERSIGNED AS THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-CAPTIONED MATTER.

Vernell A. Marshall
VERNELL A. MARSHALL
OFFICIAL COURT REPORTER

Senator LEVIN. Now, I understand you are ready so I would yield.

Senator SIMON. Yes; I will just take a few minutes.

First of all, I would like to commend my colleague from Michigan for doing a great deal of work. As you know, Mr. Kozinski, when you first appeared before the committee I said we either had the best or the worst nominee here and I was not sure which one you were going to be as far as that.

After holding up the nomination some weeks, I voted for you in the full committee, but expressed some unease; and I have expressed that to you personally in our personal conversations.

I don't think there is a question on the part of anyone on this committee as to your ability.

I do not question your integrity.

The question that I do have is the question of balance, the kind of maturity and balance that I think we should expect from a judge. The story of the woman with cancer who was let go is an example.

Let me read from, and we will put in the record, the full affidavit of Laura Chin.

[Information follows:]

AFFIDAVIT OF LAURA CHIN

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

I, LAURA CHIN, being duly sworn, hereby depose and state:

1. I am 39 years of age and reside at 4415 Fessenden Street, N.W., Washington, D.C.

2. From approximately June 1980 until the middle of September 1981 I served as the GS-13 Public Information Specialist at the Office of the Special Counsel of the Merit Systems Protection Board. Essentially my duties were to develop public trust in the Office through outreach and dissemination of information about our work and accomplishments.

3. This statement evidences my personal knowledge of the tenure of Mr. Alex Kozinski as Special Counsel. My recollection varies sharply with Mr. Kozinski's own sworn testimony about his administration, at least until my departure.

4. Prior to my employment at the Office of the Special Counsel (OSC), from 1968-73 I worked at the Census Bureau as a geographer/editor. From 1973-1980 I served at the U.S. Civil Rights Commission as a writer/editor. My performance appraisals always have been of the highest caliber and I have received numerous recommendations from previous supervisors.

5. My initial supervisor at the OSC was Acting Special Counsel Mary Eastwood. We had a close, daily working relationship. I scheduled interviews for her and began to develop an active outreach program.

6. Although initially I reported directly to Mr. Kozinski,

he very seldom communicated with me and we did not develop a working relationship. This was unique in my career as a Federal employee. I did notice him observing me on occasion, but he stopped giving me assignments. After several months, Mr. Kozinski established a layer between us through delegating a Mr. Caldwell to make the final decisions on matters such as printing, for which I was responsible. Mr. Caldwell did not appear to be knowledgeable about the functions for which he supervised me.

7. Overall I perceived Mr. Kozinski as a man without compassion. I believed that he engaged in sadistic behavior, because at the time he appeared to enjoy mistreating individuals. He simply did not treat the human beings at the Office with dignity and respect. He did not exhibit a sense of fairness, of proportion, or of the rational implications of his actions. Most fundamentally, his behavior displayed no sign that he realized the law deals with people.

8. Overall, the effect of Mr. Kozinski's behavior was to devastate the morale of the OSC staff and to cause severe depression among the individual employees. On October 5, 1981, several weeks after I resigned my position, I spoke with Mr. Thomas Devine of the Government Accountability Project, who prepared a summary of our interview. I have reviewed the report of interview and agree with its accuracy verbatim. The report of interview is attached and incorporated as Exhibit 1. It provides details of the disturbing trends that already were apparent at the Office.

9. One of Mr. Kozinski's techniques was personal

humiliation when he edited workproducts. An example is enclosed as Exhibit 2. His comments at the top of the brief begin as follows: "This is one of the worst pieces of work I have seen.... As a first draft I rate it a D+. As a final product an F. Whoever edited it deserves an F-."

10. Another technique was to question the motives of the OSC staff when Mr. Kozinski was unhappy with some development. An example in my own experience is enclosed as Exhibit 3. In this incident, Mr. Kozinski indicated that I had tried to undercut his efforts to change the date of the office picnic for OSC and Merit Systems Protection Board employees.

11. Another common trait that employees noticed was Mr. Kozinski's tendency to deny the obvious. He was disingenuous about his denials, even when he had to know better due to his well-known behavior or position on a given issue.

12. I should have been aware of outreach activities, because my job would have involved implementation of any such activity. During my employment under Mr. Kozinski, I was not aware of any outreach activity that was successfully completed and implemented. One project was pending upon his arrival. I had translated the introductory pamphlet on the OSC into Spanish, and we were trying to decide the best method of distribution for the Spanish and English versions. Mr. Caldwell delayed the new publication, however, on grounds that he wanted to revise the text. I do not know if it ever was distributed.

13. Before Mr. Kozinski's arrival, Mary Eastwood and I had discussed the need for a "how-to" pamphlet for whistleblowers.

During the summer of 1981 I had an intern develop a draft workproduct. The brochure was intended to show what happens when an employee blows the whistle, such as the job and emotional consequences the employee could expect. It also would have described sources where the employee could go for legal, emotional and other assistance. I do not know if Mr. Kozinski ever completed and distributed the pamphlet. I am not aware of its existence.

14. At approximately 5:00 P.M. on Tuesday, September 14 the secretary to Mr. Kozinski's assistant Robert Mayer called me in to his office. Mr. Mayer was there with Thomas Barbe, another OSC employee. He showed me a memorandum that instructed me not to engage in any communications without prior clearance. The restriction extended from Congress and the press down to intra-agency communications with other OSC staff. Mr. Mayer refused to provide me with a copy of the memorandum. Later I obtained the memorandum under the Freedom of Information Act, after initial denials and just prior to my filing a court suit for it. I also had to pay ther search and copying fees. When I received the document, however, it was stamped "DRAFT". When Mr. Mayer had showed me the memorandum on September 14, it was not stamped "DRAFT." The version that I obtained under the FOIA is enclosed as Exhibit 4.

15. Since I was the Public Information Officer, this total isolation made it impossible to do my job. I resigned three days later, on September 17.

16. Mr. Mayer did not offer any specific explanation for the memorandum. He also refused to tell me how it was initiated.

He said it was because I had behaved "unprofessionally." One reason may have been that I was a focal point for communications and complaints as the editor of the office newsletter. I spoke with staff from the regional offices. They also called me to ask what was going on, because the emerging developments appeared "crazy" to various employees at the regional offices.

17. During my four months under Mr. Kozinski, the environment changed from a "family" atmosphere of mutual trust, to an environment of "spies" and "informants." The effects were obvious and frightening. It is an understatement to conclude that employees stopped communicating freely. Frequently employees whispered to each other, instead of speaking aloud. In short, Mr. Kozinski bred an atmosphere of distrust within what formerly had been a closeknit organization.

I have read the above five page affidavit, and it is true and accurate to the best of my knowledge and belief.

LAURA CHIN

Subscribed and sworn to before me this 20th day of September, 1985.

Notary

JAMES P. SPELLMAN

My Commission expires September 30, 1986

Exhibit 1

[redacted]

GOVERNMENT ACCOUNTABILITY PROJECT

October 5, 1981

MEMORANDUM

TO: The Files

FROM: Tom Devine

RE: Summary of Today's Conversation with Laura Chin

Today I spoke with Laura Chin, who was the public relations officer for the Office of the Special Counsel ("OSC" or "Office") until she recently resigned. Ms. Chin requested a meeting to discuss her concern about the disintegration of the Office. She spoke to me under condition of anonymity. This summary is prepared from memory, since Ms. Chin felt nervous about my taking notes during the interview. She emphasized that her criticisms were merely her opinions, and that things might improve after the Special Counsel moves to new offices on Vermont Avenue, N. W. Ms. Chin focused on two issues: (1) low morale at OSC, and (2) an ineffective OSC effort against prohibited personnel practices.

I. LOW MORALE

Ms. Chin stated that the OSC staff are extremely depressed but afraid to speak out even internally. The agency is permeated by internal distrust. She stated that the formerly "family" atmosphere at OSC has been replaced with an environment where employees now are afraid to talk to each other. She characterized the philosophy of Mr. Kozinski's leadership as maintaining "control."

Ms. Chin feels that Mr. Kozinski laid the groundwork for this atmosphere even before he assumed office. He had individual meetings with the employees and urged them to air their concerns about the way the office was functioning. He has not used the information constructively, however, but rather as slashing criticisms thrown into memoranda that the OSC staff receive in connection with cases. She characterized Mr. Kozinski's approach as a "divide and conquer" strategy and said that employees increasingly are afraid to confide in each other.

Mr. Kozinski's personal memoranda also have become a topic of controversy. Ms. Chin reports that most of the top staff members have received "insulting" memos. She showed me an example in her own case -- a memo concerning plans for the office picnic. It was filled with humiliating conclusions about her competence and motives. From the memo, I was left with the impression that Ms. Chin was trying to sabotage the office picnic, and Mr. Kozinski had figured out her scheme. It was more than a little paranoid.

Employees who have engaged in dissent have been subject to harassment. OSC soon opened files on them and informed them that Mr. Kozinski no longer had confidence in their work.

Ms. Chin received a gag order, which she is trying to obtain under the Privacy Act. She was personally reprimanded after she spoke with another employee to share her concerns. Soon after Mr. Kozinski sent her a memo holding her personally responsible for the deteriorating morale of the regional employees in the field. He accused her of making baseless (and "malicious," she thinks) criticisms and ordered her not to speak with any regional employees.

II. INEFFECTIVE PURSUIT OF PROHIBITED PERSONNEL PRACTICES

Ms. Chin's most serious allegations involved deterioration of the Office's efforts against prohibited personnel practices ("PPP"). She recognized that OSC has struggled in the past but observed that now the substantive work is nearly at a complete standstill. She stated that since Mr. Kozinski took office there have been almost no new investigations or stay requests. (Last year there were 42 stay requests.) She stated that in order to obtain a Special Counsel finding of prohibited personnel practices, an employee now would have to present "smoking gun" evidence or the equivalent of a confession from the personnel department. There is no realistic possibility that the Special Counsel would obtain the necessary evidence through an investigation -- the case must be complete when the complainant files the charge.

Ms. Chin said that a letter from Presidential advisor Ed Meese directing expedited handling of whistleblower cases has received prominent attention. But it hasn't led to any results and appears to be little more than a public relations ploy.

I expressed curiosity about what the OSC employees were doing if there no longer was any significant PPP investigative activity or litigation. Ms. Chin replied that the PPP priority has been replaced with an emphasis on cosmetics in general, and Hatch Act violations in particular. In her opinion, cosmetic details and grammar unquestionably receive the most attention, far more than the substance of the issues. Mr. Kozinski or his assistants repeatedly return routine correspondence, because the margins are 1/4" off or other copy editing. Closeout letters go through up to five drafts without changing the substance. Employees are bogged down in administrative details such as written accounts of how they spend every 15-minute time period. The result is that all the work of the office is backlogged badly.

Ms. Chin cautioned that things might have changed since her departure.[*] She also noted that one explanation for the substantive paralysis may be Mr. Kozinski's desire to improve the quality of OSC writing and investigations. He has harshly criticized both, as have a number of outside groups and the Merit Systems Protection Board. When I observed that the solution for poor reprisal investigations wasn't to stop doing reprisal investigations, however, she laughed and agreed.

She was equally disturbed at the choice of the few investigations that still occur. She said OSC now concentrates its probes on Democratic violations of the Hatch Act. Ms. Chin feels that Hatch Act violations are relatively petty ("a federal employee carries a political sign") and the maximum civil service penalty of 30-day suspension is also insignificant. It bothered her, however, that there may be a double standard between treatment of Republican and Democrat violation of the Hatch Act. She recalled that while OSC is considering litigation for several Democratic violations, there has been only one Hatch Act investigation of a Republican. That investigation led to a warning letter "not to do it again."

There have been a few well-publicized Special Counsel initiatives in the last few months. Ms. Chin emphasized that those were staff initiatives, not Mr. Kozinski's. He approved the actions only at the urging of the staff, and in one case reluctantly. For example, although Mr. Kozinski signed the rebuttal letter on the Labor Department Office of Inspector General "gag order," the initiative and work was Ms. Eastwood's.

A more revealing example involves the OSC intervention to assist a Democratic career employee at the Interior Department. The press gave Mr. Kozinski credit for demonstrating the non-partisan nature of the Office by challenging an apparent effort to illegally force out a Democrat from the civil service. In fact, OSC only took the action after the initiative and persistent urging of Kit Bloeker and Jessie James. They felt strongly that the case should have justified a stay request, and normally the decision is Mr. James'. But Mr. Kozinski only reluctantly approved intervention in support of the employee's normal appeal. Even more significant, Mr. Kozinski or an aide then declared a lack of confidence in Mr. James' work and restricted his future duties to screening Hatch Act violations.

---

[*] Last week an OSC attorney called GAP to announce the Special Counsel would conduct a field investigation on a PPP allegation submitted by GAP.

Ms. Chin concluded that all but a handful of the veteran OSC staff is looking for other work. She no longer would advise an employee to go to or expect help from the OSC against a prohibited personnel practice. She promised to prepare and/or copy some relevant documentation for me.

Rev. 7/81

OFFICE OF THE SPECIAL COUNSEL — Exhibit 2
ROUTING SLIP

[redacted]

To:

Room 213

☐ Alex Kozinski

Room 215

☒ Chin Laura
☐ Collins Lynn
☐ Davis Elliott
☐ Don Beth
☐ Eastwood Mary
☐ Fuller Vince
☐ Hudson Joyce
☐ James Jessie
☐ Salter Donna
☐ Smith Mary
☐ Sugiyama Jim
☐ Wilkins Barbara

Room 217

☐ DiJulio Don
☐ Fletcher Rob
☐ Mauldin Linda
☐ Powell Irma
☐ Russell Dolores
☐ Sloan Mary
☐ Stewart Brenda
☐

Room 223

☐ Barber Ken
☐ Eddy Ralph
☐ Hannon Ann
☐ Jones Jim
☐ Llaverias Marita
☐ Morrison Denise
☐ Oskoui Ellen
☐ Preece Janice
☐ Spekter Mike
☐ Toye Dick

Room 263

☐ Caldwell Bill
☐ Hall Mary
☐ Jones Sarah
☐ Mayer Bob
☐

Motor Vehicle Operator

☐ Weir Charles

Room 317

☐ Bleecker Kit
☐ Carlson Walt
☐ Crickenberger Jane
☐ Erck John
☐ Kennedy Ron
☐ Montgomery Eve
☐ Neff Phillipe
☐ Proctor Dessie
☐ Smith Priscilla
☐ Stern Rob

Room 337

☐ Arnold Barbara
☐ Bunch Veronica
☐ Carrick Pat
☐ Clark Horace
☐ Cox Margaret
☐ Glover Marie
☐ Hamer Gary
☐ Hill Jeanette
☐ Hollingsworth Fred
☐ Johnson Don
☐ Owens Vivian
☐ Queen Marie
☐ Raisher Mark
☐ Rothberg Ron
☐ Springfield Dorothy
☐ Vandall Donna
☐ Womack Alice
☐
☐
☐

Field and Branch Offices

☐ Dribinsky Lenny (Philadelphia)
☐ Chenoweth Kate (Boston)
☐ Lively Paul (Atlanta)
☐ Winzer P.J. (Dallas)
☐ Olivier Bill (San Francisco)
☐ Terry Tony (Los Angeles)
☐ Shea Bill (Seattle)

☐ Your Information
☐ Note and File
☐ Note and Return
☐ Please See ...
☐ Please Call Me
☐ Draft
☐ Approval or Clearance
☐ Your Signature
☐ Comment
☐ As Requested
☐ Per Conversation
☒ Take Action By 8/5

☐ Prepare Reply For Signature Of ____________________

Remarks:

① THIS is NOT HELPFUL
SURELY YOU KNOW MORE THAN
YOUR TERSE NOTE SUGGESTS
② IF I HAVE TO TALK TO KD
MYSELF, I HARDLY NEED YOU
(OVER)

Date From

TO REPRESENT OUR INTERESTS ON THIS PROJECT

③ I INSTRUCTED YOU TO FIND OUT WHETHER THE DATE COULD BE CHANGED, NOT TO ACTUALLY CHANGE IT. YOUR NOTE IS NOT RESPONSIVE TO THIS ISSUE.

④ WHILE IT WAS CLEAR THAT YOU WERE NOT PARTICULARLY ENTHUSIASTIC ABOUT ~~[illegible]~~ THE POSSIBILITY OF CHANGING THE DATE, I EXPECTED THAT ONCE YOU GOT MY INSTRUCTIONS YOU WOULD DO YOUR BEST TO CARRY THEM OUT. THE ATTITUDE EVIDENCED IN YOUR NOTE SUGGESTS YOU ARE JUST AS GLAD IT DID NOT WORK OUT + LEADS ME TO BELIEVE YOU DID NOT DO YOUR BEST TO EXPLICATE OUR POSITION TO KD + OTHERS ON THE GUARD SIDE. YOU SHOULD KNOW THAT I DO NOT TAKE LIGHTLY SUCH FOOT-DRAGGING IN CARRYING OUT MY INSTRUCTIONS.

⑤ [illegible] REPORT BACK TO ME ON THE FOLLOWING

Ⓐ WHETHER DATE COULD BE CHANGED + IF NOT, WHY NOT

Ⓑ WHETHER YOU EXPLAINED OUR POSITION TO KD + HIS REACTION.

6/3

Donna: Picnic date remains August 29. Any more questions about that date should be directed to Kevin Dugan (MSPB) x 37111

Laura

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

August 4, 1981

MEMORANDUM TO: Laura Chin, OSC

FROM: D. Kevin Dugan, Picnic Committee Chairman

SUBJECT: Picnic Date

At this time I am reluctant to attempt to change the picnic date again. As you know, we were extremely fortunate to obtain permission to have the picnic at the Naval Observatory on July 25th. Admiral Hanson was kind enough to sponsor the picnic as a favor to Mr. Wertheim and he was scheduled to retire on the first week of August. At this time I don't know Admiral Hanson's status although I do know he entered the hospital recently due to a serious illness.

After the last date was rained out, I called Captain Voden and obtained a second date for September 12. He didn't mention any problem concerning Admiral Hanson's status, so I didn't bring it up either. After I found out that the OSC had a function scheduled on September 12, I again called Captain Voden and he was kind enough to change the date to August 29. As you know, we have publicized that date throughout the agency.

Under these circumstances I was reluctant to impose further on the good offices of Captain Voden. Upon your request, however, I did call his office and learned that he is on vacation until next week. I think that if I talked to someone other than Captain Voden our status as Admiral Hanson's guests might be questioned, and since Captain Voden won't be available until next week, it would be too late at that time to change the date.

Memorandum **Office of the Special Counsel**

Subject
Training Seminar for Attorneys

Date
July 27, 1981

To .All OSC Attorneys - Central Field and Branch Offices

From Alex Kozinski
Special Counsel

Based on the feedback that I received from OSC attorneys, (memorandum dated June 22, 1981, pertaining to a weekend training seminar on the writing of briefs, pleadings and other legal documents), I have determined to tentatively schedule the seminar on the weekend of September 12-13, 1981.

The seminar will be held at the Office of the Special Counsel's Central Office, located at 1717 H Street, NW., starting at 9:00 a.m. and ending at 1:00 p.m. each day, it will be taped for the use of the employees that will be unable to attend.

Please mark your calendars, making all necessary travel arrangements (without actually committing money) regarding the seminar.

We encourage use of "super-saver" and other cheap airfares. In addition, GSA has provided us with schedules of government contract fares which may be cheaper still. A copy of the latest schedule (June 1981) is being sent to each field office. I am also sending copies of a directory listing those hotels in the D. C. area which offer government employee discounts. I will be sending a further memorandum by August 15, 1981, indicating whether or not the seminar will be held. If there are any questions please do not hesitate to call Sarah Jones at 653-7155.

THIS IS ONE OF THE [illegible] [illegible] OF [illegible] I HAVE SEEN. IT SHOWS SLOPPY WORK HABITS, FUZZY THINKING, LACK OF ORGANIZATION, INEXPERIENCE IN FORMING A COHERENT LEGAL ARGUMENT AND TOTAL INATTENTION TO DETAIL.

AS A FIRST DRAFT I RATE IT A D+
AS A FINAL PRODUCT AN F.
WHOEVER EDITED IT DESERVES AN F−.

AB

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

Exhibit 3

[redacted]

IN THE MATTER OF:
NATHANIEL SIMS
v.
DISTRICT OF COLUMBIA GOVERNMENT

Docket No. F-1831

~~BRIEF OF THE OFFICE OF THE SPECIAL COUNSEL, AS AMICUS CURIAE IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S ORDER~~

The office of Special Counsel did not participate [illegible] [illegible]

THERE IS A [illegible] [illegible] THE [illegible] OF [illegible] [illegible] "[illegible] BY" AND "[illegible] AS" [illegible] IS [illegible]? WHAT IS THIS GUYS NAME?

Case History

[illegible] [illegible] [illegible] [illegible] [illegible] OR [illegible] [illegible]? [illegible] [illegible] [illegible] [illegible].

IS THIS RELEVANT? IF SO, [illegible]. IF NOT, IT [illegible] BECLOUDS [illegible].

Dr. Nathaniel Sims was removed by the District of Columbia Government from his excepted service position as Chief Hearing Examiner, D.C. Rental Accommodations Office, effective April 20, 1979. ~~The basis for the removal~~ was outlined in a letter to Dr. Sims from Elijah B. Rogers, City Administrator, dated April 20, 1979, ~~was~~ [illegible] that Sims had violated ~~section 7324(a)(2) of title 5, United States Code~~ 5 U.S.C. § 7324(a)(2), which prohibits D.C. Government employees' ~~involvement~~ in partisan political campaigns. Dr. Sims appealed his removal to the Merit Systems Protection Board, as he was so advised by Mr. Rogers's letter; [redacted] in pertinent part:

EXEMPTED FROM [illegible] [illegible]

① [illegible] YOUR [illegible] ② [illegible] [illegible]

[illegible]

> You have a right to appeal this decision . . . ①
> An appeal must be . . . addressed to the Merit Systems Protection Board . . . ②

[illegible] [illegible] [illegible] [illegible] OR [illegible] [illegible] & [illegible] OF [illegible]

COME ON... WILL ANYBODY BE [illegible] [illegible] THAT THIS IS THE WHOLE LETTER? AND SUCH [illegible] [illegible] [illegible]. DITTO

On July 12, 1979, Administrative Law Judge McCarthy ~~entered~~ ~~an order~~ and dismissing Dr. Sims' appeal ~~on the ground that the Board was~~ for lack of ~~without~~ jurisdiction therefore ~~to hear the case~~ since the Office of the Special Counsel had not initiated the removal action, and~~, under 5 U.S.C. 1206(g),~~ sole authority to bring such cases rests with the Special Counsel. 5 U.S.C. §1206(g).

AN [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Is this the end of ¶ ②? IF SO, why REPEAT ¶ 2 [illegible] [illegible] [illegible]?

① [illegible] [illegible]

② [illegible] "[illegible]" [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] ([illegible] [illegible] [illegible]) AT ALL.

THIS IS CONFUSING. [illegible] IDEA FROM THIS DESCRIPTION AS TO WHEN THE D.C. [illegible] WAY. ONE PROBLEM IS INTRODUCTION OF THE TERM "INVESTIGATE" FOR THE FIRST TIME W/RESPECT TO OSC. (NOTE FIRST REFERENCES TO OSC CERTIFICATION, SUPRA.) AT THE VERY LEAST ONE MORE SENTENCE IS REQUIRED TO CONCLUDE THE SYLLOGISM, IF ONE THERE BE.

NEVER USE 5 WORDS WHEN ONE WILL DO.

AGAIN, THE ISSUE IS NOT OSC's INVOLVEMENT IN THE APPEAL, IS IT?

RELEVANCE? MEANING?

~~By a petition filed~~ On July 27, 1979, Dr. Sims ~~requested~~ PETITIONED the Board ~~to review and~~ FOR reversAL Judge McCarthy's ORDER, ~~dismissal for lack of jurisdiction, claiming~~ ARGUING that he ~~had a right of~~ WAS ENTITLED TO appeal directly to the Board regardless of the involvement of the Special Counsel and that he had [illegible] taken his appeal to the Board in reliance upon Administrator Rogers' letter. On August 16, 1979, the District of Columbia ~~Government~~ filed a Petition for Review ~~and Accompanying Brief~~ requesting THAT the Board ~~to~~ reopen, reconsider, and remand the case for a hearing on the merits. The ~~D.C. Government's position was~~ DISTRICT ARGUED that section 1206 permits the Special Counsel to investigate only those alleged Hatch Act violations committed by Federal employees. On March 5, 1981, the Board invited the OFFICE OF Special Counsel~~, as well as the Office of Personnel Management~~, to file A brief~~s~~ on the issues raised in this case.

ON WHAT?

UNNECESSARY PREP PHRASE ("UPP")

WE JUST SAID THIS. I'M SURE EVEN BURT P. WILL REMEMBER

1. UPP
2. SINCE THE CASE IS ON APPEAL, HOW ARE THESE TERMS RELEVANT?
3.

WHAT DOES THIS MEAN? LIKE A BLANKET NOT.: YOUR BRIEF DOES NOT CLARIFY THE POINT

QUESTIONS PRESENTED

~~Issues~~

1) ~~Whether~~ ARE District of Columbia ~~Government~~ employees ~~are~~ covered by 5 U.S.C. § 1206(e) ~~and~~ & (g)~~; and~~ ?

WHY ARE THESE NOT SET FORTH IN FULL UNDER "STATUTES INVOLVED" SECTION!

NEVER USE A CAPITAL IN THE MIDDLE OF A SENTENCE

2) ~~Whether~~ IS the Board's jurisdiction to hear and decide cases under 5 U.S.C. § 1206(e) ~~and~~ & (g) ~~is~~ limited to actions resulting from the Special Counsel's investigation and subsequent filing of a complaint.

UPP

MISWORDED, VERBOSE & REPETITIVE PHRASING

BROUGHT BY THE SPECIAL COUNSEL?

Conclusion

1) District of Columbia ~~Government~~ employees are covered by 5 U.S.C. § 1206(e) ~~and~~ & (g)~~; and~~ .

2) The Board lacks jurisdiction under 5 U.S.C. § 1206(e) ~~and~~ & (g) to hear ~~and decide~~ cases involving alleged Hatch Act violations unless ~~these cases are~~ brought to it by the Special Counsel.

¶ IS A BUCKET?

I WOULD LIKE TO KNOW WHERE IN THE BRIEF YOU THINK YOU COVER THIS POINT. (ANYONE WHO KNOWS FEEL FREE TO COME FORWARD & TELL ME.)

THIS IS NOT A SUMMARY OF [illegible]
THE FIRST SENTENCE RESTATES THE QUESTION
(ALBEIT IN A NEW, MORE AWKWARD + MORE VERBOSE
FASHION). THE SECOND SENTENCE RESTATES THE CONCLUSION.
IF YOU CAN'T SAY MORE, SKIP IT.

OTHERWISE [illegible] ASKED + [illegible] MIGHT ALSO [illegible] "[illegible]"

Summary of Argument

~~This case presents novel issues regarding the legal relationship between and among employees of the District of Columbia, the Merit Systems Protection Board, and the Special Counsel when a person, employed by the District, is thought to have violated the Hatch Act. The Acting Special Counsel believes that Judge McCarthy's~~ RULING ~~holding is in keeping with all applicable laws and regulations and~~ CORRECT ~~should therefore be affirmed by the Board.~~

UPP + AWKWARD ©
UPP ©

GOOD GRIEF! THIS [illegible] A BRIEF, NOT AN OPINION SURVEY.

(THOUGH YOU HAVE [illegible] IT,) THIS IS THE FIRST TIME IT IS [illegible]. STANDARD PRACTICE IS TO USE THE NAME AND CITE TOGETHER AT FIRST MENTION TO AVOID ANY CONFUSION.

Argument

On March 16, 1979, Elijah B. Rogers, City Administrator for the District of Columbia, sent Dr. Sims a 30-day Notice of Intent To Remove letter as required by (District Personnel Manual § 168-3a), for violating ~~Section~~ 5 USC § 7324(a)(2), ~~of title 5, United States Code.~~[*]

HOW DO YOU JUSTIFY THE PARENTHESES?

IF ALREADY KNOWN WHO HE IS, SEE P. 1.

[*] SLOPPY FOOT-NOTE

SHOULDN'T THIS FOOTNOTE GO BETWEEN "REMOVE" and "LETTER"?

Under Federal law and the law of the District of Columbia, neither Mr. Rogers nor any other District official ~~has~~ THE DISTRICT [illegible] the authority to remove an employee for an alleged Hatch Act violation. Throughout the proceedings in this action the D.C. Government has chosen to retain Federal jurisdiction over Hatch Act violations. ~~Section~~ 9-335.1 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (March 3, 1979 D.C. Law 2-139) provides:

UPP

> The provisions of subchapter III of Chapter 73 of title 5 of the United States Code, affecting political activities of employees of the District of Columbia, shall remain effective. (Mar. 3, 1979, D.C. Law 2-139, §2512, 25 DCR 5740.)

THIS IS A [illegible] [illegible] FOLLOWED BY EITHER CITE OR [illegible] [illegible] IS THE [illegible] [illegible] THE [illegible] [illegible] ARE [illegible]

1. WHY IS THIS CITED TWICE?
2. [illegible] [illegible] [illegible] [illegible]?

THIS SOMEWHAT, BUT NOT COMPLETELY, OVERLAPS THE FIRST STATEMENT ON P.1
② IT RAISES NEW FACTS WHICH DO NOT SEEM RELEVANT TO THE ARGUMENT AND ARE NOT RECONCILED W/ THOSE ON P.2 (E.G. WERE THERE 2 LETTERS ONE ON APR 16 + A SECOND ON APRIL 20?).
③ WHAT IS THIS DOING AS THE FIRST ¶ OF THE ARGUMENT SECTION?

THE SENTENCE [illegible] IN YELLOW IS TOTALLY INCOMPREHENSIBLE. I CANNOT EVEN GUESS WHAT IT MEANS FOR D.C. TO RETAIN FEDERAL JURISDICTION IN A PROCEEDING BEFORE THE BOARD. [illegible] HOW DOES IT RELATE TO THE ARGUMENT?

---

[*] Assuming, arguendo, that the District Government could remove Dr. Sims, as of March 16, Administrator Rogers lacked the authority to do so, since Mayor Barry did not delegate such authority to him until March 21. (Mayor's Order 79-49)

RELEVANT

1. THIS IS AN ABSOLUTELY AWFUL WAY TO START THE ARGUMENT. WHY ARE YOU BEGINNING A DISCUSSION OF THE BOARD'S JURISDICTION W/A CITATION TO D.C. LAW?
2. [illegible] AS BEST I UNDERSTAND WHAT FOLLOWS THIS ¶ IS TOTALLY IRRELEVANT OR, AT BEST, MERITS A FOOTNOTE.

THIS IT HAS INNUMERABLE FLAWS. AMONG THE MOST SERIOUS:
① YOU SKIP FROM D.C. ~~[illegible]~~ LAW REFERENCE TO U.S.C. TO OPM REGS.
IT WOULD HELP IF YOU AT LEAST QUOTED OR EXPLAINED THE FED. STATUTE
② YOU ARE SUBSTITUTING YOUR ARGUMENT BY REFUTING DR. S's RELIANCE ARGUMENT, RATHER THAN HIS MORE WEIGHTY STATUTORY ARGUMENT
③ IT IS GARBLED + VIRTUALLY INCOMPREHENSIBLE
④ IT IS UNPERSUASIVE

Nevertheless what? Is it some inevitable, self-evident rule that D.C. employees are more subject to federal [illegible]? Do you have a cite? Have you checked [illegible]? Do you know?

The Office of Personnel Management's regulations ~~dealing~~ ~~with~~ subchapter III of Chapter 73, title 5, United States Code, 5 CFR §733.101 et seq., are captioned "Part 733 - Political Activity of Federal Employees." Nevertheless, the term "agency" is defined to mean "an executive agency and the government of the District of Columbia." OPM's regulations are somewhat confusing in that §733.201 would allow the employing agency to investigate and decide prohibited political activity cases involving excepted service personnel. From discussions with counsel for OPM it would appear that this section remained in the regulations through an oversight. While it is unfortunate, since the D.C. Government appears to have followed those regulations (see §163-2 DPM) and Dr. Sims in turn relied on the District's representations regarding his removal and appeal rights, nonetheless, statutory authority in the form of the Civil Service Reform Act of 1978 supersedes agency regulations.

ONE ON WHAT: SINCE WHEN DO WE CITE ACTION HEADINGS AS AUTHORITY, EVEN LESS AS LEAD-OFF ARGUMENT?

WHAT

TERM ALLOWING A FLOATING REFERENT BY ENCOURAGING FUZZY THINKING

NOT CASES. THINGS BROUGHT TO COURT OR BOARD?

THIS IS AWFUL!

THIS IS A TOTALLY NEW THOUGHT. THE 1st 2 SENTENCES DEAL W/THE QUESTION OF WHETHER D.C. IS BOUND BY OPM RULES. THIS ADDRESSES QUESTION OF WHETHER FED. AGENCIES ~~[illegible]~~ CAN INVESTIGATE ~~[illegible]~~ PPA CASES W/RESPECT TO EXCEPTED SERVICE PERSONNEL. WHAT IS THE CONNECTION?

① DISCUSSIONS W/OTHER COUNSEL: NEVER CITED; ② IF YOU DO CITE IT, YOU SHOULD GIVE AN IDENTIFYING NAME, TO VERIFY THAT IT IS SOMEONE WHO WOULD HAVE THE KNOWLEDGE. ③ OPM IS FLOUTING THEIR OWN [illegible]. HAVE YOU CHECKED OR MADE SURE THEY DO NOT CONTRADICT THIS?

WHAT A NON SEQUITUR. I ABSOLUTELY DO NOT UNDERSTAND THE CONNECTION

~~Section 1207 of title 5, United States Code, gives~~ The Merit Systems Protection Board authority to hear ~~[illegible]~~ UPP (5 USC 1207) disciplinary actions ~~presented to it~~ BROUGHT under section 1206(g). The latter section provides in pertinent part: ". . . if the Special Counsel determines that disciplinary action should be taken against any employee . . . the Special Counsel shall prepare a written complaint against the employee . . . and present the complaint . . . to the . . . Merit Systems Protection Board . . . ." (emphasis added) Subsection (e)(1) of section 1206 specifically provides that the Special Counsel "shall" investigate any allegation concerning "political activity prohibited under subchapter III of Chapter 73 of this title, relating to political activities by Federal employees; . . . ." SO BIG DEAL. WHERE DOES THIS GET YOU? DOES IT SAY ANYTHING ABOUT EXCLUSIVITY?

BLUE BOOK ACID — CONSISTENCY

UPP

This is a new term. Meaning? Connection?

I ASSUME THIS IS A NEW ARGUMENT. NO TRANSITION.

UPP AS OPPOSED TO GENERALLY, PROVIDING.

WHAT ARE YOU TALKING ABOUT?
WHICH § OF CSRA?
HOW DOES IT SUPERCEDE?
WHY DOESN'T OPM HAVE DISCRETION TO DRAFT REGS ~~[illegible]~~ ALLOWING BROAD INTERPRETATION OF CSRA.
HELP!

BESIDES, POWER OF SC TO INVESTIGATE IS NOT THE SAME AS ~~[illegible]~~ JURISDICTION OF MSPB TO HEAR CASES.

① IT IS AN UNSUBSTANTIATED, UNCITED ASSERTION.
② NOTHING SAID ABOVE ADDRESSED THE ISSUE OF EXCLUSIVITY. ALL YOU TALK ABOUT IS WHAT OSC MUST DO. IT IS QUITE POSSIBLE OTHERS CAN DO SOME OF THE SAME THINGS
③ IN ANY CASE, THIS IS NOT THE ISSUE HERE SINCE NO ONE BROUGHT A DISCIPLINARY ACTION TO THE BOARD. THIS -- YOU RECALL -- IS AN APPEAL FROM AN ADVERSE ACTION BY DC. SO THE ARGUMENT IS BESIDE THE POINT.

THIS IS A WORD ALWAYS USED WHEN THERE IS DOUBT. IT'S A DEAD GIVEAWAY -- AVOID IT.

// MEAN

The Civil Service Reform Act clearly gives the Special Counsel sole authority to investigate and bring disciplinary actions BEFORE ~~complaints to~~ the Board dealing with alleged Hatch Act violations.

WHAT DOES THIS MEAN? THIS IS WRONG, INACCURATE, ASIDE AND/OR BESIDE THE POINT IN SO MANY WAYS, I WILL LET YOU FIGURE IT OUT.

By retaining the Federal Hatch Act provisions, the District of Columbia has acceded to the authority of both the Board and the Special Counsel.

In its Brief in Support of Review, the DISTRICT OF COLUMBIA ~~D.C. Corporation Counsel~~ ARGUES ~~takes the position~~ that the Board has appellate jurisdiction in Hatch Act cases, but that the D.C. Government can remove one of its employees for violating the Hatch Act by means of its own adverse action procedures. This position is not in keeping with the plain language of the D.C. Personnel Act. Section 1-346.1 "Adverse Actions" provides that one of the bases for taking an adverse action is: "[illegible] improper political activity except as otherwise permitted by this Chapter or the Constitution; . . . ." This section further provides (at subsection (C)) that the D.C. Office of Employee Appeals has final administrative appeal authority with any further review being found in the judicial system. Nothing in the adverse action section makes reference to an appeal to the Merit Systems Protection Board. ~~Section 1-336.3 of the D.C. Personnel Act, deals with the appeal~~ procedures to the D.C. Office of Employee Appeals. Subsection (a) identifies which agency decisions are appealable to the Office of Employee Appeals by the type of action involved, e.g., performance rating, as well as by the relevant subchapter, e.g., subchapter XIV as regards performance ratings. Subchapter XXV - which covers the Hatch Act - is not one of the covered subchapters. Further, section 1336.3(d) provides that the employee or agency may appeal the Office of Employee Appeals decision to the Superior Court of the District of Columbia. There is no provision for any appeal to the Merit Systems Protection Board. Clearly, then, what the District of Columbia has

WHAT POSITION THE PREVIOUS SENTENCE STATES TWO

THE TWO PHRASES ARE NOT EVEN PRESUMPTIVELY INCONSISTENT. WHY USE THIS CONNECTOR.

RELEVANCE? REGARD, THE ISSUE IS MSPB JURISDICTION. HOW CAN D.C. P.A. AFFECT THAT?

THIS IS A NICE PHRASE!

BY USE PROPER BLUE BOOK CITE

AGAIN -- WHAT IF IT DID? CAN DC LAW ENLARGE MSPB'S JURISDICTION

IS THIS A NEW ARGUMENT? HOW ABOUT A NEW ¶?

THIS IS TOTALLY IRRELEVANT TO YOUR ARGUMENT. DO YOU SEE WHY.

SEE NEXT PAGE FOR ACERBIC COMMENT

WHO STUCK THIS IN HERE? DON'T YOU REALIZE YOU HAVE SHIFTED GEARS AND THIS IS A TOTAL IRRELEVANCY? (HINT: YOU HAVE JUST SHOWN THAT THERE ARE NO HATCH ACT RULES AT ALL.

① THIS IS [illegible]
② AGAIN, WHAT IS RELEVANCE OF DC LAW?
③ IS IT FAIR TO INTRODUCE A TOTALLY NEW CONCEPT IN YOUR LAST SENTENCE? I.E. WHAT IS DIFF. BETWEEN HATCH ACT AND IMPROPER POLITICAL ACTIVITY?

-6-

done by statute, is to separate out Hatch Act cases and have them remain in the Federal sector whereas other improper political activity cases are processed through its own system with final recourse to the D.C. Court System.

IS THAT LIKE THE PRIVATE SECTOR?

Conclusion

LEGALESE!

For the reasons stated herein as well as those put forth in Judge McCarthy's opinion, the Acting Special Counsel believes that the Administrative Law Judge's Order Dismissing Dr. Sims's Appeal should be ~~upheld.~~ AFFIRMED?

WHY CAP?

COME ON -- HOW ABOUT JUST PLAIN ENGLISH? DO YOU TALK THIS WAY?

Respectfully submitted,

Mary Eastwood
Acting Special Counsel

Ly . R. Collins
Acting Deputy Special Counsel

Jessie James, Jr.
Assistant Special Counsel
for Prosecution

NEVER USE THIS WORD IN A BRIEF

Beth L Don
Beth L. Don
Attorney

May 12 1981
Date

John R. Erck
Attorney

Washington, D.C.

SIM OR SIMS?

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served by certified mail, postage prepaid, copies of the foregoing Brief of the Office of the Special Counsel as Amicus Curiae in Support of Administrative Law Judge's Order, on the following:

Tom Moyer, Esq.
Office of General Counsel
Office of Personnel Management
1900 E Street, N.W.
Rm. 6H31
Washington, D.C. 20415

Jo Ann Chabot, Esq.
Office of General Counsel
Office of Personnel Management
1900 E Street, N.W.
Rm. 6H31
Washington, D.C. 20415

Travis A. Murrell, Esq.
1329 E Street N.W., Suite 513
Washington, D.C. 20004

Robert E. McCally
Deputy Corporation Counsel, D.C.
Legal Counsel Division
14th and E Streets, N.W.
Washington, D.C. 20004

Nathaniel Sims
7703-12th Street, N.W.
Washington, D.C. 20012

May 17, 1981
Date

Janice A. Preece

Memorandum

Office of the Special Counsel

EXHIBIT 5

Subject	Date
Communication with Field Personnel	September 14, 1981

To Laura Chin
Public Information Officer

From Alex Kozinski
Special Counsel

DRAFT

Some field office personnel have told me that you have been spreading false and baseless rumors. This has created a serious morale problem. To deal with this problem, I am instituting the following policy.

Effective immediately, you may not communicate with OSC field or branch office employees unless you have specifically cleared the communication with the relevant field office chief.

This means:

(1) You will not use office telephones to call field or branch office personnel for any purpose, and you will not use any other telephones to discuss official business with field or branch office personnel, unless the conversation has first been cleared. Similarly, you will not correspond with field or branch office personnel on official business without passing the correspondence through the field office chief.

(2) If you should receive a telephone call from an employee in a field or branch office, and the relevant field office chief has not specifically told you that the telephone call is authorized, you will say only the following and then promptly hang up: "I am not authorized to speak to you unless your field office chief calls me and tells me it's o.k. Thank you. Good bye." Correspondence from field or branch office employees should be promptly referred to Bob Mayer.

You are, of course, free to discuss any matter not constituting official business with field or branch office personnel so long as both of you are in a non-duty status and are using private telephones and/or stationery.

This policy will be in effect until the present problem has been cleared up. Please give Bob Mayer any thoughts you may have on the subject.

AK/dms

cc: H. Robert Mayer
Leonard Dribinsky
P.J. Winzer
William Olivier
Paul Lively

Senator **Simon**. Let me just read a little bit here. She says:

> Initially, I reported directly to Mr. Kozinski. He very seldom communicated with me and we did not develop a working relationship. This was unique in my career as a Federal employee.

I am skipping some sentences here, but I don't think I am taking things out of context.

> Overall, I perceive Mr. Kozinski as a man without compassion. He appeared to enjoy mistreating individuals. He simply did not treat the human beings at the office with dignity and respect.
>
> The effect of Mr. Kozinski's behavior was to devastate the morale of the OSC staff and to cause severe depression among the individual employees.

Then she says—and she was the Public Information Officer, I believe:

> At approximately 5 p.m. on Tuesday, September 14, the secretary to Mr. Kozinski's assistant, Robert Mayer, called me into his office. Mr. Mayer was there with Thomas Barba, another OSC employee.
>
> He showed me a memorandum that instructed me not to engage in any communications without prior clearance. The restriction extended from Congress and the press down to intragency communications with other OSC staff.
>
> Mr. Mayer refused to provide me with a copy of the memorandum. Later I obtained the memorandum under the Freedom of Information Act after initial denials and just prior to my filing a court suit for it.

Was this telling the public information officer that she could not have any contact with the press or with Members of Congress—was this on your order?

Judge **Kozinski**. Senator Simon, I want to answer your question fully and we have talked before. I know your deep concern in this matter.

First of all, the memorandum, I believe, is part of the record, is part of—attached to the Chin affidavit. While I don't have a copy with—of the memorandum here before me, it does not address at all the question of communications with the press or with Congress.

The memorandum simply directed Ms. Chin not to communicate with field office personnel—these are employees in my field offices around the country—without going through the first line supervisor, which is a field office chief.

This came—and the reason I drafted the memorandum is that two of my field office chiefs—and they were here this morning and they may still be here with us today, this afternoon—had come to me and had complained that Ms. Chin was wrecking havoc with the morale of their staffs because she was calling up and, in their words, spreading rumors that were making—or as best I can remember their words these many years later, that she was causing problems.

They asked me, would I please ask Ms. Chin that, when she called a field office, to go through them, the head of the office.

I drafted the memorandum—and I did explain this in my letter of October 17 to the committee in response to Senator Levin's concern—I drafted the memorandum and then I read it, and I thought it was harsh and I didn't sign it and there is no signed copy of that memorandum.

I thought to myself, well, it may be something I could do, but maybe we can do something less. So I asked Bob Mayer, now Judge

Mayer who I believe is also present in the courtroom, would he please speak to Ms. Chin and tell her to cool it.

Apparently, he did, along with Mr. Barba who I believe is also present in the room, and during that course of that conversation he must have shown her the memorandum. The memorandum was not issued to her as established by the fact that she did not have it. She had to get it through FOIA.

Of course, if the memorandum was issued to her restraining her actions, she would have been given a copy. It was shown to her and said, look, if things don't get better, if these problems don't resolve, maybe the boss—referring to me—might do something like this.

There is nothing in the memorandum that restrained Ms. Chin from speaking to the press. The memorandum clearly allows her the freedom to speak as a private person to anybody.

I viewed the memorandum—which, again, was not issued—as simply a directive to an employee as to how to deal with other employees in light of a problem presented to me.

Senator SIMON. But aside from the memorandum, what she was told, was she told or did you ask that she be told that she should have no contact with the press or not contact with Members of Congress?

Judge KOZINSKI. Senator Simon, no. I have never given instruction for her to not have contact with the press. Of course, it was not in that meeting, but until I heard you read the Chin——

I have seen the Chin memorandum—affidavit before, but until that--until I saw the Chin affidavit, I have never heard an allegation, and I am not aware of any charge that she was stopped from dealing with the press.

I certainly gave no instructions like that.

Senator Simon, if I gave my public information officer an instruction not to deal with the press, that would simply terminate her job.

Senator SIMON. Have you given such instructions to anyone in your office either not to talk to the press or not to talk to Members of Congress?

Judge KOZINSKI. No, sir. No, sir. I believe very strongly in the first amendment.

I, during the time I was special counsel, found agencies that had issued such gag orders and we pursued them vigorously. There were well-publicized articles of my fight with, for example, the Acting Inspector General at Labor who had issued such a directive.

There was furious correspondence on that point where I maintained, and eventually prevailed on the view, that an agency manager may not tell an employee when to talk to Congress and when to talk to the press as a private person.

Now, of course, you must understand—and everybody does—that when one is speaking on behalf of the agency, not every employee can stand up and say, "I am speaking for the Secretary of Labor," "I am speaking for the Attorney General," "I am speaking for the special counsel." One has to have designated representatives to speak on behalf of the agency.

But I feel very strongly that as private individuals Federal employees are no less entitled than everyone else to speak to Congress and the press.

Senator **Simon**. OK. We have a copy of the memorandum and we will enter that in the record.

Ms. Chin goes on—and I am not just picking on hers, but it kind of permeates much of what others have indicated, also—"He said, 'And it,'—that is, the memorandum—'was because I had behaved unprofessionally'."

> One reason may have been that I was a focal point for communications and complaints as the editor of the office news letter. I spoke with staff from the regional offices. They also called me to ask what was going on because the emerging developments appeared crazy to various employees at the regional offices.
>
> During my 4 months under Mr. Kozinski, the environment changed from a family atmosphere of mutual trust to an environment of spies and informants. The effects were obvious and frightening.

If I may quote from Mr. Hollingsworth's affidavit, he says:

> Mr. Kozinski frequently directed and expected that I personally adjust or repair any of his furniture, move furniture or equipment, or clean up areas. When I did this to avoid his wrath or castigation, he seemed to enjoy watching me do the manual labor as if he took pleasure in my subjugation.
>
> It was humiliating to do these chores as a GS-14 professional, but I wanted to keep my job.

Judge **Kozinski**. Senator Simon, if you ask the people to stand in this room who have seen me, either as special counsel or as chief judge of the claims court, carrying boxes and moving furniture or trying to repair machinery or sitting at a typewriter and typing, or doing all the jobs that my subordinates do, I, without looking back, would venture to guess you would get quite a few people to stand.

As head of the agency, I feel I must do, I should be willing to do everything that a subordinate can do. I may not be able to type as well as the typist, but, by God, it is not beneath me to try. I may not be as strong as some others in moving furniture, but I have put my shoulder to it.

I have crawled under desks and I have plugged in lights, and I have done what is necessary. I don't believe it is demeaning to me to do what is necessary to make an office operate.

I am deeply troubled if anybody doing those things thinks that they are menial jobs unworthy of them. I certainly don't.

Senator **Simon**. The question is really not the menial jobs. I do typing myself, periodically, and I guess we all carry boxes occasionally.

I guess the—again, it gets back to this question of balance that I was talking about. I gather, from going through the various things, that there has been a problem; and I think we have to say there has been a problem.

If you should not be confirmed, I think you still—you can learn from this whole process and your future can be a very bright one. If you are confirmed—and I think that is the probability—I think you ought to also learn from this process and try and perform with greater balance. That is what we want from a judge.

Judge **Kozinski**. Senator Simon, let me just say that I understand your concern.

I was a new manager when I came to the Special Counsel's Office. I cared a great deal about the Office and about the work.

I spent endless hours correcting people's work not because I wanted to make them feel bad, but because I wanted them to learn and I wanted to improve the work product.

Now, obviously, there are employees coming in 4 and 5 years later who are going to sit here and testify against me. Obviously, I did not do everything as I should have.

Obviously, there was something—there were employees who came today and were willing to say good things. Maybe the intent of what I tried to do got lost in the medium I used. Maybe what I thought was constructive editing, harsh but constructive, was simply perceived by some as personal attacks.

I regret that. I really do, and it troubles me.

I hope I have learned. I would venture to suggest that I have been at the claims court now for 3 years and no one has stepped forward there to raise similar complaints.

We all learn from experiences we have and I hope I am a better manager today than I was 4 years ago. I did not claim perfection and I—I certainly have learned from this experience as well from everything that has happened in the intervening years.

Senator SIMON. I think——

Judge KOZINSKI. I still hope——

Senator SIMON. Excuse me. Yes, go ahead.

Judge KOZINSKI. Well, you said you did not know whether I was the worst or the best you had seen. I hope to prove it to you.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

Senator LEVIN. Mr. Kozinski——

Senator MATHIAS. What order are we following?

Senator HATCH. If you would not mind just letting him go ahead.

Senator LEVIN. No. I apologize, Senator.

Senator MATHIAS. No, no. Go right ahead.

Senator LEVIN. No, not at all.

Senator MATHIAS. By all means. I am not going anywhere. We are going to be here until midnight or so.

Senator HATCH. Let me make a suggestion.

Senator Levin has basically been doing most of the examination. He did yield to Senator Simon. That is why we are here.

But I think you would not mind at all——

Senator LEVIN. I want to yield to Senator Mathias.

Senator HATCH [continuing]. To accommodate Senator Mathias.

Senator MATHIAS. No, I am in no hurry. Go ahead.

Senator HATCH. Go ahead.

Senator LEVIN. Judge Kozinski, back to the Jesse James' affidavit relative to the matter of Dessie Proctor, this is what he said in that affidavit.

Do you have a copy of that, now?

Judge KOZINSKI. If you would give me a page.

Senator LEVIN. Yes. Page. 3. He says:

"Examples of Mr. Kozinski's abuses include the following:"

Judge KOZINSKI. There is no name mentioned there, Senator Levin.

Senator LEVIN. Well, that is not an unknown case. I want you to follow what I am reading.

Judge KOZINSKI. Fine.

Senator LEVIN [reading].

> Examples of Mr. Kozinski's abuses include the following:

> At the time of Mr. Kozinski's confirmation as Special Counsel, the Office of the Special Counsel employed as a clerk typist an elderly female employee who had been a loyal and dedicated Federal employee in excess of 20 years. Prior to Mr. Kozinski's arrival, the employee had been hospitalized for several months after learning that she had cancer.
>
> Her condition was such that we were uncertain whether she would live or ever return to work. However, to our surprise, she regained her strength and managed to return to the office just about the time of Mr. Kozinski's confirmation.
>
> About 3 or 4 weeks after his confirmation, Mr. Kozinski summoned me and at least one or two individuals from the OSC Administrative Division, and informed us that he was going to terminate the elderly employee. When I questioned the basis for the termination, Mr. Kozinski claimed that the employee was not performing her duties.
>
> I found that difficult to believe because I knew what assignments she had received and was uncertain whether such a small number of assignments were sufficient to form a basis for termination. Further, the employee only performed duties as required by the staff attorney she worked for.
>
> Because of her illness and age, she was slower and not as proficient as younger secretaries, but I did not feel her performance was such that it warranted removal. This was especially true because it was generally well known that she planned to retire shortly.
>
> When I determined that Mr. Kozinski was determined to terminate the employee, I questioned the basis for the termination and I suggested that he wait until the employee retired. Because no one in attendance at the meeting was certain when the employee would retire, I was asked to find out and to advise Mr. Kozinski.
>
> Upon checking with fellow employees, I learned that the employee planned to retire in October of 1981. This meant that Mr. Kozinski only had to wait two months and the employee would voluntarily leave the office.
>
> I subsequently advised Mr. Kozinski of my findings and he indicated that he would take no further action. However, a few weeks later, some time during the first week of September, while I and all professional staff members were attending a training course, Mr. Kozinski circulated throughout the office one of his famous memos in which he stated that, on that day, he was saying goodbye to the employee and he thanked her for her extensive number of years of Government service.
>
> Prior to receiving the memo, there were no formal nor informal discussions with the elderly employee about leaving the office. She had made no formal statements about leaving at that time.
>
> When the employee received Mr. Kozinski's memo, she got up, placed her OSC Government identification on her typewriter, walked out of the door and never returned to the office. When the employee's husband called and raised questions about Mr. Kozinski's actions, he claimed it was all a mistake.

Is that an accurate reflection of the events relating to that lady?

Judge **Kozinski**. As in the case earlier, my recollection is far, far less specific than that of Mr. James. I have no memory to dispute or inconsistent with what Mr. James has offered.

Senator **Levin**. This is a rather unusual situation where a longtime employee was sick. You were, according to Mr. James, very specifically told of that illness: that in 2 months she would retire.

You indicated at that point that you would take no further action, and then you acted. The employee's husband, according to this affidavit, then called and raised questions about your actions, and you claimed that it was a mistake.

And you are saying that you have no recollection of the incident, or that your recollection is the same as the affidavit.

Judge **Kozinski**. What I said, Senator Levin, is that I have far fewer—a far less detailed memory of the incident than Mr. James. Such recollections as I have are consistent with Mr. James.

As to the balance, I can neither affirm nor deny whether his version of the events is accurate.

Senator **Levin**. Do you remember the call from her husband?

Judge **Kozinski**. I do not remember the call from her husband.

Senator **Levin**. Do you know whether or not the employee in question ever lost any pay or benefits as a result of your action?

Judge **Kozinski**. I do not know. I assume—and I discuss this at page 12 to 13 of my October 17 letter—I assume that she did not or could not have because the memorandum in question, as I discussed there, was simply a notice to employees that I routinely send out letting them know that somebody is about to leave.

It has no effect other than notification. It is not an official personnel action.

I do not, in fact, know. I assume that it could not have any effect on her pay or duty status.

Senator **Levin**. Did you take any action to correct that mistake?

Judge **Kozinski**. Correct what mistake?

Senator **Levin**. The mistaken notice that you put on the board.

Judge **Kozinski**. Senator Levin, I have very, very vague recollection of the event. As a matter of fact, almost everything I know about the event is based on other people's hearsay.

Naturally, if these facts and when these facts came to my attention, I felt terrible; and they might have come to my attention twice because I only learned the details of this incident, having either forgotten or not known about it, recently and I feel terrible.

Senator **Levin**. My question is: Do you remember taking any action to correct what obviously was a mistake?

Judge **Kozinski**. I do not remember one way or the other.

Senator **Levin**. I want to ask you about one action you have taken as a judge involving a judicial misconduct case.

This was a case where a complaint was filed against the judge and the complaint was not meritorious in your view, and you dismissed the complaint.

By the way, I don't disagree with your view particularly in terms of the merit of the claim. I don't have any basis upon which to make that judgment; but you did much more than dismiss the complaint.

You took an action which, as far as we can tell, is unique, unprecedented. That is that without giving notice to the parties you imposed sanctions upon them.

Are you familiar with the case?

Judge **Kozinski**. Of course.

Senator **Levin**. Now, I asked Senator Thurmond about this case, saying that I thought it was unprecedented action to apply a penalty, a sanction against a lawyer for filing a complaint against a judge without an opportunity to be heard or given notice that sanctions might be forthcoming.

You answered that letter of mine to Senator Thurmond and had a large number of legal citations for a statement which you made in that letter, and here is the statement:

> Whatever the law may be elsewhere, it is firmly established in this circuit that a court may summarily impose upon a party, it counsel or both sanctions based upon pleadings the court finds to be frivolous or otherwise inappropriate.

You cited what looks to me to be, perhaps, 15 or 20 cases in support of that statement.

The suggestion in that statement and the supporting citations is that there is precedent for what you did to those two attorneys;

that sanctions had been previously imposed upon attorneys filing pleadings without notice or a hearing was the full implication of your letter.

In the cases you cited, in the principal case, as a matter of fact, sanctions were first imposed and then, because the attorneys were not notified, the sanctions were withdrawn. But I have asked the Library of Congress, one of the legislative attorneys in the American law division, to do some research for me to see whether or not a sanction has ever been imposed on a lawyer or lawyers for filing a frivolous or otherwise unsuccessful complaint against a judge without any notice, without any hearing.

They can find no case.

Now, maybe you can give us precedent for it. Your letter suggested a dozen cases.

Judge KOZINSKI. I know of no case, Senator.

Senator LEVIN. Well, but your letter—your letter—gives exactly the opposite impression. It speaks for itself.

I indicated that your action is unprecedented. You responded that:

> Whatever the law may be elsewhere, it is firmly established in this circuit that a court may summarily impose upon a party, its counsel or both sanctions based upon pleadings the court finds to be frivolous or otherwise inappropriate.

The point—and I think you knew the point—was that this was a judicial misconduct case where the court was judging itself; and, without notice or a hearing, was imposing a sanction upon the lawyers that filed the complaint.

Let me say that one of these lawyers had denied that he even knew the complaint was filed. I can reach no judgment upon that. All I can say is that there is a purpose to due process, to give notice in a hearing before sanctions are imposed, and the key case you cited, as a matter of fact, made mention of that due process requirement.

I think this letter to the committee is misleading in this area. I think the letter from the Congressional Research Service, the American Law Division is exactly correct.

Your action was unprecedented.

If you had to do it again, would you give notice to the attorneys to see if they had any defense for that they did, to see if, in fact, the attorney who did not even sign the complaint, whose name was typed in by the one who did sign the complaint, knew about it?

Would you do this differently if you did it over again in terms of notice?

Judge KOZINSKI. Senator Levin, as you know, that I discussed that case at some length. Eight pages of my letter of November 17 dealt with that case.

Now, I wrote a lengthy opinion in the case because, like you, I thought the issue was a difficult one. I don't think it is an easy issue, but it is the nature of trial judges that we can get reversed on appeal and I wanted to be very careful that my reasons, my methodology were laid out in case I should be wrong.

Now, the attorneys in question could have, had they thought me wrong, taken appeal and, if successful, they would have had their fine suspended or reversed. They did not.

The fines were paid. My action became final.

That doesn't make it 100 percent free from doubt because law simply is not like that. We do our best. We try to lay it out. And then we let a higher authority decide whether or not we were correct.

Senator HATCH. Senator Levin, could you yield for just one statement on that?

Senator LEVIN. Yes.

Senator HATCH. Thank you.

I would point out to my colleagues that the Chief Justice of the United States has spoken strongly in support of appropriate sanctions where judicial process has been abused during, for instance, his most recent year-end report.

He stated as follows, with a title "Sanctions on Litigants and Attorneys":

> Several examples of stern judicial reaction to perceived client and lawyer misconduct have been reported.
>
> When a defendant's response to a demand for discovery was widespread document destruction, Judge Cynthia Holcolm Hall ordered a default judgment plus sanctions of $453,312. She also suggested defendant's attorneys might later be fined.
>
> Attempts to "impose substantial litigation costs against defendant while keeping plaintiff's own expenses at a minimum" resulted in a $10,900 fine ordered by Chief Judge Alex Kozinski, U. S. Claims Court.
>
> The United States Tax Court suspended an attorney from practice before it for repeatedly filing frivolous suits, such as arguing that wages were not taxable income. The news media conserved the public by reporting the imposition of fines for discovery abuse or filing suits which are frivolous to all but the plaintiff and his attorney.
>
> Judges and magistrates are rightly becoming more willing to deal strongly with frivolous actions and procedural abuse. Most of this reaction will "send a message" to the profession.

That was from Warren Burger's 1984 year-end report on the judiciary. I think that would be a good place to put that in the record.

The Chief Justice, basically, commended you for your actions in regard to misconduct proceedings.

[The information follows:]

1984
YEAR-END REPORT ON THE JUDICIARY

BY WARREN E. BURGER

CHIEF JUSTICE OF THE UNITED STATES

The first Year-End Report on the problems of the Federal Judiciary was made at the end of 1974, the fifth year of my tenure as Chief Justice. This eleventh Report in my sixteenth year begins a second decade. The Reports have become a tradition, serving as useful tools to communicate the concerns of the Judiciary. The effort, as always, is to focus on the year's most important developments and on current and future needs. I have been encouraged to learn that Congressional leaders view the Reports as helpful in legislating.

Not everything can be said in a statement as brief as this Report. The observation of Justice Oliver Wendell Holmes was "try to strike the jugular and let the rest go."[1] This begins with the events of 1984 and proceeds to the critical needs for 1985 and beyond.

CONGRESS INCREASES FEDERAL JUDGESHIPS TO MEET CASELOAD

The "inflation" in the Federal Courts continues to grow. Caseloads have increased in 19 of the past 20 years. For the year ended June 30, 1984, the District Courts experienced a 7.4 percent rise in cases filed, and the Circuit Courts faced a 6.2 percent rise in appeals. The Supreme Court had 5,100 cases on its docket in the 1983 October Term that ended July, 1984.

The trend during my fifteen-and-one-half year tenure is dramatic. In 1969, filings in District Courts totaled 112,606; in 1984, filings reached 298,330. In 1969, the number of appeals filed in the Circuit Courts was 10,248; in 1984, the number was 32,616.

Attention to the workload of individual judges may be instructive. Federal Judges resolve disputes, and they have responded admirably to the growing caseload. An average of 517 cases per District Court judgeship were terminated in 1984, almost two-thirds more than the 311 average in 1969. Each appeals panel (one panel per three judgeships) terminated an average of 709 cases in 1984, almost two each day of the year, and over two-and-a-half times more than the 279 cases per panel terminated in 1969. Few parts of government can claim such a productivity record. As I stated last year, however, there are limits to the number of cases a judge can decide. Again in 1984, more cases were filed than were terminated; this is our "deficit."

---

[1] O. W. Holmes, *Speeches* p. 77 (1934).

While the caseload nearly tripled from 1969 to 1984, the number of District Court judgeships increased 51 percent (341 to 515) and the number of Circuit Court judgeships increased 48 percent (97 to 144). At the beginning of 1984 the average judge had approximately a full year of work to do exclusive of any new cases filed. The Judicial Conference of the United States, which makes careful biennial surveys of judicial workloads through the Administrative Office of the United States Courts, called for help, asking Congress to create new judgeships in 1980 and 1982.

Congress responded. Public Law 98–353 created 24 appeals court judgeships and 61 district court judgeships. I thank Congress and the President for their action to relieve the caseload crisis facing the federal judiciary.[2]

The Federal Judicial Center, which regards the education of judicial personnel as its "first priority,"[3] provides a carefully constructed orientation program. At regional seminars, new judges view and discuss with an experienced trial judge instructional videotapes on practical aspects of case management. They also visit a federal correctional institution and discuss sentencing practices. A week-long session in Washington allows study of federal substantive law such as antitrust, employment discrimination, and securities cases; intensive treatment of other topics such as jury and non-jury trial problems, federal evidence rules, and judicial ethics is also undertaken. The Center is preparing for the next Washington session to be held January 7 to 12, 1985.

---

[2] At the same time, it must be made clear that the judgeships created today deal with accrued, existing needs but not demands of the future. Indeed the Judicial Conference has estimated 47 more positions are already needed.

[3] 1984 Annual Report of the Federal Judicial Center p. 6.

BANKRUPTCY SYSTEM RESTRUCTURED

In 1978, Congress sought to streamline bankruptcy procedures: the first major revision of the federal bankruptcy system in 80 years was enacted. Aspects of that Congressional plan were invalidated by the Supreme Court in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), for granting jurisdiction to non-Article III judges in violation of Constitutional limitations. Two years later, the House and Senate passed the "Bankruptcy Amendments and Federal Judgeship Act of 1984"; the Act became Public Law 98–353 when signed by the President on July 10, 1984.

This new legislation confers authority to decide matters arising under bankruptcy laws upon bankruptcy judges who serve the District Courts as adjunct judicial officers. Authority over related matters—not founded upon provisions in bankruptcy law, but in need of judicial resolution in conjunction with specific bankruptcy proceedings—is conferred upon District Judges. District Judges are authorized, however, to utilize bankruptcy judges in resolving such matters in the same manner in which they have for almost a decade been using the services of federal magistrates. This arrangement corrects the deficiency the Court found in the grant of jurisdiction upon bankruptcy judges by the 1978 Bankruptcy Reform Act. Bankruptcy judges are to be appointed by the Courts of Appeal for 14-year terms.

Experience under interim procedures from 1982 to 1984 showed that District Judges and bankruptcy judges, working together, can handle the workload. The Congressional action preserves the District Court as the basic unit of our federal judicial system at the trial level; bankruptcy judges are preserved as officers of the District Courts. By avoiding duplication of court systems, substantial savings of tax dollars are thus achieved. The corrective action removes the uncertainty prevalent before Congress acted.

CONTINUING EFFORTS TO EMPLOY PRISONERS

Progress continues toward education, vocational training, and meaningful employment for prison inmates,[4] even though much work remains to be done. During a 1983 tour[5] of correctional institutions in the Scandinavian countries, a team[6] of American professionals saw what had long been known: prisoners there engage in productive work, something generally lacking in America's prison systems. Prison industries employment levels in America average 10 percent; in most Scandinavian prisons virtually all prisoners work.

Prisoners must be given the opportunity to learn marketable skills, both to repay the government some of the costs of confinement and to train them for life after release. A Washington cab driver put it this way: "Right now, prisons are like putting a shirt in water with no soap. Putting it in and taking it out. It's getting wet, but you ain't getting no dirt out." Inmates' earnings will first be applied to pay room and board, and some support for their dependents. What remains can be invested to finance a job search and living expenses after release.[7]

---

[4] The federal correctional system—a leader in prison industries progress—is this year celebrating the 50th anniversary of Federal Prison Industries, Inc., a nonprofit corporation. Created by Executive Order and later codified, the corporation has worked for prisoners' employment, recently under the name "UNICOR."

[5] The tour was sponsored by The George Washington University and The German Marshall Fund.

[6] The group included Senator Mark Hatfield of Oregon; Representative Robert Kastenmeier of Wisconsin; Federal Bureau of Prisons Director Norman Carlson; Utah State Senator Karl Snow; the late Albert Woll, AFL-CIO; Frank Considine, President of National Can Corporation; Louis Mayo, The George Washington University; Steven Hill, Weyerhaeuser Company; and John Yoder, Department of Justice.

[7] This philosophy governs 1979 federal legislation that exempts certified pilot projects employing prison inmates from protectionist laws that prohibit interstate commerce in prison-made goods; these projects currently exist in Kansas, Minnesota, and Utah. The maximum number of certifi-

A meeting was held this past January at the Wingspread Conference Center in Racine, Wisconsin, to plan a national meeting to inform the public about ways to change our dismal prison systems, using the Scandinavian systems, the better state systems, and the Federal system as guides. Under joint sponsorship of The George Washington University, The Brookings Institution, and The Johnson Foundation, 72 Wingspread conferees met for two days to formulate an agenda for the national meeting.[8] From the Wingspread meeting came a successful national conference, held June 18, 1984, at The George Washington University: "Factories With Fences: The Prison Industries Approach to Correctional Dilemmas." Some 800 persons attended, and the conference was covered widely in the news media.[9] Possible initiatives by executive and legislative leaders, businesses, and communities were discussed, and the conferees resolved to effect change in the present sad situation. The momentum that the "Factories With Fences" conference gathered led to creation of a "blue ribbon" task force of 35 of our country's top leaders under the chairmanship of Frank Considine, Chairman and President of National Can Corporation. The task force's charge is to make specific recommendations for improvements in American prison industries. These recommendations will be implemented through the National Center for Innovation in Corrections, a pioneering corrections effort sponsored jointly by The George Washington University and The Brookings Institution.

One immediate goal of the National Center for Innovation in Corrections is to raise inmate employment in prison indus-

---

able pilot projects was raised as part of the Comprehensive Crime Control Act of 1984 from seven to twenty. This is progress.

[8] Interestingly, the percentage of invitees in attendance was twice the percentage that conference planners had expected—despite the fact that they were being invited at their own expense for travel.

[9] I was interviewed on this topic the following evening during a lengthened edition of the news program "Nightline."

tries from the current 10 percent national average to a 20 percent average. The long-term goal is a full 50 percent of inmates working within the next ten years. I believe that America's corporations, foundations, and entrepreneurs will contribute leadership, funds, and technical assistance in achieving these goals.

LEGISLATIVE AGENDA FOR 99th CONGRESS

Action by Congress and the President is needed in two interrelated areas. The first involves the quality of Federal Judges the nation will have; the second involves the quality of work those Judges will accomplish.

FAIR COMPENSATION FOR FEDERAL JUDGES

A critical problem for the Federal Judiciary in 1985 is inflation-shrunken compensation. Real income for Federal Judges has dropped by a full *one-third* during the past fifteen years. Only the Judiciary, Congress, and Presidential appointees have been denied fair adjustments to meet inflation—an unseemly, unjust result.[10]

In 1969, when I took my present office, a District Judge's salary was $40,000. Since that time the Consumer Price Index has risen 287 percent. Although the current salary is $76,000 in inflated dollars, in 1969 dollars the salary is only $26,828! Former Supreme Court law clerks in practice for ten years—with few exceptions—now earn more than Justices.[11]

Other economic groups have fared far better. The income of the average family of four has held its own with inflation. Attorneys in private practice have substantially bested inflation.[12] Federal Judges have not. Those responsible for setting the compensation of Federal Judges seem to have forgotten Justice Benjamin Cardozo's words: "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[13]

---

[10] Article III of the Constitution provides compensation of Federal Judges "shall not be diminished during their Continuance in Office."

[11] A law school graduate starting work in Washington, D. C., or Los Angeles in 1984 earns as much as $42,000; in New York, starting salaries reach $53,000. *Legal Times* p. A4 (September 24, 1984).

We have lost some of our best judges. Forty-three judges have resigned since 1969, most of them because of inadequate compensation. One Court of Appeals judge who resigned said he had been willing to accept a reduction in salary to go on the bench but, "I did not, however, expect to have my salary regularly reduced by inflation." Too many lawyers now refuse appointments.

In 1967, Congress and the President created the Quadrennial Commission on Executive, Legislative, and Judicial Salaries. The Commission, activated once every four years, recommends appropriate compensation levels for Federal Judges, Members of Congress, and high executive officials. The fifth Quadrennial Commission will make its recommendations in 1985 to the President, who then will decide what compensation levels to recommend to Congress.

Past Quadrennial Commissions have had their recommendations fall victim to political pressures. Congress should approve a salary level that is sufficient to attract the most outstanding lawyers to the bench—and retain them. The public will support such a salary.

CASELOAD RELIEF

Six steps must be taken:

1) *Abolish Mandatory Appellate Jurisdiction of the Supreme Court.* Most cases filed in the Supreme Court seek a writ of certiorari for review: the Court can grant the writ and hear the case, or deny the writ and let the judgment stand. Other cases reach the Court by appeal. The Court

---

[12] For example, chief legal officers of publicly held corporations averaged over $142,000 in 1983. *ABA Journal* p. 208 (Oct., 1984).

[13] B. N. Cardozo, *The Nature of the Judicial Process* p. 287 (1921).

cannot refuse to consider an appeal even though the Justices may believe that the case does not merit plenary consideration. During the 1983 Term completed this year, 26 of the 151 signed opinions issued by the Court were for mandatory appeal cases. If mandatory appellate jurisdiction were eliminated, cases with questions meriting review could still reach the Court by the discretionary writ of certiorari.

Supreme Court Justices must now work beyond any sound maximum limits. The first year of Chief Justice Warren's tenure (1953 Term), the Court issued 65 signed opinions. In the last year of his tenure (1968 Term) the Court issued 99 signed opinions. In both the 1982 Term and the 1983 Term, the Court issued 151 signed opinions.[14] Absolutely no room remains for additional cases. More important, the precious time for reflection so necessary to a Court that decides cases with far-reaching consequences has been reduced to, and possibly below, an absolute mimimum. Abolition of mandatory appellate jurisdiction would provide some much-needed relief, albeit a modest amount.

A bill to abolish mandatory appellate jurisdiction has been passed by one or the other chamber in each of the last four Congresses. Most recently, in the 98th Congress, H. R. 5644 was passed by the House of Representatives. The Senate did not act. On the floor Representative Robert Kastenmeier said,

> This change in appellate review is supported by all nine Justices of the Supreme Court. . . . The bill, in addition to being supported by the nine Justices, has been endorsed by the administration, the Judicial Conference

---

[14] Consider another perspective. At the turn of the century, the October Term consistently ended the following May. Until just 10 years ago, the October Term consistently ended the following June. Today, the October Term consistently ends the following July. Of course, between Terms the Justices must study nearly a thousand petitions for certiorari and handle emergency applications.

of the United States, and the American Bar Association. . . . [T]he bill entails no cost to the Government.[18]

Despite strong support, each year in the press of Congressional business, this bill is forgotten. In 1985 the bill must be remembered.

2) *Establish Temporary Intercircuit Tribunal.* A really major form of relief for the Supreme Court would be the creation of a temporary panel of judges to handle intercircuit conflicts. Many cases require Supreme Court attention only because there is a conflict on a question of law among the 13 Federal Circuit Courts of Appeal. This temporary court could provide a uniform federal resolution of these questions through cases referred to it by the Supreme Court. The Supreme Court could then devote more attention to questions with even greater import to the nation. The tribunal's decision would be binding on all Federal Courts unless the Supreme Court were to modify the decision.

Congressman Robert Kastenmeier introduced H.R. 1970, and Senators Robert Dole, Strom Thurmond, and Howell Heflin introduced S. 645, in the 98th Congress, to create a temporary tribunal. Both bills were reported out of subcommittee.

Creation of an intercircuit tribunal—even on an experimental basis—has generated mild opposition, perhaps on the ancient idea that "we have always done it this way." But the Chief Justice is already authorized to designate Federal Judges to sit on special courts created by Congress, and since 1969, I have designated more than 60.

The intercircuit (conflicts) tribunal would be a temporary, experimental tribunal composed of judges drawn from among the 168 Circuit Judges of the Courts of Appeals. Nine judges selected by the Supreme Court would come to Washington, perhaps for a two-week session twice each year. A "sunset" provision would end the court in five years unless extended by Congress. Within that time, Congress could determine whether the panel should continue.

---

[18] Congressional Record-House p. H9288 (September 11, 1984).

One hundred years ago—at the time of the Centennial of our Constitution—Chief Justice Morrison R. Waite pleaded for relief from the Court's increasingly unmanageable workload. In 1925, at the continued urging of Chief Justice William Howard Taft, discretionary jurisdiction by writ of certiorari was granted by Congress. Today, on the eve of the Bicentennial, the problems have multiplied and other steps are necessary. I have outlined two here. Now, as then, in the words of Chief Justice Waite, "It is the people that need relief, not the court."[16]

3) *Create Federal Courts Study Commission.* The caseload problems of the lower Federal Courts are no less real, but they are of less clear solution. Consequently, I renew my call for Congress to establish a three-branch study commission to inquire and report on the future needs of the Federal Court system. I agree with the sentiment expressed in a September 18, 1984, letter written to me by Senator Strom Thurmond, Chairman of the Senate Judiciary Committee: "Too often, we only have time to address specific problems as they arise without giving adequate consideration to the overall functioning of the courts and to problems which may arise in the future."

4) *Adjust Membership of Sentencing Commission.* At the close of the 98th Congress, the Comprehensive Crime Control Act of 1984 was passed. The Act makes comprehensive changes in our federal criminal justice system, and the judiciary is proceeding to absorb and implement it. One adjustment is immediately needed: the Act requires the Judicial Conference to submit the names of six active Federal Judges to the President, from which list he will select three to serve full-time on a commission that will recommend sentencing guidelines for all federal offenses. No provision is made for

---

[16] Quoted in C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* p. 267 (1963).

dealing with the caseloads of the judges selected. Congress should allow the appointment of senior judges to the commission and probably also provide for temporary replacement judges in case any active judges are selected.

5) *Retain Court-Conducted Voir Dire.* Under no circumstances should Congress change the jury selection procedure in Federal Courts. Presently, both civil and criminal rules allow the judge to conduct the voir dire (the questioning of jurors to determine their impartiality). S. 386 and S. 677, introduced in the 98th Congress, would have required the judge to allow the lawyers to conduct the voir dire. This would add an intolerable and unwarranted burden on our Federal Court system. Incalculable delays would result. In the states that place lawyers in control of the interrogation of prospective jurors, a major case may require weeks or even months *just to select the jury.*[17]

When lawyers are allowed "free rein," as is true in some state systems, the voir dire is often exploited to become a "brainwashing" expedition as lawyers use the process to influence jurors, not simply to select them. This development, which some would now inflict on the Federal Courts, is increasingly disruptive in the administration of justice in state courts. This helps advocates obtain a "favorable" jury. No lawyer or litigant is entitled to a favorable jury but only to a fair jury. Judges should conduct all inquiry aided by questions suggested by counsel.

6) *Eliminate Diversity of Citizenship Jurisdiction.* For several years—most notably in the 1982 Year-End Report—I have advocated the elimination of jurisdiction that allows a lawsuit to be brought into Federal Court solely because the parties are citizens of different states. The historical

---

[17] During oral argument in the Supreme Court one Justice expressed disbelief that jury selection could take six weeks; the lawyer replied that some took six months! Jury selection in the "Trailside Killer" case in California required seven months. By contrast, in England I have observed a jury selected in a criminal case in six minutes.

grounding of diversity of citizenship jurisdiction has vanished with the increasing mobility of our society, and these cases—which require Federal Judges to apply state law—properly belong in state courts. The Administrative Office of the United States Courts has estimated that elimination of diversity jurisdiction would reduce the number of additional District Court judgeships now needed from forty-two to nine.

JUDICIAL BUDGET: CONTINUING EFFORTS AT SAVING

(a) During 1980, a District Court called an average of almost 19 jurors for each day of trial. Great effort has been expended to reduce this average; as part of that effort, the Federal Judicial Center and the Clerks Division of the Administrative Office of the United States Courts began a continuing series of workshops on juror management and utilization. In 1984, the average number of jurors called for each day of trial was under 17. The Federal Judiciary spent $3.5 million less in 1984 than it would have had these improvements not been made. Also important, the persons called for jury duty are required to spend much less time sitting and waiting to be called to hear a case.

(b) Immediate savings will be realized because of a suggestion by John Antonio, on the staff of the Supreme Court Reporter of Decisions. He pointed out that the "Orders" section of *United States Reports* can be set in type smaller than is used for the opinions. One page of every five will be eliminated, resulting in annual printing cost savings of $20,000. This underscores the value of imaginative and innovative staffs.

(c) Congress should act on the proposal of the Judicial Conference to erect a new building on Capitol Hill housing both the Administrative Office of the U. S. Courts and the Federal Judicial Center. Those two agencies now occupy five different building sites in downtown Washington and Maryland. Consolidation in one building would have clear dollars and cents savings, apart from enhancing operations. Given the current rental rates in Washington, the aggregate current payments for rent would amortize the entire cost of such a building in a little over seven years.

(d) As reported last year, the Federal Judicial Center conducted a statutorily mandated study of the feasibility of electronic sound recording as an alternative method to traditional stenographic court reporting. Fourteen District Judges in 1984 commenced use of this method, and eight more are in the process. These judges may well save the taxpayers more than $400,000 annually.

(e) A pilot program is showing that many District Courts need court administration assistance from District Executives to help them increase efficiency and reduce expenditures. In another year I will report on the progress of that project.

JUDGES AS LITIGATION MANAGERS

Experience under the 1983 amendments to the Federal Rules of Civil Procedure is accumulating. The amendments not only promote early involvement in litigation by the judge to regulate discovery and the litigation process in general, but also clarify lawyers' responsibility for reasonable inquiry before pleading and proceeding in lawsuits. I encourage greater use of sanctions against lawyers who abuse these responsibilities so that litigation can be terminated with greater efficiency and less cost while a just result is achieved.

The amendments to Rules 7, 11, 16, and 26 have been in effect scarcely more than one year, but already some positive results can be seen. Rule 16(b) now mandates a scheduling conference and order in every case but contemplates that the District Courts will adopt local rules to adapt this requirement to local conditions. Forty-five districts have already done so.[18] A survey by the Judicial Administration Division of the American Bar Association shows that 85 percent of judges and lawyers in four sample federal districts view the rule changes as favorable to encouraging settlement.

---

[18] This does not include the Eastern District of Virginia's local rule that antedates Rule 16(b) and served as a model for it.

SANCTIONS ON LITIGANTS AND ATTORNEYS

Several examples of stern judicial reaction to perceived client and lawyer misconduct have been reported.[19] When a defendant's response to a demand for discovery was widespread document destruction, Judge Cynthia Holcomb Hall (C.D. Cal.) ordered a default judgment plus sanctions of $453,312; she also suggested the defendant's attorneys might later be fined. Attempts to "impose substantial litigation costs against defendant while keeping plaintiff's own expenses at a minimum" resulted in a $10,900 fine ordered by Chief Judge Alex Kozinski (U. S. Cls. Ct.). The United States Tax Court suspended an attorney from practice before it for repeatedly filing frivolous suits, such as arguing that wages were not taxable income.

The news media can serve the public by reporting the imposition of fines for discovery abuse or filing of suits which are frivolous to all but the plaintiff and his attorney. Judges and magistrates are rightly becoming more willing to deal strongly with frivolous actions and procedural abuse. More of this reaction will "send a message" to the profession.

---

[19] Even though these first steps are encouraging, we are but in the "foothills" of the search for solutions. Would that all clients followed the example of George Washington and all lawyers the example of John Marshall. Washington hired Marshall in 1789 to recover a debt from the estate of William Armstead and offered 10 percent of the amount collected as a fee. One month later, Washington wrote again:

> I have been lately informed that Mr. Armstead's sons are dead and have left their families not in very good circumstances. If this is the case—and the payment of the debt due to me would distress them, I must beg that you will not proceed any further in the matter, for however pressing my want of money is at present I had much rather lose the debt than the widow and fatherless should suffer by my recovering it.

Quoted in Leonard Baker, *John Marshall: A Life in Law* p. 88 (1974).

COURT-ANNEXED ARBITRATION

Alternative dispute resolution methods should also be developed and utilized. Another "fruit" from the "tree" of the 1976 Pound Conference in St. Paul, Minnesota, is federal court-annexed arbitration. Congress, at the request of the Judicial Conference, appropriated funds in 1978 for a pilot program. Two districts have found court-annexed arbitration effective in reducing both the incidence of trial and the time needed to achieve settlement. In the Eastern District of Pennsylvania (Philadelphia),[20] throughout the 71 months ended December 31, 1983, only 1.5 percent of cases designated for arbitration later went to trial. Eight percent of civil cases following traditional procedures during the same period went to trial. Additionally, the median time for cases terminated by the arbitration program was seven months from date of issue to date of award, while the median time from date of issue to date of trial for other civil cases was fourteen months. The court recently agreed both to raise the authorization limit from $50,000 to $75,000 and to expand the types of cases going to arbitration. Similar success has been achieved in the Northern District of California (San Francisco) where since 1978 only 34 of 2,000 cases (1.7 percent) designated for arbitration have later gone to trial.

Congress passed and the President signed Public Law 98–411 to appropriate $500,000 in fiscal year 1985 for additional pilot programs in federal court-annexed arbitration. Eight federal districts will use this money in closely monitored experiments. This is a program whose time has come. Experimentation and practical implementation in this area are sorely needed.

OTHER METHODS OF DISPUTE RESOLUTION

Summary jury trials and mini-trials are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals. In a summary jury trial, attorneys present abbreviated arguments to jurors who render an informal verdict that guides settlement of the case. Judge Thomas Lambros (N.D. Ohio), who developed a workable summary jury trial procedure, reports that virtually all of more than 100 suits handled through this method have been concluded without the need of a full trial. The Judicial Conference in 1984 endorsed the experimental use of summary jury trials "as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases."

---

[20] The Bar of Philadelphia has been a pioneer in the use of arbitration.

In a mini-trial, the parties participate in a shortened hearing. Two notable recent successes include a two-hour minitrial to resolve a $1.5 million contract dispute between American and German companies, and a mini-trial to bring two major American corporations to a resolution of an $800 million contract dispute.

These judicial pioneers should be commended for their innovative programs. We need more of them to deal with the future.

PLANNING FOR THE BICENTENNIAL OF THE CONSTITUTION

The nation is another year closer to the Bicentennial of the Constitutional Convention of 1787, out of which came the fundamental law that governs us. No other nation on earth has been blessed with two hundred years of ordered liberty under a single constitution, so the Bicentennial gives just cause for a national celebration. We should seize this occasion to recall the source of our institutions. Chief Justice John Marshall once described America's invention of a written constitution as "the greatest improvement on political institutions."

Many individuals and organizations across the country are planning and implementing Bicentennial programs. The President is appointing members of a Commission on the Bicentennial of the United States Constitution. Citizens are not waiting for this Commission, however. They are becoming involved already. These products of private initiative should be encouraged.

THE MATURING OF JUDICIAL ADMINISTRATION

An appropriate topic to close this eleventh Year-end Report is a review of recent progress in the field of judicial administration. For years, judicial administration was little more than a grab-bag of proposals from isolated, industrious innovators crying in the wilderness. Today it is an integrated, developing field with both intellectual content and practical application. Here are just six notable efforts.

ONE.—The Federal Judicial Center began operations in 1968. It has become a relied-upon source of research and information, as well as education, within the Federal Judiciary. Under the leadership of Director A. Leo Levin, in 1984 the Center conducted seminars or workshops attended by one-third of the system's personnel, including more than 90 percent of Federal Judges. At a law and economics seminar, economists, judges, and others discussed application of economic knowledge to antitrust, securities, and labor cases. The Center has recently developed the New Appellate Information Management System to replace all manual docketing procedures with electronic docketing capability for our Circuit Courts.

TWO.—The Circuit Executive Act of 1971 introduced a new "manager" to the Federal Judicial System. Experience has brought them universal acceptance among Federal Judges. The District Court pilot program, initiated in 1981 and tested in six District Courts, now shows that District Executives are needed in many Districts.

THREE.—The Pound Conference of 1976 shaped the contemporary legal scene, setting an agenda for change in many areas which are now commonly referred to as "Pound Conference issues": abuse of discovery, use of lay jurors in complex civil cases, justice centers in neighborhoods, and experiments with court-annexed arbitration.

FOUR.—The Williamsburg Conferences, which began in 1978, serve as a catalyst for increased understanding and cooperation among the three branches of the federal government in achieving judicial improvements. On March 8–10, 1985, the Attorney General, the Chairmen and ranking minority members of the House and Senate Judiciary Committees, and a small number of other leaders will again be invited to meet in Williamsburg to discuss current problems and engage in long-range planning for the Federal Judiciary.

FIVE.—Our state judicial systems have also experienced a much-needed growth of professionalism in court management. More and more systems now have trained court administrators who work with judges and court clerks, keep records, evaluate procedures, monitor resource allocation, and design management systems.

SIX.—Better mutual understanding has resulted from the existence in more than 30 states of State-Federal Councils; the first one was created in 1969.

Judicial administration professionals continued to innovate in 1984:

—The National Center for State Courts and the Institute for Court Management merged. Founded in 1971, the National Center for State Courts conducts research to identify needs and provide solutions to state court problems. Since its inception in 1969, the Institute for Court Management has trained more than 400 administrators for federal and state court systems. Most Circuit Executives have received this training.

—The National Association for Court Administration and the National Association of Trial Court Administrators voted to merge and will become the National Association for Court Management in July, 1985.

—A new Dean for the National Judicial College should continue the College's 20-year commitment to excellence in the training of sitting judges. Judge John W. Kern III, formerly of the District of Columbia Court of Appeals, takes the reins after 10 years of outstanding service by Judge Ernst J. Watts. Continued growth in attendance, which now exceeds 17,000, reflects both sound leadership and the recognition by judges of the importance of continuing education.

—A framework for much-needed financial assistance for state courts was approved this year when Congress passed a law to create the State Justice Institute. The Institute will be an independent federal agency administering discretionary grants to state courts to strengthen efficiency, encourage judicial training, and increase public access. This development is the fruit of a dozen years of effort.

We are making progress, but new problems outweigh the gains. Happy New Year.

Senator **Levin**. Senator Hatch, of course the issue here is not the imposition of sanctions. The issue here is the imposition of sanctions in a judicial misconduct case without notice.

That is the issue. The issue is the notice, not the sanctions.

There was no notice to these attorneys before the imposition of sanctions. I would like to read from the Roadway Express case which was cited by Judge Kozinski, which is that:

> Like other sanctions, attorneys' fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.

Senator **Hatch**. Well, Senator, if you will yield, the reason I read that is because the Chief Justice of the Supreme Court of the United States of America commended Judge Kozinski for leadership in misconduct doctrines, and he understood what you have been saying.

Senator **Levin**. Excuse me, Senator Hatch, perhaps I misunderstood you. Did you say that the Chief Justice had rendered an opinion say that this action——

Senator **Hatch**. The Chief Justice in his——

Senator **Levin** [continuing]. Without notice in this case was proper?

Senator **Hatch**. No. The Chief Justice commended him for what he did. Now, there——

Senator **Levin**. I am wondering if we could have the date of that.

Senator **Hatch**. It's the 1984 Year-end Report on the Judiciary.

Senator **Levin**. Is this an appeal to the Supreme Court?

Senator **Hatch**. They could have appealed in the case you refer to. The attorneys could have appealed, but they did not take an appeal.

If they had such a great case, why did they not take an appeal?

Senator **Levin**. They did appeal the dismissal, as a matter of fact, as I understand; but, putting that aside, I am just not sure——

Senator **Hatch**. Did they? That is not my understanding.

Senator **Levin** [continuing]. What that document is that the Supreme Court Justice——

Senator **Hatch**. That document is his 1984 Year-end Report on the Judiciary.

Senator **Levin**. Is it a case? I am not following you.

Senator **Hatch**. No, it is not a case. It is a speech to the Bar Association, the ABA.

Senator **Levin**. And he addressed the lack of notice to this case?

Senator **Hatch**. No.

Senator **Levin**. Because I am quoting from a Supreme Court opinion here, which I would think is pretty good authority, which says that "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for hearing on the record."

Senator **Hatch**. That certainly is a litigable issue. It is in dispute and there are two sides to the point.

All I am saying is the Chief Justice praised Judge Kozinski, along with others, for coming down hard on lawyers who acted improperly.

Senator **Levin**. Judge Kozinski also represented to this body, to Senator Thurmond, that there were at least a dozen cases that supported his view. There are no cases which support the view that in a judicial misconduct case, which this was, sanctions can be imposed upon the attorneys filing a complaint against the judge without notice and a hearing.

If you read the letter that Judge Kozinski wrote to Senator Thurmond, you will get the exact opposite impression because the statements made——

Senator HATCH. If that is the case, maybe Mr. Kozinski made a mistake. I don't know. I mean, my goodness——

Senator LEVIN. Yes. I don't doubt that.

Senator HATCH. OK. Well, that does happen to all of us once in a while; and, if so, I think he would have been reversed on appeal. He was not reversed. Thus his ruling stands as good and valid law.

These are attorneys that he fined. It happens every day. Judges make these decisions. They have to make them. That's what a judge is.

Senator LEVIN. Attorneys are also entitled to due process and the courts are——

Senator HATCH. Yes, and they generally seek it when they have some difficulty.

Senator LEVIN. And the courts have been particularly careful in judicial misconduct cases not to chill the right to file a complaint for judicial misconduct.

Senator HATCH. I am with you on that.

Senator LEVIN. All I am saying is that this is an unprecedented decision; and that, rather than saying that in his letter to Senator Thurmond, he cited a dozen cases supporting it.

He now says there are no cases supporting it. That is all I am saying.

Maybe he made a mistake.

Senator HATCH. Maybe he did or maybe he views the issue in different forms as he has testified.

Senator LEVIN. I think he did.

Senator HATCH. If that is all you are saying, then fine.

Judge KOZINSKI. Senator Levin and I have discussed other differences about this case. We simply have a different view as to what is relevant precedent.

I respectfully disagree with the Senator.

Senator LEVIN. I would like to yield, at this time, if Senator Mathias wants to question.

Senator MATHIAS. I would just like Mr. Kozinski to repeat what he just said.

Judge KOZINSKI. Oh. I feel a little bit caught in the middle.

Senator Levin and I had discussed our differences about this case when we spoke in private and we have different views as to what is relevant precedent. He points out, and I think he is absolutely right, that there are no precedents involving complaints of judicial misconduct cases; and he views—and I think this is a very respectable view—he views these types of cases as inherently different from other cases.

I view judicial misconduct cases as simply another pleading before a court and, therefore, that precedents relevant in other contexts are applicable. I would suggest that my view is at least worthy of respect; perhaps in Senator Levin's view not equal respect, but is a different view.

Senator HATCH. It may even be the majority.

Judge KOZINSKI. In any case, I pointed out to Senator Levin, I laid it all out. It was a very lengthy opinion. I invited review as I do with all of my opinions.

I have written almost 60 opinions since I have been at the claims court. I have decided numerous cases. And I try to be very careful in my rulings to lay out my reasons so that if the appellate court should disagree I want to be reversed.

I don't want to be affirmed because it misunderstands my reasons because it is important that the law be developed in an intelligent, fair and honest fashion. I would much rather be reversed because the appellate court disagrees with me than be affirmed because it misunderstands my reasoning.

That is what I did in this case. There was no appeal so we do not know what the appellate court would have done.

I cannot warrant to this body that had an appeal been taken I would have been affirmed. Obviously, if I did not think I would be affirmed in an eventual appeal I would not have issued the opinion.

I still think it's right.

Senator LEVIN. Mr. Chairman, I can finish in about 3 minutes, but I would be happy to yield at this point. You have been waiting there for me to finish.

Senator MATHIAS. Why don't you go ahead and finish up, and then I will take my turn.

Senator LEVIN. My problem is your representation to this committee about that case, that is my problem, and the citation of authority where, in fact, there is none: just to make clear what my problem is.

My other two points are—and I apologize to Senator Mathias, I think I perhaps should have tried to yield in a more timely fashion.

The CHAIRMAN. Well, Senator, let's move along.

Senator LEVIN. Fine. Two questions.

The CHAIRMAN. You have the go, go ahead.

Senator LEVIN. One is on the *Chin* matter, on the *Chin* case.

You indicated that you prepared your affidavit in the *Chin* case.

Judge KOZINSKI. Affidavit?

Senator LEVIN. My question is: Did you talk to her prior to preparing that—not affidavit, your memorandum? Did you talk to her prior to preparing that memorandum?

Judge KOZINSKI. I do not recall doing so.

Senator LEVIN. My other question relates, again, to this radio editorial.

You have said that you recently learned that GAP is no longer formally affiliated with the IPS, is the way you phrased it.

Do you have any reason to believe that they are informally affiliated?

Judge KOZINSKI. I have no reason to believe one way or the other.

Senator LEVIN. Why did you say, when you were told that they had disassociated themselves a year and a half ago, that you recently learned they were no longer formally affiliated? Why did you not say you recently learned they were not longer affiliated?

Judge Kozinski. Because, as a lawyer and judge, I know that a change in the status of an organization is not always of substance, and that it is entirely possible to have a formal disassociation and yet a continuance of a relationship which would be as real as a legal relationship.

Senator Levin. You have no reason to believe that is true?

Judge Kozinski. I have no reason to believe one way or the other.

Senator Levin. Thank you.

The Chairman. Are you through, Senator?

Senator Levin. Thank you.

The Chairman. The distinguished Senator from Maryland, Senator Mathias.

Senator Mathias. Thank you, Mr. Chairman.

Judge Kozinski, you attended the University of California at Los Angeles.

Judge Kozinski. Yes, sir; 7 years.

Senator Mathias. And you first took a bachelor of arts degree.

Judge Kozinski. Yes, sir.

Senator Mathias. What was your major?

Judge Kozinski. Economics.

Senator Mathias. Did you receive any honors for your baccalaureate degree?

Judge Kozinski. I was cum laude.

Senator Mathias. Then you went on to law school at the University of California.

Judge Kozinski. Yes, sir.

Senator Mathias. You were there between 1972 and 1975.

Judge Kozinski. Yes, sir.

Senator Mathias. Did you receive any honors at the time of your graduation from law school?

Judge Kozinski. I did, Senator Mathias.

Senator Mathias. Would you elaborate on that?

Judge Kozinski. I was graduated first in my class. I was managing editor of the Law Review. I was Order of the Coif. I achieved the Outstanding Achievement Award for my graduating class.

Senator Mathias. Then after you had been a law clerk, your first legal association was with Farry, Golbert, Singer & Gelles in Los Angeles.

Judge Kozinski. Yes, sir.

Senator Mathias. What kind of work did you do with them?

Judge Kozinski. Well, sir, it was a law firm that did work in, I guess one would call, the international law area. There were clients who—many of whom had affiliations abroad and, therefore, much of the work we did, which was both planning work and some litigation work, had an international aspect to it.

Senator Mathias. Was there any particular focus to that practice?

Judge Kozinski. As far as I was concerned?

Senator Mathias. Yes; as to the kind of transaction in which you were involved?

Judge KOZINSKI. I did a lot of things. I did trademark law. I did—it is just the first thing that comes to mind. I drafted a lot of partnership agreements, did a good bit of litigation. I did some tax planning.

Senator MATHIAS. Where was the litigation?

Judge KOZINSKI. Largely in superior court, which is a State——

Senator MATHIAS. In Los Angeles.

Judge KOZINSKI. Yes, sir; superior municipal, you understand.

Senator MATHIAS. Then in 1979 you came to Washington and were associated with Covington & Burling.

Judge KOZINSKI. Yes, sir.

Senator MATHIAS. What was your activity with Covington & Burling?

Judge KOZINSKI. Well, I was an appellate lawyer, largely. I was very much interested in appellate work and Supreme Court work, and the firm of Covington & Burling was very generous to me.

They gave me almost an uninterrupted diet of briefs in the various circuits. I had a State Supreme Court case I worked on and a number of cases in the U.S. Supreme Court.

I should say I did not argue those cases. Those were argued by more senior attorneys. But I was heavily involved in the brief-writing.

Senator MATHIAS. You were present in the courtroom?

Judge KOZINSKI. I was right there, first chair—or second chair next to the——

Senator MATHIAS. But in other courts you did carry the main burden of the litigation?

Judge KOZINSKI. I did in a number of cases. In a number of cases, I was second either by name or in effect.

I should also add, Senator Mathias, that I was very interested in obtaining hands-on experience, and Covington & Burling was very, very generous with their time in allowing me to, at the firm's expense, go down to Fifth Street, to the Superior Court, and represent clients who were in lock-up—lock-up being the place where people are brought for arraignment.

On many occasions, I went down and either was involved in an arraignment proceeding or eventually took the case, in one instance, all the way through a jury trial.

Senator MATHIAS. What is commonly known as a pro bono practice.

Judge KOZINSKI. Yes. I had a—again, Covington & Burling was very generous in allowing me to do any number of pro bono activities.

Another part of the pro bono practice that I had—and I did quite a bit of it—was parental rights termination proceedings. Those are situations where a child has been abandoned or there is a problem with a parent, somebody else would want to adopt the child, and yet the parental relationship still exists as a legal matter and has to be severed.

I represented the child in those proceedings on at least one occasion. I don't remember. There was at least one occasion when I did that.

Senator MATHIAS. Well, with that educational background and that previous legal experience, I think it is very hard for anyone to be critical of your professional qualifications; but your nomination has provoked some discussion.

I have been trying to determine what it is that has been troubling. I suppose what we are really wrestling with is that elusive quality known as judicial temperament.

Our concern is represented by the large number of complaints against you that have come from former associates, former employees. I suppose that I should do as Senator Levin has done and simply ask you about a few factual situations from which we can draw some conclusions on this subject of judicial temperament.

What is this business about not wanting to allow investigators to have carfare?

Judge KOZINSKI. I certainly don't recall ever denying an investigator carfare. Frankly, the question of carfare did not rise to my level of approval.

If somebody beneath—below me refused carfare for an investigation, they obviously were off the mark.

You must remember, Senator—and one must cast one's mind back, now, to 1981-82—in November 1981, about a month into the fiscal year—this would have been the 1982 fiscal year—the entire Government got hit with a 14 percent—or, at least, my part of the Government; I assume it was entire Government, although I don't recall—our agency was hit with 14 percent budget cut.

It was devastating. We had planned our budget for the year and for an agency as small as the Special Counsel's Office, one that had been growing and trying to fulfill its mission for 2 or 3 years, the 14-percent cut was absolutely devastating.

We had to make choices. We had to make choices between continuing certain operations and the possibility of furloughing employees.

Our sister agency, the Merit Systems Protection Board, for reasons I am sure are good ones, wound up sending people out on furlough in that fiscal year. I am pleased to say that we never had to do that.

We did have to save here and there, but truly something like carfare I just cannot imagine that it happened; but, if it did, certainly—if anybody asked me about it, 50 cents or $1 for carfare, it is not something we would disapprove.

Senator MATHIAS. In the same period of time when these economies were being enforced, did you redecorate your office?

Judge KOZINSKI. Well, Senator Mathias, no.

Senator MATHIAS. Did you buy some furniture?

Judge KOZINSKI. I want to answer the question as fairly and accurately as I can.

We moved to new quarters in the summer of 1981. This was a move that had been planned before I got there and was amply justified.

At the end of the 1981 fiscal year, there was significant money available to finance the move and, also, to furnish all of the offices—not my own, alone; everybody in the central office.

There was an upgrading of the computer system and a number of other expenditures that were incurred during that fiscal year.

During the early part of the 1982 fiscal year, we thought there would be significant money available for training, for hiring of new employees, and we acted accordingly. If my memory serves correctly, It was about November 1981 that the crunch came.

I remember a day that I believe my deputy had been out of town and came back, and that was the last discretionary trip that we could take for a long time. From that point on, we proceeded—and I am sure others remember as well as I do—week after week, month after month, one budget resolution after another, not knowing what our budget was going to be for the entire year: Whether we would have a supplemental appropriation, what our fiscal situation was going to be for the—I guess this was the 1982 budget cycle.

Again, I wanted to answer your question fully. The answer is no, but there is the explanation.

Senator Mathias. So you are stating that you did not buy any furniture.

Judge Kozinski. Now while—there were no expenditures made—well, let me make this absolutely clear. I don't remember whether we went out and bought a chair or something of that sort, but I think you are talking about large furniture purchases, and——

Senator Mathias. Well, we have been told that there were large expenditures for furniture.

Judge Kozinski. Right. There were.

Senator Mathias. Then there were.

Judge Kozinski. There were.

The entire office, every attorney, secretary, investigator moving to new quarters, got furniture that would fit their office, that would fit their equipment, that would be practical, useful, that would be appropriate.

The expenditures were fiscal—as best memory serves, and it has been a long time, those decisions and obligations were made while money was available and I believe it was mostly in the—or all of them in the fiscal 1981 budget year.

Once the curtain came down, once we became subject to a 14-percent budget cut, once uncertainty about our budget situation became known—again, I cannot warrant that there were no furniture purchases made after that point, there might have been an isolated item here or there, but certainly nothing of any significance.

Senator Mathias. Let me ask you about just a couple more of these allegations against you because I don't know of any other way to clear the air and clear the record.

Judge Kozinski. Yes, sir.

Senator Mathias. Do you have any recollection of ever having terminated an employee who was ill without giving her notice of her termination?

Judge Kozinski. Senator Levin—Senator Mathias, rather——

Senator Mathias. I may sound like Senator Levin.

Judge Kozinski. No, no, no. I am sorry. I've been saying Senator Levin all——

Senator Levin. I am flattered, I don't know about you.

Senator Mathias. I am approaching this in the most constructive way that I can.

Judge Kozinski. It has been a long day.

Senator **Mathias**. These matters are on our table and we simply have to clear them.

Judge **Kozinski**. It is not possible to terminate an employee in the Federal Government without the appropriate paperwork. I cannot just—to my knowledge, at least, it is just not possible.

I cannot, as a Federal manager, simply issue a memo and saying, this is an employee's last day. That may be possible in the private sector, but to my knowledge it is not possible in the Federal Government.

There have to be appropriate forms cut and unless we are dealing with a schedule C employee, which is a wholly different matter as I understand it, if we are dealing with career employees, there are certain procedures to be followed and those procedures normally involve notice.

Senator **Mathias**. And I suppose your answer would be essentially the same if I asked you about another case that has been reported to us which involved a veteran employee, 25 years of service, who was terminated while he was on sick leave and without notice?

Judge **Kozinski**. Well, I am not sure I would say that my answer would be exactly the same. I think the cases you are referring to are cases that were discussed earlier and were also discussed in my letter to the committee of October 17, 1985, at page 12 to 13.

I am a little reluctant, Senator Mathias—and I do want to be responsive, but I am a little reluctant to answer the question you have posed too easily. That is a more complicated case—that was a more complicated case and I feel uncomfortable in giving a yes or no answer.

I would refer you to my discussion of the case in—if I believe the case is the same one in the middle of page 13 of my October 17, 1985, letter. I would be happy to read it to you.

Would you like me to do that?

Senator **Mathias**. I did not hear your——

Judge **Kozinski**. I said I would be happy to read it to you, if you would like. I did not want to give you an easy answer.

Senator **Mathias**. I have a copy of your letter here, but I think it might be useful.

Judge **Kozinski**. It is the first full sentence——

Senator **Mathias**. Is this the one you refer to in your letter as "the case involving Filipe Neff"?

Judge **Kozinski**. From your description, it sounded like the same case. I am not certain.

Senator **Mathias**. What you say is that:

> As the transcript makes clear, the question in that case was not whether the employee would continue working in the office. It was clear that he was permanently disabled and that he would not return.
>
> At issue was whether he would continue on the payroll while running out his sick leave. The employee would have had a right to do so if he had applied for disability retirement, an option that my staff had strenuously urged upon him.
>
> The case was finally settled and Mr. Neff agreed to pursue this course of action. It is regrettable that a lawsuit was required to persuade Mr. Neff to take the course we urged upon him to begin with.
>
> Although I recognize members of my staff could have been more careful and thorough in explaining to him and to me his rights in the circumstances, as head of the office I must, of course, accept responsibility for any shortcomings in the agency's treatment of Mr. Neff.

Judge KOZINSKI. Yes, sir.

Senator MATHIAS. Let me ask you one other question which has been brought to my attention on several occasions. While you were special counsel to the Merit Systems Protection Board, there were a very large volume of complaints that were brought to your attention.

Judge KOZINSKI. When you say——

Senator MATHIAS. Some thousands of complaints.

Judge KOZINSKI. Cases filed with the office?

Senator MATHIAS. Yes.

Judge KOZINSKI. Yes. Well, I don't have an independent recollection, but Mr. O'Connor who testified before this committee at the July 17 hearing estimated there were 3,000.

I don't know if there were that many, or how many there were.

Senator MATHIAS. The allegation which has been made to me is that there were about 3,000 complaints that were closed, disposed of without finding any merit.

Does that comport with your recollection?

Judge KOZINSKI. I don't know how many there were. Again, I defer to those who remember or those who have the information.

I don't have any quarrel with that. I don't have any basis for disagreeing.

Senator MATHIAS. I am, of course, equally without any primary knowledge of the matter.

Judge KOZINSKI. Mr. O'Connor said so.

Senator MATHIAS. It is alleged that there were 3,000 complaints closed out and not even as many as half a dozen were found to have merit.

It is, of course, entirely possible that there were 3,000 complaints filed and that none of them had any merit; however, actuarially, it is more likely that out of 3,000 complaints there must have been some basis for at least a handful of them.

Judge KOZINSKI. As I stated on July 17, Senator Mathias, I brought every case I thought I had. Mr. O'Connor testified, on July 17, and he stated that he had reviewed a number of the cases which I had closed out at the request of, I believe, Congresswoman Schroeder and he found that every one of my actions—again if I am remembering correctly what his statement was, but he found no fault with any of my actions.

Indeed, he went so far as to say that, in his view—again, I'm paraphrasing from memory—but I believe he stated that in his view out of those 3,000 cases I did not make a single mistake. That was his view, the man who took over the reins of the office, the man who had opportunity to look into cases that I had dealt with and worked with, and look at them again.

Senator MATHIAS. I think it would be useful for each of us to refresh our recollection on that testimony. It seems to me that he did not review the whole 3,000.

Judge KOZINSKI. I would be surprised if he had, Senator Mathias.

Senator MATHIAS. He spot-checked maybe 30 or 40.

Judge KOZINSKI. I believe there were a group that were sent to him by—again, I am working from memory and I may be inaccurate. My best recollection is that there was a group that were sent to him by Congresswoman Schroeder that somehow he thought might be problematic. He looked into those.

Mr. O'Connor, I think, is still here if you would like to talk to him. I simply suggest that he is still here. He might be better able to address this.

But I think he also stated that there were other cases that he looked at during the course of his stewardship of the office. He had occasion to go back during the routine—on a routine basis, go back and reconsider cases for various reasons, and that in none of the cases he reconsidered, either routinely or at special request, did he find a problem.

But, again, I ought not to paraphrase Mr. O'Connor. He is here and he is under oath, having been sworn in by Senator Hatch.

Senator **MATHIAS**. Since he has already testified on this, I think what might be useful is to ask the committee staff to supply for us that portion of his testimony which touches on this issue.

Judge Kozinski, what we are groping for is some help on this elusive matter of judicial temperament. How would you define judicial temperament?

Judge **KOZINSKI**. That is a tough one.

Senator **MATHIAS**. It is. It is a question I frequently ask judicial nominees, though.

Judge **KOZINSKI**. Judicial temperament. I guess, to me, it involves the willingness to think carefully about the law; to approach every problem with an open mind; to be fair, even kind to the litigants and their attorneys.

Senator **MATHIAS**. To be fair and to be kind?

Judge **KOZINSKI**. Even kind where appropriate to litigants and their attorneys.

The difficult aspect about litigation is that both sides cannot win.

The **CHAIRMAN**. Senator Mathias, excuse me.

Would you like to go and vote, and come back?

Senator **MATHIAS**. No. I believe I can finish.

The **CHAIRMAN**. Senator Levin has two more questions, he says.

Senator **MATHIAS**. In the next 7½ minutes——

The **CHAIRMAN**. I wonder what we better do. I want to get your advice and Senator Levin's.

Senator **LEVIN**. I will waive any questions. I will not need anymore time, Mr. Chairman, if Senator Mathias——

The **CHAIRMAN**. You have 3 or 4 more minutes if that is enough. If not, we can come back.

Senator **MATHIAS**. I hope that will be enough. Let's see.

Judge.

Judge **KOZINSKI**. To treat the attorneys that appear before you as a judge with respect, to give your——

The **CHAIRMAN**. The press want to hear what you say.

Judge **KOZINSKI** [continuing]. To give your reasons for whatever judicial decision you reach because if you are wrong a superior court can judge you and reverse you, if appropriate; to be fair, scrupulous and honest with the record before you;

To take the time to come to court prepared because the time spent by the lawyers is valuable to them and expensive to their clients. They should not have to educate you there on the bench.

You need to come in having read the record, having studied the briefs, having studied the cases, and ready to go.

Now, Senator, that usually means the decisionmaking process becomes more difficult. I have spent, in difficult cases, a full day hearing all arguments from the parties; but I make it a practice when I go into court to go in with an open mind insofar as possible and to listen to what the parties have to say, and to ask tough questions not because I want to be tough on the lawyers but because I want to be right.

Senator MATHIAS. Should a judge be concerned about his box score on reversal?

Judge KOZINSKI. In a sense. I think a judge, a trial judge who doesn't get reversed once in a while is not doing his job right. I think, as a trial judge, you have the responsibility to develop the law insofar as it is open to you to do so.

I think if you make a decision that is, in your own mind, of questionable correctness—and a lot of the things we do are of questionable correctness: 51 percent/49 percent, 60 percent/40 percent—you should acknowledge the problem. There are lots of ways as a trial judge you can hide that problem: by creative fact-finding or the like. When I see a trial judge who has not been reversed very often or never, or claims never to have been reversed I get very suspicious.

I think a few reversals show you have some guts.

Senator MATHIAS. What about the fact that, as you have already said, both parties cannot win.

Judge KOZINSKI. I wish they could.

Senator MATHIAS. But what about the concern of a judge with the fact that one of the parties is going to be hurt? Does that have to be an overriding concern of the judge?

Judge KOZINSKI. There is nothing we can do about the fact that one side has to lose. It is like death and taxes: part of the process.

If I were unwilling to make hard decisions, I would not be a judge. I try to soften the blow as best I can.

I do try—if I give bench rulings, I give bench rulings with some regularity, I make it a practice of saying something positive about the performance of the losing lawyer.

It is not going to put money in his client's pocket, but at least a pat on a shoulder saying, "You did a good job. It was a close fight," may help.

Senator MATHIAS. What about the duty of the bench to the education of the bar, particularly the young lawyers?

Judge KOZINSKI. I think we have a responsibility; and don't get me wrong, Senator Mathias. I impose sanctions on lawyers and I don't think—I do think there are cases when a court has to be stern, but this is a rare exception.

We need to educate the bar and, frankly, Senator, the bar needs to educate us. I learn something from every case. I learn something about the case, I learn something about the law, I learn something about human nature.

I like to bring to a case part of myself and leave part of that with the lawyers, and frequently they leave part of what they have with me.

Senator MATHIAS. What about the way you educate the bar? I remember, from my days as a practitioner that some judges loved to embarrass counsel. Some judges gained great satisfaction from criticizing counsel in front of the jury and in front of their clients.

I remember another great judge who presided in the Maryland State courts who always would call the counsel to the bench, and say, "Now, Mr. Mathias, that was a novel point of law. I have not heard about that before. Tell me about it."

What is your sense as to the better way to interact with counsel?

Judge KOZINSKI. Well, Senator Mathias, one thing I learned my 3 years as a judge is the awesome power you have over those people in the courtroom, particularly the lawyers.

It takes little more than a raised eyebrow to ruin a lawyer's day and I think the watchword in a courtroom——

Senator MATHIAS. To ruin his life.

Judge KOZINSKI. Oh, Lord, I hope I don't ruin anybody's life; but I possibly can ruin his day.

I try to be—err on the side of generosity in the courtroom. I try to be punctual myself. I have had lawyers walk in late. I have never said anything to anybody.

I think when a lawyer walks in late and sees the judge sitting there, that is all of the discipline that lawyer needs. The judge does not need to say a thing.

Senator MATHIAS. Thank you very much.

Judge KOZINSKI. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

Senator Levin.

Senator LEVIN. Just one question.

Judge KOZINSKI. Yes, sir.

Senator LEVIN. How many people were there in the office here in Washington that you supervised, approximately?

Judge KOZINSKI. You are talking about the Special Counsel's Office?

Senator LEVIN. Yes.

Judge KOZINSKI. The amounts differed from——

Senator LEVIN. About how many?

Judge KOZINSKI. I would guess 50 or so.

Senator LEVIN. About 50 people.

Judge KOZINSKI. On and off, more or less.

Senator LEVIN. Approximately.

In the case that Senator Mathias asked you about, the one gentleman, was that the same case in which the Federal judge said that there was no discernible valid, legitimate, acceptable governmental interest in doing anybody this way?

Was that the same gentleman, do you know?

Judge KOZINSKI. Assuming that I was correct in deducing what Senator Mathias was talking about, that is right.

Senator LEVIN. Thank you very much.

Again, I appreciate the courtesy of this committee in allowing me to participate.

The CHAIRMAN. Senator, we are glad to accommodate you.

Now, are there any more questions?

Senator LEVIN. There were some for the record, I think, for Mr. Collins that he was going to answer by tonight.

The **Chairman**. All right. Do you have those questions you want to submit?

Senator **Levin**. They are being prepared, I think he will have them by midnight.

The **Chairman**. Do you want to get those to the judge?

Senator **Levin**. No, no. This was for Mr. Collins.

The **Chairman**. Oh, I see, a witness.

Senator **Hatch**. I think we ought to have them by 6, is what they said. That is what they said.

Senator **Levin**. OK. By 7?

Senator **Hatch**. Sure.

The **Chairman**. All right, 7. Get them to Mr. Short.

Senator **Levin**. Then there was the request, also, for those files which created some discussion.

The **Chairman**. We turned those files over to——

Senator **Levin**. Senator Metzenbaum.

The **Chairman**. You can ask him, when he gets through with them, to return them.

Any more questions?

Senator **Hatch**. Mr. Chairman, could I just make a short statement?

The **Chairman**. Yes.

Senator **Hatch**. We have now had two hearings, one on July 17, another today. Mr. Kozinski also went through a confirmation process when he became chief judge of the claims court.

The Senate has repeatedly reviewed his record at the Office of the Special Counsel and the Judiciary Committee, with that evidence before it, and have approved Judge Kozinski unanimously.

Now, we have had this nomination before us for nearly 5 months. That is a long time to keep Judge Kozinski and his family on hold.

We posed question after question to Judge Kozinski and—I think he has answered them fairly and honestly. We have allowed all Senators a chance to ask any further questions of any of the witnesses that have been here.

At some point, Mr. Chairman, the Senate, having had offered all of these ample opportunities to ask questions, has to move ahead. Frankly, I would just close by stating what I said earlier.

Judge Kozinski took over a new court with new jurisdiction, few resources, and myriad unanticipated problems that accompany the inauguration of a new Federal court. He has earned the respect and the loyalty of all the judges and staff of his court.

In only 3 years, he has established that court as one with a fine reputation. He has reduced the backlog that it suffered from despite being short one judge for more than a solid year.

He has carried a full caseload in addition to his administrative duties as chief judge and, in 3 years, he has published 56 opinions, disposed of over 170 cases, and handled countless motions and hearings, and he has already logged 110 hours trial on the bench.

Now, frankly, I have not heard anything here today that would lead me to vote against Judge Kozinski. I want to personally commend you, Judge Kozinski, for being here, and for the candor with which you have answered questions. I think your reputation on the bench at the Claims Court is justly deserved.

Mr. Chairman, I am sorry I took so much time, but I just felt that I had to say that at the end of this hearing.

The CHAIRMAN. Senator Levin, do you want to make a statement?

Senator LEVIN. No.

The CHAIRMAN. Now, I just want to say this.

Judge Kozinski, we acted on your nomination previously. It was sent out unanimously. It is on the calendar now and I hope it will be voted on next week.

Out of courtesy to the Senator from Ohio, Mr. Metzenbaum, the Senator from Michigan who is here with us now, we gave this extra hearing. But, frankly, I have heard nothing today that has changed my opinion.

I was looking to see if there was anything. I am convinced from your past record, your magnificent record in college and your excellent and efficient record since you finished college, your various positions you have held including a member of the Claims Court where you have done such a fine job—I am convinced that you are a man of integrity, efficiency, and dedication.

You have set high standards for yourself. You have demanded high standards of those who worked with you.

I commend you for that. It is hard sometimes to be put in a position of having set high standards for your employees and your coworkers, but I tell the employees in my office that we are all working for our country. We are coworkers.

I don't consider that necessarily I am employee. I am just a coworker with them and I don't ask them to work any harder than I do.

I am convinced that you feel the same way. I commend you for giving awards to those who have proven extra competence. I think that is important. It motivates people. They have inducements there to look forward to.

I commend you for wanting to weed out incompetence. This is to the advantage of the taxpayers. I am sure the people of the country wish we had more people in public office who would want to do that.

From what I have heard today, of all the hearings I have held I think these charges that have been brought here by other people to these Senators are the punyest, most nitpicking charges that of any hearing I have ever held.

At any rate, I wish you well on the bench. I am sure you will make an excellent judge. And good luck and God bless you.

Judge Kozinski. Thank you, Mr. Chairman.

The CHAIRMAN. Now we stand adjourned.

[At 5:26 p.m., the committee adjourned sine die.]

CONFIRMATION HEARING ON: FRANK X. ALTIMARI, JOHN T. NOONAN, JR., GLENN L. ARCHER, JR., MORRIS S. ARNOLD, PATRICK A. CONMY, LYNN N. HUGHES, AND NICHOLAS TSOUCALAS

WEDNESDAY, NOVEMBER 6, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to call, in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, McConnell, and Simon.

Staff present: Duke Short, professional staff.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

There is a vote, but since there are some Senators here, we will hear them now to save them from coming back.

I believe Senator D'Amato is here.

Is Senator Moynihan here?

[No response.]

You can make a brief statement and put your entire statement in the record. You have two judges, both from New York.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'Amato. Mr. Chairman, let me thank you for once again giving us the opportunity to present two outstanding nominees of President Reagan, Judge Nicholas Tsoucalas, who is before you today and seeks the committee's approval as a U.S. judge of the Court of International Trade and also Eastern Federal District Court Judge Francis X. Altimari who this committee passed upon in 1982 and now sits as a distinguished member of the Federal district court who is seeking committee support as the second circuit judge.

Mr. Chairman, in the interest of time, I will ask that my prepared remarks be received into the record as if read in its entirety.

[Prepared statement follows:]

Prepared Statement by Senator D'Amato Introducing Judge Francis X. Altimari and Judge Nicholas Tsoucalas

Mr. Chairman, it is a great pleasure to introduce to you and the Senate Judiciary Committee two very distinguished judges.

Francis X. Altimari

Judge Francis Altimari's many years of distinguished service make him exceptionally well qualified to be a U.S. Circuit Judge for the Second Circuit.

He has been a Federal District Court Judge in the Eastern District of New York since 1982. Before that, he was a New York State Judge for seventeen (17) years, and he served with great distinction as a Nassau County Supreme Court, County Court, and District Court Judge. More than forty (40) of his decisions have been published in the official Federal and State Reports.

Prior to becoming a judge, Francis X. Altimari had a very extensive and successful trial practice.

He is a graduate of Brooklyn Law School and St. Francis College. He also taught at St. Francis as a professor of law from 1954 to 1963.

At the request of the Chief Judge of the New York Court of Appeals, he has lectured extensively before New York judges on developments in the law. He has also been in great demand with the State Bar Association, and at New York's law schools and colleges.

Judge Altimari has received numerous honors and awards from the New York State Bar Association, the American Academy for Law Enforcement, and others for his great service to the legal community.

Judge Altimari has also been active in numerous civic organizations. He is married to Angela Scavuzzo Altimari, and is the father of four children.

Mr. Chairman, I thank you for the opportunity to present Judge Altimari. I am confident he will make a great Federal Circuit Court Judge.

Nicholas Tsoucalas

It is also a great pleasure to introduce to this committee, as a nominee to be a Judge of the U.S. Court of International Trade, Judge Nicholas Tsoucalas.

Since 1968, this nominee has served with great dedication and ability on the Criminal Court of the City of New York. He has also had 7 years of experience as an Acting Supreme Court Judge in Brooklyn and Queens, NY.

Before entering college, Nicholas Tsoucalas served in the Navy during World War II. He is a graduate of Kent State University. After receiving his law degree from New York Law School in 1951, he was recalled by the Navy, and served there until he was honorably discharged in December 1952.

Judge Tsoucalas is the former President of the Greek-American Lawyers' Association. He has served as Chairman of the Federal Bar Association Committee on Juvenile Delinquency, and of the New York County Lawyers' Association Subcommittee on Public Order and Responsibility. He is or has been an active member of the American Bar Association, the National Judges' Association, and numerous other associations of judges and attorneys.

His extensive experience as an attorney includes more than 3 years as an assistant U.S. attorney in the late 1950's. As an attorney in private practice, he successfully specialized in immigration and admiralty law.

Like Judge Altimari, Judge Tsoucalas is an active member of various community and civic groups. He is married to the former Catherine Aravantinos, and he has two children.

Mr. Chairman, Judge Tsoucalas will make a most distinguished Judge of the U.S. Court of International Trade, and it is with great pride that I present him to this committee.

Thank you, Mr. Chairman.

Senator D'Amato. Let me say the President has never made two better selections than the candidacies of Judges Altimari and Tsoucalas. Both have been outstanding judges in the State system and the Federal system, and I am sure they will continue their exemplary service.

The Chairman. Judge Altimari to be circuit judge now. He is on your right?

Senator D'AMATO. Yes.

The CHAIRMAN. Judge Tsoucalas to be a judge of the Court of International Trade.

Senator, thank you very much. I appreciate your taking the time as busy as you are to come over here to personally testify. Thank you very much.

Is Senator Wilson here? Will you come around. We will be glad to hear from you, senator. You have Judge Noonan to be a circuit court judge.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Mr. Chairman, I am grateful for the opportunity to appear before you this afternoon to introduce Prof. John T. Noonan who has been been nominated by the President to serve as U.S. circuit judge for the Ninth Circuit Court of Appeals.

As the committee is aware from a review of Professor Noonan's resume, he has not been idle since he graduated summa cum laude from Harvard University in 1946. After receiving his bachelor of arts degree, he studied English literature at Cambridge University and returned to the United States to earn a masters degree in philosophy in 1951. He returned to Harvard to study law and received his law degree in 1954.

John Noonan has certainly put his scholastic training to remarkable use over the past 30 years. In his extensive writings and in his work, he has expanded our understanding of important moral and legal issues that affect our daily lives.

Particularly gratifying to him, has been his tenure as a professor of law for the past 20 years at the University of California School of Law.

John Noonan is a true scholar. His voluminous writings have touched on wide-ranging, complex issues, including legal ethics. He has served as a teacher, lecturer, and visiting professor and as advisor to a number of governmental organizations. In recognition of his scholarship and public service, he has received honorary degrees from colleges and universities all across the country.

Mr. Chairman, in the interest of time, I will cap this remarkable career to say that John Noonan is a well-educated man who has a deep understanding of and respect for the law. It is clear from his life as a philosopher of the law, and as a teacher and practitioner of the law, that he is superbly qualified for the role of a circuit judge. He understands that role and the importance that it serves in our legal system, and the role that our judicial system plays in our constitutional form of government.

His biographical data in summary form, which includes synopses of his books, book reviews, and lectures, is some 15 pages. How he accomplished so much in the past 30 years, I think, is difficult for ordinary men to comprehend. His has been a truly remarkable career.

I know those who serve on the faculty at Boalt Hall as well as his students hold him in the highest regards. He has an unimpeachable reputation as well as intellectual integrity, and he will bring to the ninth circuit bench a quality of mind and scholarship and judicial temperament that promises to make him an outstanding judge.

The **Chairman**. Thank you very much, and I congratulate Professor Noonan for the high esteem of the senator who endorses you so highly.

We will have to take a recess to vote.

Senator Wilson, thank you very much.

[Brief recess.]

Senator **McConnell**. The hearing will come to order.

I see Senator Andrews is here on behalf of Mr. Conmy of North Dakota. I would like to call on Senator Andrews for his statement at this point.

STATEMENT OF HON. MARK ANDREWS, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator **Andrews**. Mr. Chairman and members of the committee, it is with pleasure that I introduce to you Patrick Conmy who is the President's nominee to fill the vacancy on the U.S. District Court for the District of North Dakota.

Mr. Conmy has served the State of North Dakota for nearly three decades as a competent and respected trial attorney. In addition, he has been active in civic affairs in his hometown of Bismark, N.D. and is a well-respected member of that community.

He is a graduate of Harvard. We don't hold that against him, Mr. Chairman, and Georgetown University Law Center. We don't hold that against him either.

He returned to North Dakota in 1959 to enter into the practice of law with his father who was also an eminent jurist. Since that time, he has distinguished himself as a community leader, State legislator, trial attorney, husband and father. I can think of few North Dakotans better suited to serve as a Federal judge. His temperament makes him an ideal candidate for the Federal bench.

It is with that thought in mind I am proud to bring Pat Conmy before your committee. He was recommended to me by a number of legislators from across the State, by a number of civic leaders, and the North Dakota Bar Association.

Mr. Chairman, let me also point out he carries the respect and support of our senior senator, Senator Burdick from our State, and he represents the best of North Dakota's judicial tradition.

Senator **McConnell**. Thank you, Senator Andrews.

What we will do at this point, since there are no other senators here, we will go back to the top of the agenda and we will call Judge Altimari.

Judge Altimari, raise your hand. Do you swear the testimony you give in the hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Judge **Altimari**. I do, sir.

TESTIMONY OF FRANK X. ALTIMARI, OF NEW YORK, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Senator **McConnell**. Judge Altimari, the chairman normally chairs these hearings and he left behind a few questions for you.

You served as a U.S. district court judge since 1982. During this time I am sure you have had the opportunity to observe the performance of a great number of attorneys before your court. Would you please tell me your opinion as to requiring attorneys to undergo special training before being allowed to practice in Federal courts.

Judge ALTIMARI. Senator, as recently as Monday evening, I lectured approximately 200 lawyers at the Nassau County Bar Association as a part of a continuing legal education program. I am convinced that we should not force someone to do that which he or she is already doing. Lawyers that have appeared before me have done so with great competence and great ability. So long as they continue to seek the knowledge that is necessary to keep abreast of the law, I feel there is no immediate need for compulsory special training. If indeed that changes, which I doubt, because I think the legal community as a whole is very aware of the need to grow and to learn, then we should reevaluate the entire matter.

Senator MCCONNELL. Thank you.

Judge, would you give the committee your views on penalties that should be imposed for second- and third-time drug violators.

Judge ALTIMARI. In the past 20 years, I have presided over many criminal drug trials. I always lengthen the sentence imposed whenever a defendant has been convicted previously of this heinous crime or has made a lifestyle of selling drugs while eluding indictment. Prior drug conviction is a significant factor in the sentencing process.

Senator MCCONNELL. In response to the committee's questionnaire concerning judicial activism you stated, "If there is a standing to raise an issue and there is, indeed, a ripe controversy which must be determined, then the court will proceed to decide the merits of the grievance."

Judge would you give us your opinion of the Supreme Court toward stricter requirements of standing.

Judge ALTIMARI. In my judgment, it is a good trend. Judges ought to confine themselves to the issues created by the pleadings, that is, the genuine issues before the court. As judges, we should apply the relevant law and avoid rendering advisory opinions where no case or controversy exists. If the matter is moot or not ripe for review, the party does not have standing, and thus the court just doesn't have jurisdiction.

Senator MCCONNELL. Those are all the questions the chairman had.

Is there anyone here you would like to introduce?

Judge ALTIMARI. I would like to introduce my wife of more than 34 years, Angela.

Senator MCCONNELL. I see Senator Bumpers and Judge Arnold are here. Senator, would you like to come forward and make your statement at this time?

STATEMENT OF HON. DALE BUMPERS, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator **Bumpers**. Mr. Chairman, with your permission, I would like to ask unanimous consent that my formal statement be inserted in the record.

Senator **McConnell**. Without objection.

[Prepared statement follows:]

Opening Statement of Senator Dale Bumpers

Mr. Chairman, I am honored and pleased to recommend Morris (Buzz) Arnold to become a U.S. District Judge for the Western District of Arkansas.

Morris (Buzz) has an impressive and comprehensive background in the law. After receiving an engineering degree from the University of Arkansas, he went on to graduate from the University of Arkansas School of Law at the top of his class. He continued his legal education at Harvard Law School, where he received his LL.M and S.J.D. degrees. He has since been a distinguished professor at the University of Pennsylvania Law School and at the Law School of the University of Arkansas at Little Rock. He is currently Dean of the University of Indiana Law School. He is a nationally renowed legal scholar, has received numerous academic awards and is the author of numerous books and articles.

Morris (Buzz) comes from a family which is legendary among Arkansas lawyers. His grandfather founded the family law firm at Texarkana, Arkansas, which is still headed by his father. His brother, Richard, clerked for Justice Brennan and was later my Legislative Director, a District Judge and now sits on the Court of Appeals for the Eighth Circuit. Upon Buzz's confirmation, I believe it will be the first time brothers will have sat on the Federal Judiciary.

I believe Morris (Buzz) Arnold will be invaluable addition to the Federal bench at a time when the Court in the Western District of Arkansas has a heavy and growing caseload. He is eminently qualified by his intelligence, his efficiency, his compassion and his energy.

My recommendation is without reservation, and I hope the Committee will act quickly to report his nomination and that the Senate will confirm this nomination without delay.

Senator **Bumpers**. I will speak extemporaneously in my introduction of Morris "Buzz" Arnold and, with your indulgence, I will refer to him as Buzz because that is all I have ever known him as in the years I have known him.

First of all, as a lawyer active in bar association activities—and served 18 years as a trial practitioner before I got into this business—I can say that the Arnold family was legendary in our State as a legal family and as a scholarly family. It was only after I was elected Governor that I really got to know them on a personal and more intimate basis, both the father and the two sons, and not since I was here before the committee once before to strongly recommend Buzz' brother, Judge Richard Arnold who now sits on the Court of Appeals for the Eighth Circuit, have I had a chance nor I dare say has this committee had an opportunity, to hear of the kind of academic credentials and background that Buzz Arnold possesses.

He is unique in that he first got a degree in engineering at the University of Arkansas, after that went on to Arkansas Law School where he graduated No. 1 in his class. He then continued his legal education at the Harvard Law School where he received his LL.M and S.J.D degrees. He has since been a distinguished professor of law at the University of Pennsylvania Law School and the Law School of the University of Arkansas at Little Rock. He is currently Dean of the University of Indiana Law School. He is a nationally renowned legal scholar, has received numerous academic awards and is the author of numerous books and articles all of which are listed in his résumé.

I was amazed when I went out to speak at the law school of my own alma mater, Northwestern, back in May. During conversation with the dean of the law school there, I found that Buzz had virtually been offered the deanship of my own alma mater.

His grandfather founded the family law firm in Texarkana and it is still headed by his father. His brother Richard clerked for Justice Brennan, and was later my legislative director.

As I pointed out, Richard now sits on the Court of Appeals for the Eighth Circuit. The staff could check this out but I believe that with Buzz' confirmation, he and his brother Richard may be the only two brothers ever to sit in the same circuit in the Federal judiciary. Is that right or wrong?

Mr. ARNOLD. That is correct.

Senator BUMPERS. I believe it is correct if he says it is.

Mr. Chairman, I thank you for your indulgence and time to let me come here to strongly recommend without reservation a unique resource in our State of Arkansas. I think he is going to be a valuable addition on the bench at a time when the caseload of the Western District of Arkansas is growing. He is eminently qualified by his intellect, his experience, his compassion, and his energy and I hope that this committee will report him out shortly and that the Senate will quickly confirm him.

Thank you, Mr. Chairman.

Senator MCCONNELL. Thank you.

Senator Pryor.

STATEMENT OF HON. DAVID H. PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Senator Bumpers gave you a good descriptive detail of Judge Arnold's academic achievements and background.

I would like to talk for a moment, Mr. Chairman, if I might without citing specifics about the commitment that the Arnold family has had to community activities and community affairs in our State. He is truly representative, I think, of one of the finest legal families that the State of Arkansas has ever produced. Buzz' achievements make him the envy of many lawyers who aspire to high academic goals. He is truly a lawyer's lawyer, Mr. Chairman. His nomination before this committee has brought best wishes from the Arkansas legal community including acceptance and enthusiasm.

He will be fair to the lawyers and those before his court. He will consider the entire scope of our judicial system in rendering opinions which he truly believes to be right and fair, honest and impartial.

I strongly support him, Mr. Chairman, and I urge his nomination. I hope you and this committee will give his nomination your most careful consideration.

Senator MCCONNELL. Thank you, Senator Pryor.

I don't see any other Senators here.

I think we will go back to our order and we will get to you in a moment, Mr. Arnold.

I would like to call Prof. John Noonan, nominated by the President to be on the U.S. Circuit Court for the Ninth Circuit.

Professor Noonan, do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. NOONAN. I do.

The CHAIRMAN. There is a statement from Senator Orrin Hatch supporting your nomination which we will insert in the record at this point.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, it is a pleasure to join you in welcoming each of these distinguished nominees to the Judiciary Committee. I am confident that each of them will make fine additions to the Federal Judiciary.

This is a particularly distinguished group in my mind because it includes a legal scholar in whom I place deep trust. I am honored to greet my friend, Mr. John Noonan, once again in a hearing before this committee. Mr. Noonan has often appeared before our committee on a variety of very important constitutional issues. His contributions to those proceedings have always been extraordinarily insightful and thorough.

Reciting his many accomplishments could take much of the rest of the afternoon. Briefly he established an enviable academic record in literature at Cambridge, in philosophy at Catholic University, and in law at Harvard. Since then, he has made extensive contributions to the law in his various professional endeavors, including most recently his post as professor of law at the University of California, Berkeley. His major writings have been extensive and highly lauded in legal fields as diverse as usury law, domestic relations, constitutional law, and bribery.

Perhaps I should just add a brief statement on Professor Noonan from Newsweek:

> John T. Noonan, Jr. . . . is uniquely gifted as a moralist, historian, and lawyer . . . as a historian, Noonan is at home in any legal system, ancient or modern, Continental or American, ecclesiastical or civil. As a scholar (he reads seven languages) and master of narrative prose, he can, at the age of 58, justly claim three classic studies in the history of moral ideas. To these he has now added a fourth, bribes.

Senator MCCONNELL. There are several letters here—one from the dean of the Yale Law School.

> I have known John Noonan for more than 20 years. He is a superb scholar and a person of great intellectual distinction. I have argued with him but found him open and willing to listen. I also always learn something from his point of view. I think he would be an excellent judge.

That letter was from Guido Calabrese.

Also a letter endorsing your nomination from Jesse Choper, dean at Berkeley.

Also from James Vorenberg, dean of the Harvard Law School.

Also from Erwin Griswold, former Solicitor General, who is now a private attorney.

The chairman has several questions, Professor Noonan.

TESTIMONY OF JOHN T. NOONAN, JR., OF CALIFORNIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Senator MCCONNELL. In reviewing your committee questionnaire, I noted from 1961 to 1966, you served as professor of law at Notre Dame Law School. Are you presently a professor of law at Notre Dame and also a professor of law at the University of California Law School, a position you have held since 1967? Do you foresee any transition from the circuit to Federal level?

Mr. NOONAN. I believe there are distinct differences and, at the same time, strong analogies. After all, a great deal of my work as a member of a law school faculty has been research, analyzing of cases and writing, and that kind of activity is very much part of the judging activity of a circuit judge. So I feel that while there will be a change, there will also be a fair amount of continuity if I do move from one position to the other.

Senator MCCONNELL. Thank you, professor.

How would you resolve a conflict between your conscience and your own sense of judgment and the clear meaning of a constitutional or statutory provision?

Mr. NOONAN. I think there is no doubt at all that a Federal judge deciding a case has the obligation of following the statute, following the Constitution, following the precedent. If it were a case where there was a severe conflict, of course, I would have to recuse myself, but I don't foresee that kind of conflict arising.

I think as far as I can see, my conscience and the law are going to agree.

Senator MCCONNELL. Thank you, professor.

Article 3, section 1 of the Constitution vests in the Congress plenary power to ordain and establish such inferior courts as it sees fit. To what extent as a direct function of that is Congress equally empowered to limit the jurisdiction lower courts under various cases?

Mr. NOONAN. I would say the Constitution means what it says—that it has vested in Congress a power that it can exercise in creating inferior courts and implied in that, of course, is the power to limit those courts.

Senator MCCONNELL. Thank you, Professor.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Mr. Noonan, I note that the California women lawyers' group has written to us saying on behalf of the California women lawyers, I am writing to express our serious reservations about the confirmation of John T. Noonan to the Ninth Circuit Court of Appeals.

Basically, their objection is based on your writings in the field of abortion. If the law states something whether it is the field of abortion or any other field that you happen to disagree with that law, how do you regard your position as a judge? How do you handle that as a judge?

Mr. NOONAN. Senator Simon, I believe there is a very large difference between exercising one's rights as a citizen, one's basic political rights which I have been exercising, and what I would feel bound to do as a judge. As a judge, I would feel absolutely constrained to follow the applicable statute, the applicable constitutional provision, the applicable Supreme Court precedent.

Senator SIMON. I thank you for that answer which I think is the correct one.

I was interested in reviewing your background to note that you had written an article on judicial power in which you joined FDR in suggesting that the Supreme Court ought to be expanded. Do you still feel that this committee should initiate such legislation?

Mr. NOONAN. Senator, that article was written in the immediate wake of Roe against Wade. It represented my immediate strategic evaluation. I had a great Democratic President as a precedent

But it's not my opinion today. I think the whole situation has changed. Even if I were advocating legislation, I would not be advocating that legislation.

Senator SIMON. And one final question. Has anyone in the process of your being nominated asked questions that you felt were in any way beyond the pale of what they should be?

Mr. NOONAN. No, they have not, Senator. I would say that one of my teaching fields has been legal ethics. I feel I have been in teaching particularly sensitive to questions of lawyers' ethics and judges' ethics, and I can say with complete confidence that nothing that was asked me bordered in the least on the improper.

Senator SIMON. I thank you. I think the Senator from California, Pete Wilson, is coming in right now, and he may want to add a word here.

Senator MCCONNELL. I think he's already spoken.

Senator WILSON. I've already had the pleasure of introducing Mr. Noonan.

Senator MCCONNELL. Senator Wilson, we are just about through here.

There is some indication that Senator Mathias may come over and ask you some questions, Mr. Noonan, so you might stick around until the end of the hearing.

Mr. NOONAN. All right.

Senator MCCONNELL. Thank you very much.

Mr. NOONAN. Thank you.

Senator SIMON. I apologize to my colleague; I thought he was just walking in.

Senator MCCONNELL. Senator Burdick has arrived and would like to say a few words on behalf of Mr. Conmy.

Senator Burdick.

STATEMENT OF HON. QUENTIN V. BURDICK, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator BURDICK. Mr. Chairman, it's a distinct pleasure for me to introduce this next nominee. I've known the Conmy family most of my adult life. I've had some tough lawsuits with his father and his uncle. He came up in a legal family and a good legal background. I think Pat Conmy is an excellent choice and will serve this country well in its judiciary.

Senator MCCONNELL. Thank you, Senator Burdick. Mr. Conmy, we will get back to you in a few minutes.

OK, Mr. Archer, Glenn L. Archer, Jr., of Virginia, to be U.S. circuit judge for the Federal circuit.

Mr. Archer, if you would raise your right hand.

[Mr. Archer stands and raises his right hand.]

Do you swear the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ARCHER. I do.

Senator McConnell. Senator Warner has asked that we include in the record at this point a statement in your behalf, which will be done.

[The following was received for the record:]

Prepared Statement by Senator John Warner

Mr. Chairman, it is a pleasure for me to introduce to the committee Glenn L. Archer, Jr., for confirmation for a judgeship position on the U.S. Court of Appeals for the Federal Circuit.

Mr. Archer brings to the bench over 30 years of experience in the law as an Air Force officer, a private practitioner and as Assistant Attorney General of the United States.

Following a distinguished collegiate career at Yale University and the George Washington University School of Law, Mr. Archer joined the Air Force's Judge Advocate General Corps.

He entered private law practice in 1956 as a member of the firm of Hamel & Park in Washington, DC, and made the wise choice to reside in Virginia.

For nearly 25 years Mr. Archer specialized in Federal taxation, handling litigation and administrative practice before the Internal Revenue Service.

Recognizing Mr. Archer's wealth of experience and knowledge in tax law, President Reagan nominated him for the position of Assistant Attorney General for the Tax Division.

This country has had the benefit of Mr. Archer's talents and good judgment for the past 4 years.

He has gained the well-deserved respect of his colleagues, peers and more than 300 attorneys he manages in the Tax Division at the Department of Justice.

Mr. Chairman, Mr. Archer has demonstrated his dedication to public service throughout his career.

I believe he possesses the necessary judicial temperament to be an asset to the U.S. Court of Appeals, and I wholeheartedly endorse his nomination.

TESTIMONY OF GLENN L. ARCHER, JR., OF VIRGINIA, TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Senator McConnell. Mr. Archer, the chairman has some questions to be propounded to you.

Presently you serve as Assistant Attorney General for the Tax Division at the Justice Department. Prior to that you were in private practice for 25 years.

Now that the President has nominated you to be U.S. circuit judge for the Federal circuit, would you tell the committee what steps you've taken to prepare yourself for this important position?

Mr. Archer. Senator, as you indicated, I have been in practice both in and out of Government for now over 30 years. My practice experience has been concentrated, to some extent, in the field of Federal taxation. I think many would view taxation as one of the most intricate and complex areas of the law.

I feel that it will serve me well in handling not only the tax cases that come before the Federal circuit, but also some of the other complex areas of law that that circuit has coming to it.

Finally, I've been in Government now for 4 years, and while I think many would have the view that the Tax Division at the Department of Justice deals with technical tax issues, we in fact get a very broad range of both civil and criminal issues as well as appellate and trial issues.

Senator McConnell. Mr. Archer, I consider judicial temperament to be a prerequisite for a Federal judge.

Would you please give me your thoughts on this subject?

Mr. ARCHER. Senator, I believe that that is absolutely necessary for a Federal judge at all levels. I think a judge, in order to give the appearance of being fair and to be fair to the litigants involved, must exercise judicial temperament. That to me means that the judge must be courteous at all times to the litigants, the parties, as well as to his colleagues on the court.

Senator McCONNELL. What is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution, as that judge interprets it?

Mr. ARCHER. Senator, my view is that it is very important that there be stability in the law. But when a precedent of a court conflicts with the Constitution, there is no question in my mind that that precedent cannot stand up; the Constitution, of course, would control.

Senator McCONNELL. Thank you, Mr. Archer. Senator Simon?

Senator SIMON. Thank you, Mr Chairman. Mr. Archer, as you are aware, the American Bar Association, in its Canons for Judges, says "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."

I understand that you have been a member of the Metropolitan Club, but that you either have resigned or will resign, is that correct?

Mr. ARCHER. That is correct. I have been a member many years at the Metropolitan Club. I did not join it for any reason of bias or prejudice, of course. And I have submitted, at the time that I sent my questionnaire to the committee, my resignation.

Senator SIMON. I appreciate that. I notice—and I am asking you, but I could ask this of several nominees—I notice that the bar association minority found you not qualified.

Does that disturb you? Is there a reason for that?

Mr. ARCHER. Well, I do not know what reasons may have been involved there. I think for someone who has maybe practiced in a specialty area, as I have, at least the concentration of my practice has been in the tax law, that I may not be as well known throughout the general bar as others.

And that could be a factor, I suppose. It does not really disturb me. I think with 30 years of experience, both in and out of Government, and having probably in the last 4 years the equivalent experience that many lawyers would have in their lifetime, I think I am fully qualified to sit on this court of appeals.

Senator McCONNELL. Senator Simon, I might say that staff informs me that that is a fairly common occurrence in every administration.

Senator SIMON. The staff is correct, it is fairly common—in fact, it's too common almost. I am concerned.

Senator McCONNELL. You are looking for unanimity of opinion on that, are you?

Senator SIMON. No, I understand—and I am not picking on you, Mr. Archer, for that.

Mr. ARCHER. I understand.

Senator SIMON. I am concerned when I see a relatively high percentage of the nominees frankly coming back with not-qualified votes on the part of the minority of the committee reviewing the nominees.

Mr. Archer, you also list on page 3 of your public statement the number of partnerships that you have. How do you intend to handle that as a judge?

Mr. ARCHER. Well, for the most part, those partnerships are very small investments in public partnerships that were sold much like stocks by brokerage houses.

In the case of those partnerships, I think that I would treat those in the same manner that I would treat any other investment in a publicly held company.

With respect to the private partnerships that I am in, if there were ever any situation in which those partnerships were before the court, of course I would follow the guidelines and the code of judicial ethics and recuse myself. They are partnerships, though, that are not easily disposed of right at the present time.

Senator SIMON. Well, I appreciate that, and that is obviously the proper conduct.

The bar association also has, as one of its provisions, code of ethics for lawyers, that—and I'm quoting: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Can you tell me what you have done to live up to that part of the code of ethics?

Mr. ARCHER. I have, I think, tried throughout my practice to be aware of and to support, in ways I could, voluntarily, the principle of equal justice for all under the law. In the early years of my practice, when it was more frequently done, I did volunteer and was assigned cases for both juveniles and indigent defendants here in the District of Columbia. I have worked actively in the American Bar Association for many years to work for better laws, particularly in the area of taxation. And I have been active in my church and in other religious organizations, and, to some extent, with youth groups in the church.

I think I have been cognizant of the admonition of the code of professional ethics in that regard.

Senator SIMON. When you knew you were under consideration, in addition to questions that came from the Justice Department, were there any organizations that asked you questions?

Mr. ARCHER. No, sir, there were not.

Senator SIMON. Did anyone ask you any questions that you felt were unethical.

Mr. ARCHER. No, Senator, they did not.

Senator SIMON. I have no further questions, Mr. Chairman.

Senator MCCONNELL. Thank you, Mr. Archer. Do you have any members of your family here that you would like to introduce?

Mr. ARCHER. Yes, I do, Senator. My wife is here, Vera; my two daughters, Susan and Sharon, are both here; and my longtime secretary, Polly Benson, is here; and I thought my son had departed, but he is here also—Thomas. And the fourth child, a son, is away at college, so he's not here.

Senator McCONNELL. We are glad to meet all of you, and I know you are proud of Mr. Archer.

Thank you.

Mr. ARCHER. Thank you very much, Senator.

Senator McCONNELL. I see that Senator Gramm has come in.

I would like to ask him to come forward. He is here on behalf of Judge Lynn Hughes, who has been nominated by the President to be a district judge for the southern district of Texas.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr. Chairman, Senator Simon, I am honored to be here today with my friend, Lynn Hughes, who is a State district judge in Harris County. He has served with distinction on the bench for 5 years. In that period he has been cited for distinction by his peers. I think it's fair for me to say that my judicial review committee—composed of distinguished deans of law schools in my State, distinguished attorneys from big cities and small cities, independent practitioners, and members of big firms—rated no one higher in their evaluation than Lynn Hughes.

I believe he is a remarkable person with a remarkable record. He is a seasoned attorney and judge, but yet he is a young man. And I believe he will be a very effective Federal judge and will impartially administer justice in our State.

His nomination is strongly supported by our entire congressional delegation, and I am very honored to be here to introduce him to you.

Senator McCONNELL. Thank you, Senator Gramm, for those glowing words, and, in support of what you said, I have a statement here from Senator Bentsen, which we will insert in the record at this point.

[The following was received for the record:]

PREPARED STATEMENT BY SENATOR LLOYD BENTSEN

Mr. Chairman, I am pleased to support the nomination of Judge Lynn Hughes to be the new Federal District Judge for the Southern District of Texas. Judge Lynn Hughes has already served the State of Texas for 6 years as a State District Judge. A graduate of the University of Texas at Austin Law School, Judge Hughes has known the roles of lawyer, jurist, and academic.

Judge Hughes' credentials reflect the temperament and knowledge necessary to fill the life-role as a Federal judge. His experience as a professor of law at South Texas College of Law, in Houston, for the last 13 years provides him with a strong foundation to cogently illuminate the law, not just for the litigants, but for the community at large.

As a constitutional law professor, Federal questions will most likely receive qualified attention. I understand that the U.S. Supreme Court has already found agreement with Judge Hughes early in his career, in the case *Xeros* v. *the County of Harris*. The instant case, which dealt with the issue of when jurisdiction attaches for the purposes of taxation, was overturned on appeal in the Texas high courts but ultimately was affirmed by the U.S. Supreme Court. No small success story for a new State judge.

Judge Lynn Hughes has gained wide respect during his tenure on the State bench, and his transition to the Federal bench will most certainly provide him with greater access to applying the pedagogical principles of law, he has so earnestly taught as a constitutional law professor.

I wish Judge Hughes great success and share in this congratulatory moment with his wife Olive Dixon Allen Hughes and their three children.

I know that you will weigh fairly each case and that both lawyers and academicians will glean knowledge from your legal opinions.

Again, let me express complete support for the nominee before this committee. Thank you Mr. Chairman.

Senator SIMON. Before Senator Gramm leaves, let me just commend him, because I have been critical of the fact that we have been getting too many nominees who are barely qualifying. I note that the bar association recognizes Judge Hughes as well-qualified, one of their higher recommendations.

And that is a tribute to you, Judge Hughes, and a tribute to my colleague from Texas.

Senator GRAMM. Thank you.

Senator MCCONNELL. Thank you, Judge. We will get back to you shortly. Thank you, Senator Gramm.

I might say, Senator Simon, that as a former staffer on this committee years ago I have found that there have been those who frequently allege that there were unqualified or not-as-qualified nominees suggested for the bench as there could have been. And that is not unique with this particular administration. I have seen that in every single administration as long as I have either been around this town or observed this town.

OK, we will now call Mr. Morris Arnold of Arkansas, who has been nominated for U.S. district judge for the western district of Arkansas.

Mr. Arnold, if you will raise your right hand.

[Mr. Arnold stands and raises his right hand.]

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ARNOLD. I do.

Senator MCCONNELL. Thank you.

TESTIMONY OF MORRIS S. ARNOLD, OF ARKANSAS, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF ARKANSAS

Senator MCCONNELL. Mr. Arnold, the chairman has three questions for you.

Would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

Mr. ARNOLD. Senator, I think the answer to that question depends partly on whether it is a criminal case or a civil case.

In the instance of a criminal case, assuming that the incompetence was on the part of the lawyer for the defendant, I think that the court has a duty to oversee such situations and to make such corrections as may be necessary. If it's a bench trial, I think that is probably easier to do than if the case is being tried before the jury, where, in my estimation, judges ought to be quite careful not to be too intrusive.

But it would depend also on the character of the incompetence, that is, the context in which the incompetence made itself apparent. If, for instance, it had to do with a failure to object to evidence that was clearly excludable, and if this conduct were repeated and obviously prejudicial to a criminal defendant, I think the judge has the duty at least to inquire of the defense counsel out of the hearing of the rest of the room whether he or she wants to object to that material.

I think in the Federal courts, at least in some circuits, also, there is an opportunity for trial judges in their summations to the juries to point to things that have occurred in the trial that perhaps counsel should have pointed to but did not.

So I guess what I am saying is that trial judges do have a duty to make sure that the record of the trial does not show such glaring evidence of incompetence as to make it obvious that a post-conviction relief petition would be granted.

Senator McCONNELL. Dean Arnold, in his famous dissent in Plessy against Ferguson in 1893, Justice John Harlan referred to our Constitution as a "color-blind" Constitution.

Would you agree with this characterization?

Mr. ARNOLD. Senator, I would agree with it, though I think there may be precedents of more recent vintage that have eroded that principle somewhat, and precedents by which I would naturally be bound as a district judge if the Senate should confirm me.

Senator McCONNELL. Dean Arnold, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Mr. ARNOLD. I think it probably, in common parlance, is used to describe an activity on the part of a judge in which he or she rules according to personal preference rather than according to law; if that is what you mean by the phrase—and I suspect it is—then I think everyone would agree that that is an improper way of behaving.

Senator McCONNELL. Thank you. Senator Simon?

Senator SIMON. Thank you very much. In just glancing through your biographical material, I note that your present home is Bloomington, IN. You are on the faculty there at the university, is that correct?

Mr. ARNOLD. I am the dean of the law school there.

Senator SIMON. Dean of the law school. Forgive me for not finding that vital piece of information.

You heard me read before on the Judicial Canon of Ethics on membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

The information that we have here is that you are a member of the Atheneum Club, an all-male club.

Is that correct?

Mr. ARNOLD. That's correct, Senator.

Senator SIMON. Do you intend to resign from that, or how do you intend to comply with the Canon of Ethics?

Mr. ARNOLD. Senator, I think it's relevant to point out that the club is in London, England, and I would also like to say that I have only the most casual connection with it; that is to say, I am a member, but I am there probably once a year.

It's a club that consists of politicians and lawyers and clerics and is in the 18th and 19th-century tradition of English gentlemen's clubs.

Now, I have no sympathy with the club's bylaw provision which excludes women. Indeed, I just recently voted in favor of a revision of the bylaws that would have admitted women to membership. And I think it's also relevant to note that a majority of the membership of the club voted in favor of that bylaw revision.

Unfortunately, it was ruled—by whom I am not sure, and, in any event, I think wrongly—that a two-thirds majority vote was required to carry the amendment.

So we have a situation here in which I am certainly not opposed to having women as members—indeed, I have actively sought that change; a situation, moreover, in which a majority of the members of the club feel exactly the way I do.

And I am wondering if the principles of this antidiscrimination policy might not better be served by having me remain as a member.

So I guess I am somewhat uncertain about what the better course to follow would be in this kind of situation.

Senator SIMON. I would simply say that I think the canon of ethics is fairly clear, and my own feeling is that you probably ought to reflect on that, and before your name is brought before the committee—and I will put a hold on that until the decision is made by you on that, because I think the canon of ethics is fairly clear, and I think that we should be abiding by that Canon of Ethics.

And I am not suggesting that you initiated the discrimination—as you said, it's an 18th- and 19th-century tradition. But some of the 18th- and 19th-century traditions are not good.

And I think whatever decision you make on that, if you can communicate that to the chairman of the committee and to me, I think that would be helpful to us.

Mr. ARNOLD. Very well, Senator.

Senator SIMON. You heard my question to at least one other nominee about what you have done to help the disadvantaged in your life as an attorney.

How would you respond to that?

Mr. ARNOLD. Well, when I was a young practitioner in Arkansas, I was fairly frequently appointed to represent indigent defendants in criminal matters. I remember one case in particular in which I wrote a brief in support of a petition for writ of ceriorari to the Supreme Court of Arkansas from the Supreme Court of the United States. All of this was done, of course, free of charge, and I was glad to do it, because I thought it was my duty.

More recently, I have been a member of Volunteers of Central Arkansas Legal Services. A few years ago, when some cuts were made to the Legal Services budget, the Legal Services Corporation of Arkansas initiated a program in which it elicited the support of the local bar in order to pick up some of the slack. And I was a member of that organization I think for 2 years, and during that time I represented a number of indigents, free of charge again.

Then also in my teaching—I teach legal history, among other subjects—I have emphasized the notion of equality in American history, and changes that the idea has undergone over the years and its centrality and importance in our history.

Senator SIMON. I thank you.

Mr. ARNOLD. Thank you, Senator.

Senator MCCONNELL. Thank you, Senator Simon. Mr. Arnold, any members of your family here that you would like to introduce?

Mr. ARNOLD. Yes, Senator. I would like to introduce my brother, Judge Richard S. Arnold of the Eighth Circuit Court of Appeals.

Senator MCCONNELL. Judge, glad to have you here.

Thank you, sir.

Mr. ARNOLD. Thank you.

Senator MCCONNELL. I would like to call now for the third time, Mr. Conmy. You are getting used to that path up the middle there.

Would you raise your right hand, please.

[Mr. Conmy stands and raises his right hand.]

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. CONMY. I do.

TESTIMONY OF PATRICK A. CONMY, OF NORTH DAKOTA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NORTH DAKOTA

Senator MCCONNELL. The chairman has asked me to ask you three questions. You have been a practicing attorney since 1959; since 1979 you have served as a member of the North Dakota House of Representatives. Now you have been nominated to be U.S. district judge for the district of North Dakota.

Do you feel this experience will be beneficial to you as a Federal district court judge?

Mr. CONMY. Mr. Chairman, yes, I do. The experience of chairing the House Judiciary Committee for two terms and one interim in North Dakota I think is an invaluable experience in understanding the process by which laws are made, the give and take, the compromises, the language problems that sometimes arise. And I think it's of great assistance to someone to have the legislative background and knowledge in the preparation of the laws.

Senator MCCONNELL. Thank you. How does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection clauses?

Mr. CONMY. Mr. Chairman, I would say that the questions aren't open-ended in the sense that there is a body of case law both at circuit and Supreme Court level which describes the parameters of the problem, the decisions, indicate the course of conduct that fits in with the supervisory court's opinions on the matter—and I hope there is an ample stare decisis body of law to guide one in that fashion.

Senator MCCONNELL. Mr. Conmy, are there ever circumstances under which a judge should attempt to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. CONMY. Mr. Chairman, I would say no. But again, based on the legislative experience I've had, I am jealous, in a sense, of my power as an elected legislator responsible to the electorate to make the laws. And I am upset when someone who is not answerable to the electorate seeks to secondguess the process we have done, the process we have gone through.

But, with full awareness that we have passed out some things that Solomon couldn't decipher—so there are some bad bits of writing, and heaven help the courts in dealing with them.

Senator McCONNELL. Senator Simon?

Senator SIMON. Thank you. Mr. Conmy, as I look through your questionnaire, I note in the answer to the one question about your law practice, 99 percent civil and 1 percent criminal.

Do you plan to do anything to kind of beef up your background on the criminal side of this experience after you take that oath as a judge?

Mr. CONMY. Very much, Senator. Literally everything I can do. I have a feeling I could sit in a civil trial without a piece of paper in front of me and have no difficulty. I am at the moment frankly frightened of my ability to handle a major criminal jury trial without doing a great deal of research and without help. And I am attempting to get that additional background.

Senator SIMON. We have had a few people, some of whom have had no trial experience at all—you are certainly in much better shape than many of them—but they have said they are just going to take some time off, go into another jurisdiction and just sit through a few trials in order to gain some sense of how things are handled.

I am not mandating anything like that, but I pass it along simply as one way of balancing that experience which, as your record indicates, is a little deficient in that area.

I just pass that along.

You have heard me ask others about the American Bar Association's Canon of Ethics on helping the disadvantaged.

What have you done in your work, either as an individual or as an attorney?

Mr. CONMY. Senator, my partners are, in a sense, glad to get rid of me, because I have a reputation of never being able to say no and not being smart enough to collect fees in advance. My reaction is: They can't do that to you! And I will put in an answer, I will take action.

And that is just I guess from a combative Irish nature.

For one, I was delighted to see Legal Assistance come in, because that relieved me from all the impecunious domestic relations clients; it relieved us in part from the court appointments for criminal defense. I could not escape them completely. I have six children, all of whom are active and interested in motor vehicles, all of whom have many friends, and I have spent many, many hours involved with the automobile and the infractions teenagers get into with them, all without pay.

I have served on a number of supreme court committees. Whether that relates to the political aspect or the legal professional aspect, I don't know.

We have really a tradition in North Dakota of voluntary assistance, sometimes not intended but frequently intended. I think our record is good as a bar association.

Senator SIMON. I thank you. I have no further questions.

Senator McConnell. Thank you, Mr. Conmy. Do you have any members of your family here you would like to introduce?

Mr. Conmy. No, Senator, but I do have a lovely guide and chauffeur, the eldest daughter of one of my law partners, Beth Nodland. I will embarrass her by introducing her.

Senator McConnell. Hello, how are you? Well, you couldn't have afforded to bring six people here anyway.

OK, Judge Hughes?

If you would raise your right hand.

[Judge Hughes stands and raises his right hand.]

Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge Hughes. Yes, sir, I do.

TESTIMONY OF LYNN N. HUGHES, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

Senator McConnell. The chairman has asked me to ask you three questions.

Judge Hughes, you have served on the 189th District Court for the State of Texas since 1981. How do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a district court judge?

Judge Hughes. Well, Senator, I feel that having tried complex civil cases intensively, mostly to a jury, for the last 6 years as a judge, as well as teaching law school 13 years in what I laughingly refer to as my spare time in the evening, as well as being the chairman of the Rules Committee of the Board of District Judges, which includes the criminal courts—all of that has given me an appreciation of what will be required in the Federal district court.

Senator McConnell. Thank you, Judge. What are your views of the primary purposes of the criminal justice system?

Judge Hughes. Assuming that the question refers to the Federal criminal system, first it is a supplement to the more thorough State criminal justice system, and it is intended to deter by punishment those among us who cannot voluntarily follow the rules.

Senator McConnell. Judge Hughes, to what extent do you see the American system of federalism, or division of responsibilities between the National and State Governments, as an institution for checking the abuse of Government powers?

Judge Hughes. The division vertically of all of our governments into the branches of the legislative, judicial, and the executive is one aspect of our republican form of government; and then dividing it horizontally between the National Government, the regional government, the State, and the local governments, the cities, counties, and special districts, gives a diffusion of power, much of it very close to the people.

And that prevents an aggregation and an abuse of power in any particular area.

Senator McConnell. Senator Simon?

Senator Simon. Yes, thank you. One of the more intriguing little items in your background is that you are a member of the American Anthropological Association. I look forward to your observations about the Federal judiciary. I think you will be the only member of the Federal judiciary who is a member of the American Anthropological Association.

Judge HUGHES. My mother, when she found out that I was majoring in anthropology, said "There's just no chance you are going to get a job with that, is there?" I said "No, ma'am, I have to go to law school."

Senator SIMON. Well, you are a little bit of a Jeffersonian type of person.

I was intrigued by the fact that you were active in judicial selection in the bar of Texas.

Judge HUGHES. Yes, sir.

Senator SIMON. What criteria did you use in selecting judges?

Judge HUGHES. Perhaps you are misled. What I have been doing for the last 8 years is trying to change the method of selection. We had no influence—and that is not an exaggeration—on either the elections or the Governor's selection. Texas is one of the few States that has a completely partisan election system, with no commissions, no vacancy commissions, no retention elections. And I was working to modify, I would suggest, to reform that system, to implement some sort of vacancy commission or retention election, to further separate the judicial function from ordinary policy politics.

Senator SIMON. I was looking for some guidance that we might use here at the Federal level for criteria—and I am afraid the State of Texas is not going to provide that kind of example.

Judge HUGHES. No, sir.

Senator SIMON. I have no further questions.

Senator MCCONNELL. Thank you, Senator Simon.

Senator SIMON. Thank you.

Senator MCCONNELL. Judge Hughes, do you have any members of your family you want to introduce?

Judge HUGHES. No, sir. My wife is teaching school and the three children are going to school.

Senator MCCONNELL. That's a worthy undertaking. Thank you.

Judges HUGHES. Thank you.

Senator MCCONNELL. Nicholas Tsoucalas, of New York, who has been nominated by the President to be on the U.S. Court of International Trade.

If you will raise your right hand.

[Mr. Tsoucalas stands and raises his right hand.]

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TSOUCALAS. I do.

TESTIMONY OF NICHOLAS TSOUCALAS, OF NEW YORK, TO BE A JUDGE OF THE U.S. COURT OF INTERNATIONAL TRADE

Senator MCCONNELL. Judge Tsoucalas, the Customs Court Act of 1980 provided for the Court of International Trade. This court has jurisdiction over any civil action against the United States arising from Federal laws governing import transactions.

Judge Tsoucalas, what advantage, in your opinion, does the new court provide over the previous customs court?

Judge TSOUCALAS. Well, the advantage is that it takes a lot of the burden off the district courts and brings it into the Customs Court, and it brings about a better dealing with the court system. Instead of having two courts handle various matters dealing with importation, they have the one court dealing with it.

Senator MCCONNELL. Judge Tsoucalas, do you have any recommendations for changes in the Customs Court Act that would benefit the Court of International Trade?

Judge TSOUCALAS. Well, I wouldn't make any recommendations until I sat there for awhile to see what it's like before I make any recommendations.

Senator MCCONNELL. Sounds reasonable. Are there ever circumstances under which a judge should attempt to establish new judicial precedents, and, if so, what are the criteria that you would use in order to determine the propriety of reversing an existing precedent?

Judge TSOUCALAS. Well, I believe that precedents, as far as it goes, should be followed by a judge either in the district court or in the lower courts. I don't think they should come out and change laws on their own.

However, if a case comes up where you believe there is definitely a mistake that was made, and the facts show a difference than the decision that a court of appeals or the Supreme Court have made, then I would say you can state your opinions, but not change the law. Because you are not the Supreme Court and you are not the court of appeals.

Senator MCCONNELL. Thank you. Senator Simon.

Senator SIMON. Thank you. Judge Tsoucalas, you heard me read before the Canon of Ethics for Judges.

Judge TSOUCALAS. I did.

Senator SIMON. And my notes here say that you are a member of the New York Athletic Club.

Judge TSOUCALAS. That's right.

Senator SIMON. An all-male club. Do you intend to comply with the code of ethics?

Judge TSOUCALAS. Yes.

Senator SIMON. And you will be resigning then from the club?

Judge TSOUCALAS. If I have to, I will.

Senator SIMON. Pardon?

Judge TSOUCALAS. I will.

Senator SIMON. One other question. With a good Greek name, you have to be more sensitive to this area of ethics than others must be, others of us who can't claim a marvelous Greek name.

Has anyone asked you questions that you would consider improper as a result—in the process of your consideration for being nominated?

Judge TSOUCALAS. No.

Senator SIMON. Did any organization ask you questions other than the Justice Department?

Judge TSOUCALAS. The International Trade Bar interviewed me.

Senator SIMON. But other than bar associations and the Justice Department, there was no group that cleared you, so to speak?

Judge TSOUCALAS. No.

Senator SIMON. I have no further questions.

Senator McCONNELL. Thank you, Senator Simon. Any family members you would like to introduce?

Judge TSOUCALAS. No, Senator.

Senator McCONNELL. Thank you. Senator Mathias has arrived, and I am going to ask him, if he will, to finish up the last two witnesses, and also he may have some additional questions.

Thank you, Senator Mathias.

Senator MATHIAS [presiding]. Mr. Richard J. Kaplan, president of the Customs and International Trade Bar Association.

Mr. Kaplan, if you will rise and raise your right hand.

[Mr. Kaplan stands and raises his right hand.]

Do you swear that in the matter now pending you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAPLAN. I do.

TESTIMONY OF RICHARD J. KAPLAN, PRESIDENT, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION, NEW YORK, ACCOMPANIED BY DAVID BUSBY, ESQ.

Senator MATHIAS. Would you each please state your name for the record so the reporter can identify you.

Mr. KAPLAN. My name is Richard Kaplan, I am appearing here to comment on the nomination of Nicholas Tsoucalas to be a member of the Court of International Trade, a national court located in New York, and I am accompanied today by Mr. David Busby, chairman of the judicial selection committee of the Court of International Trade Bar Association.

Senator MATHIAS. We are going to ask you if you will be kind enough to limit your testimony to 5 minutes. If you have a written statement, it will be included in the record.

Mr. KAPLAN. I would ask that my full written statement be included as a part of the record.

Senator MATHIAS. Without objection, it's so ordered.

Mr. KAPLAN. And I will attempt briefly to cover some of the points made in that statement.

I am the president of the Customs and International Trade Bar Association, which is a national bar association whose members practice before the Court of International Trade which happens to be located in the city of New York, and before the Court of Appeals for the Federal Circuit, which happens to be located here in Washington, DC.

Our members are vitally concerned with the nominees to these two courts. The concern is not new. For more than 50 years these courts and their predecessors, the Customs Court and the Court of Customs and Patent Appeals, have been the principal courts before which attorneys engaged in the practice of customs and international trade law appeared.

To summarize briefly the points made in my full written statement, first, we are concerned that the Court of International Trade which in fact is a national court, dealing with the most important international trade issues, is becoming too provincial a court. Nicholas Tsoucalas' appointment would mean that seven of the nine sitting judges will be from New York State. And it is anticipated that before the end of the year one of the two judges who is not from New York State will be seeking senior status.

We are unalterably opposed to geographical quotas of any sort in the selection of candidates to a national court. We firmly believe that nominations to the court should be founded on intellectual excellence, judicial demeanor, integrity, and legal experience in the customs and international trade sector.

However, to make the point again, we deplore the present de facto bias apparently applied to nominations to the Court of International Trade, one part of which seems to be New York citizenship.

Second, this court needs judges who are at least as good as the calibre of those for any U.S. district court in this country. International trade issues are increasingly involving complex rules and regulations as well as intricate multinational financial transactions.

As you well know, through legislation sponsored by this committee, the jurisdiction of the courts has been expanded; their significance both domestically and internationally to international trade and customs matters is of even far greater impact than it was before.

Most cases before the courts involve millions, and in some cases involve billions of dollars. Substantially all of the cases affect the lives of all Americans and often involve international relations with our trading partners as well.

Third, the Court of International Trade and its appellate tribunal, the court of Appeals for the Federal Circuit, have specialized substantive law jurisdiction. The courts are somewhat unique: They are in fact true national courts but national for a specialized substantive law jurisdiction.

We urge that a potential appointee's experience in the practice of this substantive specialty, customs and international trade law, be considered to some degree at least to be a desirable asset, hopefully to be possessed by candidates before they are given serious consideration for appointment as a judge of either court.

Last, and for reasons much more detailed and spelled out in my written testimony, even though the members of our bar association are those most directly and vitally affected, we have been and continue to be excluded from the nomination process for judicial appointments to the Court of International Trade. We believe this is working to the detriment of the courts, of the administration of justice, of the American people, as well as of the practitioners before these courts.

In conclusion, your committee devoted a great deal of time in developing and drafting the legislation which created these courts.

The national Court of International Trade is being unduly handicapped by the nomination of individuals from only one State and of individuals who rarely, if ever, have had any experience in the practice of customs and international trade law.

It is ludicrous to require New York citizenship to be a judge on a national court. We believe the rest of the country has something to offer the Court of International Trade, and that this national court is being tainted by geographic discrimination, de facto though it be.

We urge this committee to make superior quality a sine qua non for nomination to the court. The post is just simply too important to the Nation's economic wellbeing to allow for the appointment of less than outstanding judges—and in our written statement we have emphasized the point that in fact, in the course of recommendations, giving qualifications to appointees, the American Bar Association rates various nominees exceptionally well-qualified, qualified, or not qualified for district court appointments. We have suggested and in fact we have asked the ABA committee to give us their opinion, and we suggest that this committee ask it in the future, to give its opinion of the qualifications of an appointee to the Court of International Trade as though he were being considered for the most prestigious district court in the country.

On behalf of the association, I thank the committee for the opportunity to submit our written testimony and to give this testimony, and we would be willing to answer any questions the committee might have.

[The following was received for the record:]

November 6, 1985

STATEMENT OF RICHARD J. KAPLAN, PRESIDENT, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION AT THE HEARING OF THE UNITED STATES SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF JUDGE NICHOLAS TSOUCALAS TO THE UNITED STATES COURT OF INTERNATIONAL TRADE

I. INTRODUCTION

My name is Richard Kaplan and I appear to comment on the nomination of Nicholas Tsoucalas to be a member of the Court of International Trade, a national court located in New York. I am accompanied today by David Busby, Chairman of the Judicial Selection Committee of our bar.

I am the President of the Customs and International Trade Bar Association (CITBA), a national bar association whose members practice before the Court of International Trade (CIT) in New York and the Court of Appeals for the Federal Circuit (CAFC) here in Washington. Our members are vitally concerned with nominees to these two Courts. This concern is not new; for more than 50 years these Courts and their predecessors, the Customs Court and the Court of Customs and Patent Appeals (CCPA), have been the principle courts before which attorneys engaged in the practice of Customs and International Trade law appear. I will limit my brief remarks to four important points:

1. We are concerned that the [illegible] national Trade — a national court dealing with the most important international trade issues — is becoming too provincial. Nicholas Tsoucalas' appointment would mean that 7 of the 9 judges will be from New York State.

2. This court needs judges, at least as good as the calibre of those for the U.S. District Courts. International trade issues increasingly involve complex rules and regulations, as well as intricate multinational financial transactions. Most cases involve millions, and some cases involve billions, of dollars, affect the lives of all Americans, and often involve international relations with our trading partners.

3. The Court of International Trade and its appellate tribunal, the Court of Appeals for the Federal Circuit, have specialized substantive jurisdiction. We urge that a potential appointee's experience in the practice of customs and international trade law be considered a desirable asset to be possessed by candidates before they are given serious consideration for appointment as a Judge of either court.

4. Even though the members of our bar association are most directly and vitally affected, we continue to be excluded from the nomination process for judicial appointments to the Court of International Trade. We believe that this works to the disadvantage of this Committee and of the nation in securing the most qualified judges for appointment to the CIT.

II. THE COURT IS BECOMING TOO PROVINCIAL

The Court of International Trade is a national court in every sense. The court hears and tries cases throughout the United States and its territories, and has exclusive jurisdiction over international trade matters arising anywhere in the United States. Nevertheless, nearly all of its current judges have been appointed from the State of New York.

As a New York lawyer, I do not suggest or imply that there is anything wrong with the State of New York or the quality of its lawyers. However, I do raise these questions: Are there no individuals from states other than New York qualified to sit on a Court dealing with vitally important national and international issues affecting all Americans? Are there Senators, other than those from the State of New York, who have constituents worthy of consideration for appointment to this National Court? Would this Committee be comfortable if 7 of the 9 U.S. Supreme Court Justices were from one state?

We are unalterably opposed to geographical quotas of any sort in the selection of candidates to a national court. We firmly believe that nominations to the Court of International Trade should be grounded on intellectual excellence, judicial demeanor, integrity, and legal experience in the customs and international trade sector. However, we deplore the present de facto bias applied to nominations to the Court of International Trade, one part of which seems to be New York citizenship.

III. THE COURT OF INTERNATIONAL TRADE REQUIRES INTELLECTUAL EXCELLENCE

International trade problems have become one of the nation's leading concerns. One need only consider a few statistics. In 1950, U.S. imports amounted to $10.3 billion. In 1980, U.S. imports amounted to $295.7 billion. As of October 1, 1985, over $267.6 billion of imports entered the United States.

The role the Court plays in international trade cannot be over emphasized. These staggering import statistics underscore the fundamental importance of nominating judges to the Court who are intellectually at least the equal of, if not even more capable than, U.S. District Court appointees. The rules and regulations governing international trade are enormously complex. The policy considerations which support the United States' trade laws can involve questions of exceptionally broad importance. The financial transactions involved are often extraordinarily large, in some cases involving billions of dollars.

The decisions of this Court governing international trade law are simply too important to this country's economic well being to be left to anyone less than an above average federal judge. We urge this Committee to insist that all nominees to the Court of International Trade be a "cut above" the average Federal District Court judicial candidate. In this regard, we have requested the American Bar Association's (ABA) Standing Committee on Federal Judiciary, to advise whether it would find Nicholas Tsoucalas to be exceptionally well qualified, well qualified, qualified, or not qualified for an appointment to the Southern or Eastern District Courts of New York. Any judge who is not rated at least well qualified for any District Court appointment should not be considered for appointment to the Court of International Trade and any Administration which seeks the appointment of such an individual to the Court of International Trade should have its appointee rejected by your Committee. You are in a position to demand that each and every future nominee for appointment to the Court of International Trade be rated as being well qualified or better for a District Court appointment. We urge you to impose such minimum standards for appointments to the Court of International Trade and comparable appellate court standards for future appointments to the Court of Appeals for the Federal Circuit.

IV. CONSIDERATION SHOULD BE GIVEN TO NOMINEES HAVING SOME EXPERIENCE IN THE ACTIVE PRACTICE OF CUSTOMS AND INTERNATIONAL TRADE LAW

For many years there has existed in the United States a segment of the bar consisting of attorneys, both in private practice and within government service, whose practice has been concentrated in handling customs and international trade matters and disputes, administratively, before the Customs Service, Treasury Department, Department of Commerce, the Office of the President's Trade Representative, and the International Trade Commission (ITC) and in handling litigation and appeals before the specialized national customs and trade courts. The Court of International Trade and its appellate tribunal, the Court of Appeals for the Federal Circuit, are unique in that they have specialized substantive jurisdiction which is national in scope unlike that of the Federal District Courts and other Circuit Courts of Appeal. These courts interpret the application of congressional acts in the customs and trade areas; the validity and enforceability of agency regulations; the legality of executive action; and the affect and scope of international trade agreements, including various international textile agreements and the international dumping or subsidy codes. The outcome of these customs and trade cases directly affect employment patterns, both domestic and foreign, patterns of international trade, consumer interests, and other issues directly affecting the U.S. economy.

Customs and international trade law eventually can be learned through on the job experience, if necessary, but it is more desirable that experience within this specialized area of law should be accorded some weight in seeking potential candidates for appointment to this national court of specialized substantive jurisdiction.

As an association of lawyers involved in the unique practice before these specialized courts, we have already urged that appointees to these courts be among the most qualified and competent of prospective federal judicial appointees. We also urge that this Committee insist that appointees be sought out from among competent and qualified lawyers who have acquired knowledge and skills in the field of customs and international trade law through experience in the practice of this substantive specialty.

V. THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION SHOULD PLAY A ROLE IN THE NOMINATION PROCESS

Two years ago we appeared before this Committee to urge it to include our Association in the selection process for nominees to the Court of International Trade and the Court of Appeals for the Federal Circuit. We then met with responsible officials at the White House and the Department of Justice, who indicated they would welcome our participation in the process. I regret to say that we continue to be effectively ignored and excluded.

U.S. District Court nominees are generally well known to other lawyers practicing before the courts in their respective states or geographic areas. Consequently, such nominees are generally afforded a peer review, by those familiar with their reputation and practice, when their nomination is reviewed by local representatives of the ABA. However, our members are the lawyers who practice extensively before the customs and trade courts and comprise the peer group most directly concerned with the quality of these courts. Yet, for all this expertise, we have effectively been excluded from the selection process. Without our active participation in the selection process there is no real peer review of nominees by those who practice before these specialized courts.

We want to review the qualifications of candidates to the Court of International Trade. Your Committee surely wants to receive the most informed comment possible to aid its deliberations. Therefore, we have a common interest. To help this Committee, we must be allowed to do more than merely review the candidate whose nomination has already been sent to this Committee. This is too late in the process for meaningful substantive input. If the President, the Justice Department, and this Committee wish to establish and maintain high standards of excellence for this Court, our bar association must be permitted to play a more meaningful role in the appointment process. We must be able to suggest individuals who have attained the nationwide respect of their peers and are worthy of your consideration. This is a modest request which can only help the process of selecting the most highly qualified individuals for these specialized national courts.

Last year, representatives of the Customs and International Trade Bar Association met with officials from the Department of Justice and the White House regarding the process of filling judicial vacancies on the CIT and CAFC. We were informed of their past difficulties in finding qualified candidates for these Courts who have had experience with Customs and International Trade practice and who are willing to accept a judicial appointment. Subsequently, we asked our own members and others engaged in Customs and International Trade practice throughout the United States to furnish us with the names of lawyers they felt would be outstanding candidates for appointment to the Court of International Trade. After screening by our judicial selection committee, we carefully reviewed the records of nine highly qualified, experienced customs and international trade lawyers, each of whom was willing to accept an appointment to the CIT. Our Committee reviewed all of their writings, their experience, their reputations amongst their peers and, after careful consideration, confirmed that there were indeed customs and trade practitioners (not necessarily CITBA members) who do possess the requisite qualities and experience for appointment to the CIT. The Committee passed on its recommendation to both the White House and the Department of Justice.

Our Association is disheartened and discouraged about the unwillingness of the process to accept a non-political, meritorious review and recommendation. Instead, we feel as though we have been led down the garden path and that the American people are the losers. As the only national organization of practitioners before the CIT, we believe that we are in a unique position to conduct a peer review of any potential judicial candidate who has had experience practicing before this non-regional court. In the interest of seeking out experienced, intelligent candidates who enjoy the respect of their peers, our Association should be given a more significant role in the appointment process by both the Administration and this Committee.

VI. CONCLUSION

Your Committee devoted a great deal of time in developing and drafting the legislation which created the Court of International Trade and the Court of Appeals for the Federal Circuit. These Courts often deal with complex rules and regulations involving, in turn, complex financial and economic issues. Even more important, these Courts have exclusive jurisdiction over these critical issues, subject only to appeal to the Supreme Court — which is rarely accepted.

The national Court of International Trade is being unduly handicapped by the nomination of individuals from one state and of individuals who rarely, if ever, have had any experience in the practice of customs and international trade law. It is ludicrous to require New York citizenship to be a judge on a national court. We believe that the rest of the country has something to offer the Court of International Trade, and that this national Court is being tainted by geographic provincialism.

Further, we urge this Committee to make superior quality a sine qua non for nomination to the Court. This post is simply too important to the nation's economic well being to allow for the appointment of less than outstanding judges.

Further, wherever possible, some consideration should be given to the experience and legal background of potential nominees. All other things being equal, qualified candidates should be encouraged and sought out from among those who have learned something of customs and international trade law during their years of practice.

Finally, the Customs and International Trade Bar Association should be included as an active and officially accepted participant in the nomination process. Our bar association can and should play an important role in proposing candidates and in the peer review of nominees before appointment to this lifetime position.

Thank you very much.

Respectfully submitted,

Richard J. Kaplan, President
Customs and International
Trade Bar Association

Senator **Mathias**. Thank you very much, Mr. Kaplan. Mr. Busby.

Mr. **Busby**. I have no statement, Senator Mathias. I would be glad to answer questions.

Senator **Mathias**. Thank you. Senator Simon, do you have questions?

Senator **Simon**. Just very briefly. You touch on two things. One is that you be consulted in the process.

I will send a letter to the Justice Department asking that this be done in the future. I have to say I am not the most senior member of this committee—in fact, I am the least senior member of this committee—but I think that request is a modest one.

Mr. **Busby**. Senator, we have done that both in person and by letter.

Senator **Simon**. Well, we will try and buttress your request.

Mr. **Busby**. Thank you.

Senator **Mathias**. I will be happy to join with you.

Senator **Simon**. Good.

Mr. **Busby**. Thank you.

Mr. **Kaplan**. A point that we make, Senator, is the fact that appointees to the district courts, since they are in fact regionally, territorially, limited, receive a true peer review by regional representatives of the ABA. In fact, the only peers, the only group that practices trade law before the two courts we are talking about, are the members of our association.

And appointees to these courts have not, in the past, been receiving that kind of true peer review.

Senator **Mathias**. If the Senator would yield; are you the only bar association that represents lawyers who practice before the Customs Court?

Mr. **Kaplan**. That's correct, Senator.

Senator **Mathias**. So there is only one group to be consulted.

Mr. **Kaplan**. There is one bar association in existence nationally representing customs and international trade lawyers, and this association is it.

Senator **Mathias**. After I said that I would join with Senator Simon, I thought I had better consider how many different organizations might have to be consulted—but if it's only one, I do not forsee any problem.

Senator **Simon**. I certainly think it does. I think that is not asking too much.

The second thing you touch upon is the whole question of quality of nominees. And this is a problem that goes much beyond—and I don't mean this disrespectfully now to the judge who has just been the most recent nominee—but time and time again we are finding nominees who just barely get by bar association requirements. We are finding very few who get a well-qualified rating.

And I would urge you—perhaps you might get in touch with Mr. Robert Fiske who heads the committee for the American Bar Association, to reflect on what the bar association itself can do.

In addition to the grades we now get—they are not called grades but that's essentially what they are—I think it would be very helpful if the bar association would in addition simply say: We recommend that Tom Jones or Jane Smith be approved, or we recommend that he or she not be approved.

The bar association, candidly, is not helping this process as much as it should, and I think we need greater assistance to improve the quality of the nominees that we are receiving.

I have no further questions, Mr. Chairman.

Mr. KAPLAN. Senator, to respond to the non-question, after meeting with the people from the Justice Department and the White House at the end of last year, one of the things that was indicated to us was that they have in the past had great difficulty finding well-qualified potential judicial appointees who also have experience in the areas of customs and international trade law.

Taking the challenge, Mr. Busby's committee of our association circulated not only the bar but all practitioners before the Court of International Trade, and subsequently interviewed nine individuals, all of whom indicated a desire and a willingness to accept appointment if it were to be forthcoming, and we submitted to both the Justice Department and the White House at least the most qualified, in the eyes of the bar association, individual as a potential appointee to that court.

It is the fact that this apparently has been to no avail that is one additional reason for bringing us to you today.

Mr. BUSBY. In other words, they asked us to help in the process and then ignored our recommendation. So we have our nose a little out of joint on that.

Senator MATHIAS. If it's any comfort to you, that's not a unique experience.

Senator SIMON. I have no further questions.

Senator MATHIAS. Let me ask about this geographical limitation. My experience in human affairs would lead me to believe that this was originally a protective device established by the New York lawyers to keep the judgeship at home. Am I correct?

Mr. KAPLAN. I think not. As a New York lawyer, I find myself advocating the national basis of this court.

Senator MATHIAS. That's what intrigued me. What is the origin of this geograpical limitation?

Mr. BUSBY. Senator, that has originated in the last few years, the last 3 to 5 years. Before that it was a truly national court, and we had judges on it from all over the United States.

Senator MATHIAS. This is a practice that has sprung up in recent years?

Mr. KAPLAN. Apparently the most recent appointees have all been from New York, and there has been a plethora of recent appointees.

Senator MATHIAS. Well, as the representative of the great port city of Baltimore, I am sure we can find some lawyers from outside New York who are qualified for this court.

We will consider this very carefully, and appreciate very much your attendance here today. Thank you very much.

Mr. BUSBY. Thank you, Senator.

Senator MATHIAS. Our next witness is Estelle Rogers, the National Director of the Federation of Women Lawyers' Judicial Screening Panel.

Will you please raise your right hand?

[Ms. Rogers stands and raises her right hand.]

Do you swear that the testimony you will give in the matter now pending will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. ROGERS. I do.

Senator MATHIAS. We will ask you to limit your oral statement to 5 minutes, but any written statement you may have will be included in the record in full.

TESTIMONY OF ESTELLE H. ROGERS, NATIONAL DIRECTOR, FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL, WASHINGTON, DC

Ms. ROGERS. Thank you, Senator. Mr. Chairman, Senator Simon, my name is Estelle H. Rogers, and I appear here as the National Director of the Federation of Women Lawyers, Judicial Screening Panel, with respect to the nomination of John T. Noonan, Jr.

First, I would like to express my appreciation for this opportunity to testify before you on behalf of the Federation of Women Lawyers' Judicial Screening Panel. This is the organization which evaluates potential nominees to the Federal judiciary primarily on the basis of their demonstrated commitment to equal justice under law. That phrase, "demonstrated commitment to equal justice," is found in two Executive orders signed by President Carter in 1978 in which he enunciated the standards for the merit selection of judges, among them legal ability, integrity, judicial temperament, and a "demonstrated commitment to equal justice under law." These Executive orders have never been rescinded, and the principles set forth therein have the full force of law today.

How do these standards apply to John T. Noonan, Jr., the nominee who is the subject of this hearing? As women and as lawyers, we of the Federation of Women Lawyers are deeply concerned about the fitness of John Noonan to sit on the Ninth Circuit Court of Appeals. Although our concern stems from Professor Noonan's well-publicized views on abortion, I wish to emphasize that it is not his views, but rather the intemperate zeal with which he holds and expresses them, that forms the basis of our opposition to his nomination. Let me make it clear that I have not come here to disagree with Professor Noonan's position on abortion, nor do I intend to debate the wisdom of the Supreme Court's decision in *Roe* v. *Wade*. I am not a constitutional scholar. I am a feminist lawyer representing other feminist lawyers who are working to ensure a Federal judiciary committed to fairness and equity, in the finest tradition of American law.

Nor am I here to cast aspersions on Professor Noonan's extensive written work on abortion. However, one cannot help but be struck by its tone. There is a certain passion, an emotional pitch, if you will, which pervades Professor Noonan's work on the subject, whether scholarly articles, book reviews, "op-ed" pieces, or congressional testimony. In short, he writes on abortion with a fervor which ill befits a Federal appellate judge, to whom we entrust the awesome duty of adjudicating all of the cases which come before him, fairly, impartially, and with due deference to the Constitution and laws of the United States. Upon reading this body of work, one is forced to pause and consider whether such fervor could magically disappear with the incantation of the oath of office.

Let there be no mistake about it: Abortion is not an incidental or trivial issue in the life of a Federal judge. As Professor Noonan himself pointed out in hearings before a subcommittee of this committee in 1981, "The enforcement of this right * * * has required constant litigation and the judicial overruling of dozens of municipal ordinances and State laws," including suits against doctors and hospitals refusing to perform abortions, zoning challenges to abortion clinics, and cases involving the regulation of late-term abortions. Abortion is an issue which will almost inevitably face any circuit court judge in this country, and before this committee puts its imprimatur upon this nominee, it must examine whether the record supports the proposition that John T. Noonan could discharge his judicial duties "agreeably to the Constitution and laws of the United States," as a Federal judge's oath of office requires.

It strains reason to expect that a man who has spent 12 years and hundreds of pages excoriating *Roe* v. *Wade* as "the [supreme] court's amendment of the Constitution," and an opinion which "could have been authored by Paul Ehrlich or Bella Abzug," can suddenly, dutifully follow its dictates, casting aside all of the abhorrence he has felt so deeply and for so long. It is even more foolish to expect that those seeking justice at the bar could approach Judge Noonan, were he to be confirmed, confident that he could be fair and free from bias if he were called upon to hear and decide a case involving abortion. Our citizens have a right to expect Federal judges to be capable of dispassionate reasoning in adjudicating the cases and controversies before them. Could we as citizens be secure in that right if this committee were to confirm a judge who has so passionately, so publicly embraced a position of moral absolutism in direct opposition to the law of the land, a judge who has called legal abortion, alternatively, annihilation, slaughter, and atrocity?

You have before you a nominee who seriously proposed overturning *Roe* v. *Wade* by packing the Supreme Court with six more, presumably like-minded, members; who, with absolutely no medical expertise, published an article entitled "The Experience of Pain in the Unborn," a thinly disguised attempt to rationalize religious conviction by an appeal to "scientific" truth. Perhaps most importantly, for almost 13 years, Professor Noonan has consistently and repeatedly misled the American public by stating that *Roe* v. *Wade* effects abortion on demand for all 9 months of pregnancy——

Senator MATHIAS. Ms. Rogers, we are running out of time.

Ms. ROGERS. Excuse me, Senator, I will just summarize the rest of my remarks.

He has claimed for almost 13 years that the decision of the Supreme Court in *Roe* v. *Wade* guarantees abortion on demand for 9 months of pregnancy, and this interpretation is in complete contradiction with all the scholarly work on the subject.

I would like to reiterate that the American system of justice sets standards for Federal judges; they are not ideological standards or political standards, but they are standards nonetheless. And one of them is that we can expect a Federal judge to listen and to be open-minded about the issues that come before him.

I have grave doubts—and I represent many others who have grave doubts—that Professor Noonan could accomplish this end.

Thank you, Senator.

[The following was received for the record:]

Federation of Women Lawyers' Judicial Screening Panel
2000 P Street, N.W., Suite 601, Washington, D.C. 20036 (202) 223-0011

NATIONAL DIRECTOR
Estelle H. Rogers, Esq.

MEMBERS-AT-LARGE*
Rhonda Copelon, Esq.
Nancy Davis, Esq.
Equal Rights Advocates, Inc.
Mary Gray, Esq.
Women's Equity Action League
Marcia Greenberger, Esq.
National Women's Law Center
Ruth L. Harvey, Esq.
National Association of
Black Women Attorneys
Prof. Marilyn Ireland
Section on Women and Legal
Education, Association of
American Law Schools
Marsha Levick, Esq.
NOW Legal Defense and
Education Fund
Judith Lichtman, Esq.
Women's Legal Defense Fund
Barbara Mendel, Esq.
Director, ABA
Young Lawyers' Division
Miriam Newman, Esq.
National Association of
Women Lawyers
Susan Perry, Esq.
Women's Rights Task Force,
National Conference of
Black Lawyers
Isabelle Katz Pinzler, Esq.
ACLU Women's Rights Project
Maria Rodriguez, Esq.
Chicana Rights Project,
Mexican-American LDEF
Lynn Hecht Schafran, Esq.
Phyllis N. Segal, Esq.
Ada Shen-Jaffe, Esq.
National Center on
Women and Family Law
Maureen Thornton, Esq.
League of Women Voters
Education Fund
Dolores Pegram Wilson, Esq.
Women's Division,
National Bar Association

CIRCUIT REPRESENTATIVES
1st Circuit
Prof. Ruth F. Chevion
2nd Circuit
Michele F. Moss, Esq.
3rd Circuit
Sharon A. Bembery, Esq.
4th Circuit
Sharon Thompson, Esq.
5th Circuit
Joellen Snow, Esq.
6th Circuit
Elizabeth C. Barker, Esq.
7th Circuit
Aviva Futorian, Esq.
8th Circuit
Ragnhild Anne Westby, Esq.
9th Circuit (North)
Kimberly Osenbaugh, Esq.
9th Circuit (South)
Betty C. Bullock, Esq.
10th Circuit
Betty Jones, Esq.
11th Circuit
Ellen Freidin, Esq.
D.C.
Zona F. Hostetler, Esq.

---

*Organizational affiliations for purposes of identification only

STATEMENT OF ESTELLE H. ROGERS AT THE CONFIRMATION HEARINGS OF JOHN T. NOONAN, JR.

Committee on the Judiciary
United States Senate

November 6, 1985

Mr. Chairman, members of the Judiciary Committee. First, I would like to express my appreciation for this opportunity to testify on behalf of the Federation of Women Lawyers' Judicial Screening Panel, the organization which evaluates potential nominees to the federal judiciary primarily on the basis of their demonstrated commitment to equal justice under law. That phrase -- demonstrated commitment to equal justice -- is found in two Executive Orders, signed by President Carter in 1978, in which he enunciated the standards for the merit selection of judges -- among them, legal ability, integrity, judicial temperament, and a "demonstrated commitment to equal justice under law." These Executive Orders have never been rescinded, and the principles set forth therein have the full force of law today.

How do these standards apply to John T. Noonan, Jr., the nominee who is the subject of this hearing? As women and as lawyers, we of the Federation of Women Lawyers are deeply concerned about the fitness of John Noonan to sit on the Ninth Circuit Court of Appeals. Although our concern stems from Professor Noonan's well-publicized views on abortion, I wish to emphasize that it is not his views, but rather the intemperate zeal with which he holds and expresses them, that forms the basis of our opposition to his nomination. Let me make it clear that I have not come here to disagree with Professor Noonan's position on abortion, nor do I intend to debate the wisdom of the Supreme Court's decision in Roe v. Wade.[1] I am not a constitutional scholar. I am a feminist lawyer representing other feminist lawyers who are working to ensure a federal judiciary committed to fairness and equity, in the finest tradition of American law.

Nor am I here to cast aspersions on Professor Noonan's extensive written work on abortion. However, one cannot help but be struck by its tone. There is a certain passion, an emotional pitch, if you will, which pervades Professor Noonan's work on the subject -- whether scholarly articles, book reviews, "op-ed" pieces, or Congressional testimony. In short, he writes on abortion with a fervor which ill befits a federal appellate judge, to whom we entrust the awesome duty of adjudicating all of the cases which come before him, fairly, impartially, and with due deference to the Constituton and laws of the United States. Upon reading this body of work, one is forced to pause and consider whether such fervor could magically disappear with the incantation of the oath of office.

---

[1] 410 U.S. 113 (1973).

Let there be no mistake about it: abortion is not an incidental or trivial issue in the life of a federal judge. As Professor Noonan himself pointed out in hearings before a subcommittee of this committee in 1981,[2] "The enforcement of this right . . . has required constant litigation and the judicial overruling of dozens of municipal ordinances and state laws," including suits against doctors and hospitals refusing to perform abortions, zoning challenges to abortion clinics, and cases involving the regulation of late-term abortions. Abortion is an issue which will almost inevitably face any Circuit Court judge in this country, and before this Committee puts its imprimatur upon this nominee, it must examine whether the record supports the proposition that John T. Noonan could discharge his judicial duties "agreeably to the Constitution and laws of the United States,"[3] as a federal judge's oath of office requires.

It strains reason to expect that a man who has spent twelve years and hundreds of pages excoriating Roe v. Wade as "the [Supreme] Court's amendment of the Constitution"

---

[2] Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess, on S.J. Res. 17, 18, 19, and 110; Volume 1, at page 44.

[3] 28 U.S.C. §453

[emphasis added][4], and an opinion which "could have been authored by Paul Ehrlich or Bella Abzug",[5] can suddenly, dutifully follow its dictates, casting aside all of the abhorrence he has felt so deeply and for so long. It is even more foolish to expect that those _seeking_ justice at the bar could approach Judge Noonan -- were he to be confirmed -- confident that he could be fair and free from bias if he were called upon to hear and decide a case involving abortion. Our citizens have a right to expect federal judges to be capable of dispassionate reasoning in adjudicating the cases and controversies before them. Could we as citizens be secure in that right if this committee were to confirm a judge who has so passionately, so publicly embraced a position of moral absolutism in direct opposition to the law of the land, a judge who has called legal abortion, alternatively, _annihilation_, _slaughter_, and _atrocity_?

You have before you a nominee who seriously proposed overturning _Roe_ v. _Wade_ by packing the Supreme Court with six more, presumably like-minded, members;[6] who, with absolutely no medical expertise, published an article entitled "The Experience of Pain in the Unborn",[7] a thinly-disguised attempt to rationalize religious conviction by an appeal to "scientific" truth. Perhaps most importantly, for thirteen years, Professor Noonan has consistently and repeatedly misled the American public by stating that Roe v. Wade effects abortion on demand for all nine months of pregnancy, this interpretation in stark contradistinction to the explicit language of the Supreme Court's opinion and the commentaries of every other respectable legal scholar to have written on the subject. For a professor of law and an aspiring federal judge, such conduct is irresponsible, inflammatory and inexcusable.

---

[4] _Id_., at 36

[5] Noonan, "Raw Judicial Power", _National Review_, March 2, 1973, at 261.

[6] _Id_., at 264

Let me conclude much as I began. There are, in the American system of justice, standards by which we evaluate one's fitness for judicial office. These are not standards of ideological purity or political loyalty, about which we have been reading so much in recent months, but they are standards nontheless. A judge is one who has the ability and the inclination to listen to conflicting arguments and to resolve them in accordance with the dictates of the laws and the Constitution of the United States. One who will sit behind the bench in order to advance a preconceived agenda, to whom promotion of an idea is more important than achievement of the ideal of American justice, is not qualified to sit there. For these reasons, the Federation of Women Lawyers' Judicial Screening Panel opposes the confirmation of John T. Noonan, Jr., and we urge the members of this Committee to do the same.

---

[7] See Hilgers, Horan and Mall, eds., New Perspectives on Human Abortion (1981: Aletheia Books, University Publications of America, Inc.), at 205.

Senator **Mathias**. Thank you very much. Do you have any questions, Senator Simon?

Senator **Simon**. I do not.

Senator **Mathias**. Thank you very much.

We will ask Professor Noonan, then, if he will return. Let me remind you that you are still under oath.

TESTIMONY OF JOHN T. NOONAN, JR., OF CALIFORNIA—Resumed

Senator **Mathias**. I notice that you attended Harvard College from 1944 to 1946. Did you complete the whole baccalaureate course in that short period of time?

Mr. **Noonan**. I did, Senator. That was accelerated because of the war, but I was going in the summer.

Senator **Mathias**. Those were the accelerated days.

Mr. **Noonan**. Yes.

Senator **Mathias**. What was your major at Harvard?

Mr. **Noonan**. English literature.

Senator **Mathias**. You are a fortunate man.

Mr. **Noonan**. Thank you.

Senator **Mathias**. It must have been a great joy to study English literature at Harvard in those days.

Then you went on to Cambridge. What did you study there?

Mr. **Noonan**. I continued in English at Cambridge University.

Senator **Mathias**. What period did you enjoy the most?

Mr. **Noonan**. Well, my period was—I really specialized in Dr. Johnson, Dr. Johnson was a hero, and I specialized in Dr. Johnson.

Senator **Mathias**. Well, you are working your way into my heart. I was instrumental in having a luncheon at the Library of Congress on the 200th anniversary of Dr. Johnson's death a few months ago.

Mr. **Noonan**. Well, Senator, I might say that my tutor was Walter Jackson Bate, and, of course, he is one of the great people in Johnson studies.

Senator **Mathias**. Well, my tutor on the subject was Chauncey Brewster Tinker, who was a great Boswell and Johnson scholar.

Mr. **Noonan**. Another great figure, yes.

Senator **Simon**. If I can enter this learned discussion here for one moment, I first realized as a Member of the House that my colleague over in the Senate, "Mac" Mathias, was an unusual person—we were flying to Cyprus and he was reading a biography of Boswell. I have to say he is the only Member of the U.S. Senate I have ever found reading a biography of Boswell.

Senator **Mathias**. Well, more should do it. And then you took a degree in philosophy at Catholic University and came back to the Harvard Law School.

Mr. **Noonan**. That's right.

Senator **Mathias**. You worked then in the White House for Bob Cutler.

Mr. **Noonan**. I did. That was my first real job, working for him in the White House.

Senator **Mathias**. We certainly have no doubt as to your intellectual capabilities for this seat on the court. Your academic record and your professional record are outstanding.

The area that Ms. Rogers has just testified about is one that I think the committee has to think about somewhat carefully.

As a student of Dr. Samuel Johnson, you will be familiar with the career of Edmund Burke. You may remember that Edmund Burke said that a representative owes to his constituents his industry, his knowledge, his experience, his communication, his intercourse, but most of all he owes his judgment. And if he submits his judgment to theirs, then he is depriving his constituents of the thing which is most important.

That's a rough paraphrase, but not too far from what Burke said.

We are in a little paradox here, because Senator Simon and I are exhorted by Burke to use our judgment, even as against the wishes of our constituents, whereas you are nominated for a judgeship in which in many matters we would expect that you would not be guided by your personal opinions and judgment but would be guided by the law, and would be applying the law as it is written and as it is understood by the superior courts.

And I am sure it is not new to you to have heard what Ms. Rogers just testified, the concern that you have very strong opinions, particularly in the field of population control, birth control, family planning, abortion, in which it would be difficult for you to apply the law, if the law were in fact contrary to strongly held personal views of your own.

How do you feel about that?

Mr. NOONAN. Senator, I feel there is a very sharp difference between the role of advocate and the role of judge. I suppose Burke is as good an example as anyone of an advocate who was wholehearted and even passionate in his advocacy, and I would have felt as doing less than I could if I had been less than wholehearted in the causes in which I have been an advocate.

But when one takes off the garb of an advocate and puts on that of a judge, it's a very different role. And I would be surprised and ashamed if I became an advocate as a judge. I feel a strong constraint to follow the law, to follow the precedents—and that is something very different from my role as advocate.

Senator MATHIAS. If a case were before you—and I want to be careful about this, because I think it's unfair to ask a judicial nominee to prejudge what he or she would do in a given case—but if a case right on the point of *Roe* v. *Wade* were before you, do you feel that you could participate objectively in such a case, or do you feel that it would be better to recuse yourself in such a case?

Mr. NOONAN. I feel, if the case was within the area of Roe against Wade, or one of the other Supreme Court precedents, of which now there are several in the abortion field, that I would not have any choice but to follow the precedent. And as someone who has spent a lot of time teaching legal ethics to students, I would feel absolutely delinquent if I couldn't follow the law.

I think that answers that question.

Senator MATHIAS. Of course, with courts, as with legislators, there is also the question of the perception of what you do as well as what you do. And there are cases in which Members of the Senate may recuse themselves from participating, even though they may be confident that they can render a conscientious decision on the subject, but because there is some perception of interest on their part, that they would, under the Senate rules, ask to be excused from voting on that subject.

Mr. **NOONAN**. Well, I think that's absolutely correct, and, of course, I would take very seriously any representation that someone did not think that they could receive a fair hearing.

Now, I do think—and I've thought about this a good deal—that the American tradition is not trying to insulate judges from prior political experience or prior political stands. It's very different from the Italian tradition or the German tradition where judges make a career and are thereby pure of any partisan positions before they go on the bench.

But to think of someone from academe—and I am afraid I will have to use examples from the Supreme Court, because they are known to me and known to everyone—Felix Frankfurter took a very strong stand on labor injunctions and criticized them very severely, and yet certainly didn't feel disqualified from deciding cases involving labor injunctions after he went on the bench. Or to take a person even more eminent in the realm of civil rights, I think of Thurgood Marshall. I do not believe that Justice Marshall felt that he was disqualified from deciding cases involving the civil rights of minorities because he had been the wholehearted and even passionate advocate of minorities before he went on the bench.

Senator **MATHIAS**. You almost stated a case for Dr. Johnson's famous observation: "Sir, a man is not upon oath in lapidary inscriptions." And I suppose "lapidary inscriptions" fall within the general rule of advocacy.

When should a judge recuse himself, as an academic matter?

Mr. **NOONAN**. Well, it's very clear, of course, that where he has a financial interest, where he has a personal interest and a relationship.

Senator **MATHIAS**. Clearly. That was the rock on which Judge Haynesworth's ship foundered

Mr. **NOONAN**. Oh, yes. Then I think, after that, one has to look at it case by case. I do think there is a certain danger that we all realize in our common law tradition of making broad statements. You wait till you see the case, the contours, the briefing, before you actually say, well, in this case someone is too involved to decide.

But I do believe that everyone is entitled to an impartial judge and to a judge who they feel to be impartial.

Senator **MATHIAS**. You have mentioned Thurgood Marshall. It is my understanding that he does in fact recuse himself in any case in which the NAACP Legal Defense Fund is a party. Is that your understanding?

Mr. **NOONAN**. I have actually not searched his record, but I have certainly seen his votes on a number of cases involving the civil rights of minorities.

Senator **MATHIAS**. I think when the NAACP Legal Defense Fund is a party, he does not participate.

Mr. **NOONAN**. I think that is certainly an excellent precedent which I would be quite prepared to follow.

Senator **MATHIAS**. Would you feel that you would follow that precedent in cases in which Americans United for Life were——

Mr. **NOONAN**. Right, I think that would be a very fair way to look at it, because I have been a director for a number of years, and

Americans United for Life has been the legal arm of this particular cause.

Senator **Mathias**. The statute, of course, requires disqualification in any case in which a judge has a substantial interest, has been of counsel, has been a material witness, or is so related to or connected with any party—so it does seem to me that that would be a reasonable rule.

Mr. **Noonan**. I think that's a good line, and I would be absolutely ready to follow it.

Senator **Mathias**. One of your seminar courses, I understand, is on being a judge, on judges.

Mr. **Noonan**. That's right, Senator.

Senator **Mathias**. And that one of the topics of discussion is what makes a great judge. And if you understand the answer to that question, I think we ought to trade places.

Mr. **Noonan**. Well, having looked at 10 figures from English and American judicial history, 9 of whom at least are generally rated as great, I have tried tc form a composite image. But it's very difficult to——

Senator **Mathias**. What are the common qualities of a great judge?

Mr. **Noonan**. I think one is courage, another is power of expression and clarity of expression, another is willingness to be immersed in the facts, and another is caring about the law, caring about the result. Those are four major qualities.

Senator **Mathias**. Let me urge Senator Simon to join in this at any point at which he wishes to do so.

But let me ask you this question: Where would you place responsibility to younger members of the bar? Is one of the qualities of a great judge to set an example, to be a model, a teacher, to the oncoming members of the bar?

Mr. **Noonan**. Well, it's my conviction that a great judge is a teacher, that opinions are very much the way that people like Marshall and Brandeis, to name two absolutely preeminent ones, the way they have shaped both the law and lawyers.

And I suppose the written communication is very important, and then, of course, the way they have actually lived their lives—that's important.

Senator **Mathias**. Well, the style of life—in John Marshall's day, of course, when they were riding on circuit and the judges and the lawyers rode together, there was opportunity for a very direct impact on young lawyers. Circumstances of life are somewhat different today, and a little more difficult for a judge to have that kind of a personal relationship with young lawyers.

But I am encouraged to hear that you think that it's an important aspect of life.

Mr. **Noonan**. I think I do, Senator.

Senator **Simon**. If my colleague would yield for one more question.

Senator **Mathias**. Yes, sure.

Senator **Simon**. In looking through your writings and so forth, I came across your statement on behalf of the human life bill, which would remove Federal court jurisdiction from abortion-related cases.

And, again, as in the case of packing the courts, is it wise, is it constitutional, to say that any field is beyond the jurisdiction of the Federal courts unless it is a very limited local jurisdiction case?

Mr. **Noonan**. Senator, I have to say you have the advantage of me to a degree, if you have looked at a statement in which I have said that. I actually do not remember testifying to that effect.

I have testified as to aspects of the Human Life bill which involve the power of Congress, under section 5 of the 14th amendment, to establish civil rights. And I believe that was the main focus of my testimony.

I don't recall the other. I don't want to absolutely say I didn't have something to say on that. But if you ask me as a general rule, no, I think the Federal courts should be open to all kinds of cases; I don't have any particular brief to hold for arbitrarily withdrawing jurisdiction.

Actually, in the case of this issue, my normal approach, when I have been asked about it, is that it's too late, the courts have already spoken on this; this would be a rather vain and foolish effort. So just on the basis of sheer practical common sense I have never been much in favor of that.

But I cannot recall my testimony.

Senator **Simon**. We have a copy of it here. But does seem to me that barring either side from an ability to go in the Federal courts, whether it is abortion or any other issue, is not the greater part of wisdom on the part of the Congress of the United States.

I have no further questions, Mr. Chairman.

Senator **Mathias**. One of the questions that I have asked a number of the circuit court nominees is the question of experience in litigation.

I frankly have been shocked that one or two have had absolutely no experience—I mean, absolutely none: they have never been in a courtroom. And they are sent to the bench of the circuit court of appeals without that experience of understanding the dynamics of litigation, the dynamics of courtroom procedure, and they are going to be asked to pass upon the propriety of courtroom proceedings of which they are totally ignorant.

So I put the question to you because you state in your résumé that you appeared occasionally in court in the period 1955 to 1960, and far less frequently in the ensuing 25 years.

Would you review just briefly what you have done in terms of litigation?

Mr. **Noonan**. Yes. After serving with the National Security Council staff, I was with the firm of Herrick & Smith in Boston, and had, I would say, a fairly well-rounded exposure to all the kinds of practice that a large urban firm has. And in the course of that I had cases in the probate court, I had argument in the Supreme Judicial Court of Massachusetts, I had a case or two in the Federal district court, and I was very substantially involved in litigation involving the Brookline Redevelopment Authority, of which I was the chairman, and was a party myself in a suit that tried to get rid of a very undesirable developer, and finally succeeded in getting rid of that very undesirable developer.

Now, when I moved to academe obviously my focus was not on trials. And when I have been involved in litigation since, it has been substantially on national issues where I have been an adviser, a consulter, a brief-writer, but not involved in the day-to-day workings of a trial.

I have taken very much to heart Richard Posner's book, "The Federal Courts," which I have been reading, and which issues an earnest recommendation to anyone going on the court of appeals, that they take a few cases in the district court, as Posner himself did, not having had all that much trial exposure, I suppose—and every year he has taken on several cases in the district court. And it seems to me excellent advice if one is to understand the dynamism of the court one is reviewing.

Senator MATHIAS. Well, not only to understand the dynamism of the courtroom process, but, judging by my own experience, it nurtures a sense of humility.

Mr. NOONAN. Oh, yes.

Senator MATHIAS. Because there are so many pitfalls, and it is very difficult for even an experienced lawyer not to hit one of them in the course of an extended trial—and you know how these human errors can happen.

So I think that it does nurture your humility as well as provide you with added experience.

Mr. NOONAN. I am sure you are right, Senator.

Senator MATHIAS. Just one final question that we ask of nominees who are in your situation, which is that you have been found qualified by a majority of the American Bar Association Standing Committee, but a minority disagreed.

And I am wondering if you had been advised as to the basis of their disagreement.

Mr. NOONAN. No, I haven't, Senator. I would assume or infer that there is a group of people who vote on those matters, who believe that extensive trial experience is necessary. That is certainly the impression that I received informally before this vote.

Senator MATHIAS. By comparison with some of the other nominees who have been before us recently, you have extensive trial experience.

I see the Justice Department smiling in the back of the room.

But if that is the case, we can take note of the precedents in this matter.

I think I have no further questions. I appreciate your staying with us till this late hour in the afternoon, and congratulate you on the President's nomination.

Mr. NOONAN. Thank you.

Senator MATHIAS. We will hold the record open on all of the hearings conducted today until the close of business tomorrow so that if there are further statements or additional statements the record will be open to receive them.

If there is no further business to come before the committee, we will stand in recess, subject to the call of the Chair.

[The committee recessed at 4:04 p.m.)

[Letters follow:]

UNIVERSITY OF CALIFORNIA, BERKELEY

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

JESSE H. CHOPER
DEAN

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720
TELEPHONE (415) 642-6483

November 1, 1985

The Honorable Strom Thurmond
Chairman, Judiciary Committee
SR-218
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

It is a pleasure for me to furnish you with a brief account of Professor John T. Noonan, Jr.'s career while he has been a member of the faculty of the University of California at Berkeley School of Law.

Professor Noonan came to Berkeley in January 1967 as a visiting professor from Notre Dame Law School. Later that same year, he accepted a permanent appointment in this Law School and has remained a member of our faculty to the present time. During this period of nearly twenty years that John has been my colleague he has been a distinguished teacher, an active and renowned participant in public debate on important moral, legal, and political issues, and a highly productive scholar who has risen to a position of international eminence.

On two volatile and controversial issues -- abortion and a balanced federal budget -- he has been an important contributor to public discussion and has produced writing of both practical and theoretical significance. With respect to the abortion question, Noonan has held leadership positions in several organizations opposed to the Supreme Court's decision in *Roe v. Wade*, and his book, *A Private Choice: Abortion in America in the Seventies*, is a leading critique of that decision. John has also played an active role in the movement for the proposed balanced budget amendment. In 1982, he published an article on the convention procedure for constitutional amendment, relating it to the drive for the balanced budget amendment ("The Balanced Budget -- The State Call for a Convention," *Balanced Budgets, Fiscal Responsibility, and the Consitution*, Cato Institute, 1982, Richard E. Wagner, et al., eds.). In 1984, he was, with Griffin Bell and Sam Ervin, Jr., an amicus curiae in a case involving a balanced federal budget initiative in California. On the balanced budget issue as on the issue of abortion, he has been a witness before a subcommittee of your Committee on the Judiciary.

Rec'd 1:25pm 11/4/85

As a teacher, John has focussed on professional responsibility, jurisprudence, and legal history. Much of his very extensive and widely acclaimed scholarship falls in these areas as well. He draws on his graduate training in English literature, philosophy (he has a Ph.D. in this field), and law to produce brilliantly written works combining legal analysis, historical scholarship in several languages, and philosophically informed moral reflection. He is extraordinarily well-equipped to study the moral and legal components of the judicial role, and his books *Persons and Masks of the Law* (based on the 1972 Oliver Wendell Holmes, Jr., Lectures at Harvard Law School) and *Power to Dissolve* are exemplary works of this kind. Along with much else, John has also written classic studies on usury, contraception -- both classic books -- and, just published, bribery.

In recent years, John has received numerous honors conferred in recognition of outstanding work. I will mention only two. He has just been named to the Milo Rees Robbins Chair of Legal Ethics here at Berkeley, and in 1984 he received the Laetare Medal, the highest university honor of the University of Notre Dame, awarded annually to a leading American Catholic and presented in recent years to Ambassador (and former Senator) Mike Mansfield, Secretary of State (and former Senator) Edmund Muskie, and President John F. Kennedy.

Naturally, I will be happy to provide any further information or details (of which there is a very great amount) if you would find it helpful.

With best regards.

Sincerely,

JChoper

Jesse Choper

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

OFFICE OF THE DEAN

November 1, 1985

The Honorable Strom Thurmond
Chairman, Judiciary Committee
United States Senate
Washington, DC 20510

Dear Senator Thurmond:

I am writing in connection with the Committee's consideration of Professor John Noonan to be a judge on the Court of Appeals for the Ninth Circuit.

Professor Noonan is a graduate of this School, where he had a very distinguished record. He is a highly respected law professor, who has done outstanding scholarly work in a number of fields. For example, in 1972, he delivered the Oliver Wendell Holmes Lecture, Harvard Law School's most important visiting lectureship.

The breadth of his scholarly work is truly impressive. I regard him as one of the most broad-ranging and effective legal scholars in teaching today.

In conclusion, I can say that as Dean of the Harvard Law School, I would be pleased and proud to see Professor Noonan on the Court of Appeals.

Sincerely,

James Vorenberg
Dean

JONES, DAY, REAVIS & POGUE

OFFICES IN
CLEVELAND
COLUMBUS
DALLAS
LOS ANGELES

METROPOLITAN SQUARE
655 FIFTEENTH STREET, N.W
WASHINGTON, D.C 20005-5701

TELEPHONE: 202/879-3939
TELEX: DOMESTIC 892410
TELEX: INTERNATIONAL 64363
CABLE: ATTORNEYS WASHINGTON
TELECOPIER: 202-466-8642

November 2, 1985

Hon. Strom Thurmond
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond, In re: John T. Noonan, Jr.

I am writing in support of the nomination of John T. Noonan, who has been nominated to be a judge of the United States Court of Appeals for the Ninth Circuit.

My acquaintance with Mr. Noonan goes back to 1951, when he came to the Harvard Law School as a student while I was dean of the Law Faculty there. My wife and I were acquainted with his parents, since Mr. Noonan, Sr., was a graduate of the Harvard Law School and a prominent and public spirited lawyer in Boston.

With this background, I followed John, Jr.'s career quite closely and came to know him well. He was an outstanding student, and received the LL.B. degree *magna cum laude* in 1954. He was a member of the editorial board of the Harvard Law Review, and was the book review editor of the Review during his third year as a student. (He had already received the Ph.D. degree before he came to Law School.)

After a year on the staff of the National Security Council, Mr. Noonan practiced law in Boston for five years, so he has had a good grounding of practical experience. He then turned to law teaching and scholarship, first at the Notre Dame University Law School, and then at the University of California in Berkeley, where he has been a professor since 1966. He has been a Guggenheim Fellow and a Fellow of the Woodrow Wilson Center here in Washington.

Mr. Noonan quickly established himself as a teacher and a scholar. He has written a number of important books, and has made substantial contributions in the fields of jurisprudence and legal history. His book entitled Persons and Masks of the Law, published in 1976, is particularly relevant. As one reviwer wrote: "The book is a strong and needed reminder that the legal process involves human beings as well as abstractions."

Mr. Noonan is a peron of excellent background and good training. He has had broad experience, and has proved himself as a lawyer and a scholar. He is a fine person, of outstanding character. In my opinion he is well qualified to be a member of the United States Court of Appeals for the Ninth Circuit. It is my firm expectation that, if confirmed, he will soon be an outstanding member of that court, and of the Federal bench.

If there is any further information I can give you, please let me know.

Very truly yours,

Erwin N. Griswold

Erwin N. Griswold

November 6, 1985

I've known John Noonan for more than twenty years. He is a superb scholar and a person of great intellectual distinction. I have argued with him and disagreed with him frequently, but always found him open and willing to listen. I also always learn something from his point of view. I think he would be an excellent judge.

Guido Calabresi

Dean, Yale Law School
(Dictated in New Haven,
Transcribed in
Washington.)

BIOGRAPHIES

FRANK X. ALTIMARI

NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT

Birth: September 4, 1928, Queens, NY.

Legal Residence: New York.

Marital Status: Married to Angela Scavuzzo Altimari, 4 children.

Education: 1946-1948—St. Francis College. 1948-1951—Brooklyn Law School, LL.B. degree.

Bar: 1951—New York.

Experience: 1951-1956—Austin & DuPont, Jamaica, NY, Associate. 1956-1966—Hoffmann & Altimari, Partner. 1966-1970—Judge, District Court, County of Nassau. 1970-1973—Judge, County Court, County of Nassau. 1974-1982—Justice of Supreme Court, County of Nassau. 1982-present—U.S. District Judge Eastern District of New York.

JOHN T. NOONAN, JR.

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: October 24, 1926, Boston, MA.

Legal Residence: California.

Marital Status: Married to Mary Lee Bennett Noonan, 3 children.

Education: 1944-1946—Harvard College, B.A. degree. 1946-1947—Cambridge University. 1947-1951—Catholic University, M.A. degree, Ph.D. in Philosophy. 1951-1954—Harvard Law School, LL.B. degree.

Bar: 1954—Massachusetts.

Experience: 1954-1955—Robert Cutler & Dillon Anderson, Special Assistant to the President, National Security Affairs Assistant. 1955-1960—Herrick, Smith, Donald, Farley & Ketchum, Boston, Mass., Associate. 1961-1969—American Journal of Jurisprudence, Editor. 1961-1966—Notre Dame Law School, Associate Professor, 1961-63, Professor of Law, 1963-66. 1967-present—University of California Law School (Boalt Hall), Professor of Law.

GLENN L. ARCHER, JR.

NOMINEE, U.S. CIRCUIT JUDGE, FEDERAL CIRCUIT

Birth: March 21, 1929, Densmore, KS.

Legal Residence: Virginia.

Marital Status: Married to Vera Poe Wiseman Archer, 4 children.

Education: 1947-1951—Yale University, B.A. degree. 1951-1954—The George Washington University Law School, J.D. degree.

Bar: 1954—District of Columbia.

Military Service: 1954-1956—U.S. Air Force.

Experience: 1954—Burton, Heffelfinger, McCarthy & Kendrick, Associate. 1956-1981—Hamel, Park & Saunders, Associate, 1956-1960, Partner, 1960-1981. 1981-present—Assistant Attorney General, Tax Division, U.S. Department of Justice.

MORRIS S. ARNOLD

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF ARKANSAS

Birth: October 8, 1941, Texarkana, TX.

Legal Residence: Arkansas.

Marital Status: Divorced.

Education: 1959-1961—Yale University. 1962-1968—University of Arkansas, B.S.E.E. degree (1965), LL.B. degree (1968). 1968-1971—Harvard Law School, LL.M. degree (1969), S.J.D. degree (1971).

Bar: 1968—Arkansas. 1984—Pennsylvania.

Experience: 1968—Arnold & Arnold, Associate. 1974-present—Of Counsel. 1969-1970—Harvard Law School, Teaching Fellow in Law. 1971-1976—Indiana University, Professor of Law. 1977-1981, 1984-1985—University of Pennsylvania, Professor of Law and History, Associate Dean, 1978-1979, Director, Office of the President, 1979-1980; Vice President/Director, Office of the President, 1980-1981. 1981-1984—University of Arkansas, Little Rock Law School, Altheimer Distinguished Professor of Law. 1981-1982—Republican Party of Arkansas, General Counsel. 1981-1984—Sole practitioner, Little Rock, AR. 1985-present—Indiana University Law School, Dean and Foskett Professor of Law.

PATRICK A. CONMY

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NORTH DAKOTA

Birth: January 5, 1934, Fargo, ND.

Legal Residence: North Dakota.

Marital Status: Married to Josephine L. Keller, 6 children.

Education: 1951-1955—Harvard College, B.A. degree. 1956-1959—Georgetown University Law Center, J.D. degree.

Bar: 1959—North Dakota.

Experience: 1959-present—Lundberg, Conmy, Nodland, Lucas & Schulz, P.C. (firm has had various other names), Conmy, Donahue & Conmy (1959-60), Conmy & Conmy, Conmy, Conmy, Rosenberg & Lucas, Conmy, Rosenberg & Lucas, Conmy, Rosenberg, Lucas & Olson, Lundberg, Conmy, Nodland, Rosenberg, Lucas & Schulz. 1976-present—North Dakota House of Representatives, Member.

LYNN N. HUGHES

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF TEXAS

Birth: September 9, 1941, Houston, TX.

Legal Residence: Texas.

Marital Status: Married to Olive Dixon Allen Hughes, 3 children.

Education: 1959-1963—University of Alabama, B.A. degree. 1963-1966—University of Texas, J.D. degree.

Bar: 1966—Texas.

Experience: 1966-1972—Private practice, Houston, TX. 1973-1979—Howard & Hughes, partner. 1979-1980—Judge, 165th District Court of Texas. 1981-present—Judge, 189th District Court for the State of Texas.

NICHOLAS TSOUCALAS

NOMINEE, JUDGE OF THE U.S. COURT OF INTERNATIONAL TRADE

Birth: August 14, 1926, New York, NY.

Legal Residence: New York.

Marital Status: Married to Catherine Aravantinos, 2 children.

Education: 1946-1949—Kent State University, B.S. degree. 1949-1951—New York Law School, J.D. degree.

Bar: 1953—New York.

Military Service: 1944-1946—U.S. Navy.

Experience: 1953-1955—Private Practice. 1955-1959—Assistant U.S. Attorney, Southern District of New York. 1959-1968—Private Practice. 1968-present—Judge, Criminal Court, City of New York. 1975-1978—Acting Supreme Court Judge, Kings County. 1978-1982—Acting Supreme Court Judge, Queens County.

CONFIRMATION HEARING ON: DEANELL REECE TACHA, GARRETT E. BROWN, JR., ROBERT L. MILLER, JR., AND JOHN R. BOLTON

THURSDAY, NOVEMBER 14, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, in room SD-226 Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Laxalt and Simon.

Staff present: Duke Short, professional staff; Laurie Westley, chief counsel to Senator Simon.

OPENING STATEMENT OF SENATOR PAUL LAXALT

Senator LAXALT. The committee will please come to order.

Ladies and gentlemen, I am filling in for Senator Thurmond who will conduct the hearing involving various judges. We have a vote on the floor which he is now taking care of. As quickly as that is completed, he will come back and substitute for me, if that is a proper term.

I would like to make a statement as a member of the committee with respect to one of the nominees. If you will step forward, Mr. Bolton, I would appreciate it.

Mr. Bolton, according to the agenda, your nomination hearing will be conducted after the judges, but in view of my own time limitation and my interest in your nomination, I would like to make the following remarks for the record.

I am proud to speak here today on behalf of John Bolton, my long-time friend and President Reagan's choice to be Assistant Attorney General for Legislative and Intergovernmental Affairs. From my own experiences with John, I know that he is talented, hard-working, and highly qualified for this position.

John has excellent credentials. He was graduated from Yale College and Yale Law School, both of which he attended on scholarship. He served in our Armed Forces. Upon graduation from law school, he joined the distinguished Washington law firm of Covington & Burling, where he later became one of the firm's youngest partners.

Despite the financial lure of private law practice, John has offered his considerable energy and talents to public service. He first joined this administration as legal counsel in the Office of the White House Counsel. He then moved to the Agency for International Development, where he was general counsel and then an Assistant Administrator.

On a more personal note, John has been of great assistance to me on a number of public policy issues. Since President Reagan took office, I have consistently relied on John's legal ability and political judgment. He has the talent of bringing together those with differing points of view to accomplish a particular objective. In short, John is a shining example of the kind of quality in public service that the American people deserve, and I am sure that my colleagues on this committee and in the Senate will support the President's choice for Assistant Attorney General.

John, I wish you well.

Mr. **Bolton**. Thank you, Senator, I looked forward to working with you.

Senator **Laxalt**. If you can survive the Thurmond cross-examination later, you will be all right.

Senator Warner will also be here to submit a statement.

Ladies and gentlemen, if you will be patient, we will stand in recess until the eminent chairman returns.

[Brief recess.].

The **Chairman**. The committee will come to order.

We have met this afternoon to hold a hearing for one circuit judge and two district judges and an assistant attorney general.

I see our able and distinguished majority leader here, and I am sure he must be here for some good reason. We would be glad to hear from you.

STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator **Dole**. Mr. Chairman, I appreciate very much the opportunity to be here this afternoon. Having been a member of the committee, I know the demands on your time and we appreciate your making a special effort for the hearing on this circuit court nominee, plus the other nominees you will hear today.

I am here with my colleague, Senator Kassebaum. We are both very proud to be here to introduce to you Deanell Reece Tacha who has been nominated by President Reagan to be U.S. Circuit Judge for the Tenth Circuit.

At the outset, Mr. Chairman, as I have indicated, I appreciate your cooperation and your willingness. I know the heavy responsibility. I know the work done by you and your staff and we appreciate that very much.

May I present Deanell Reece Tacha, her husband, and her three oldest children. The youngest one who is one and a half is back home in Lawrence. Also Mrs. Tach's parents, Mary Ellen and Bill Reece, who are right behind me.

The **Chairman**. Would you like for them to stand?

Senator **Dole**. Yes, I would like everyone to know them.

We are very proud of the entire family, and I know Senator Kassebaum will agree. Many times I have been in this committee where members would appear with nominees. They generally knew the nominees, but we can tell you, Mr. Chairman, we know the whole family. We have known them for 15, 20, 30 years or more. Perhaps longer than they would like to remember, but they are an outstanding family. We have an outstanding nominee in Mrs. Tacha who brings excellent qualifications to you for review and approval.

Her background in Government and civic affairs is of the highest caliber. This background, combined with the fact that she is the working mother of small children, gives her the education, experience, discipline and temperament needed for effective service on the Federal bench. Mrs. Tacha, if confirmed by the Senate, will be the second woman to be appointed to the tenth circuit bench and only the 17th since the circuit courts of appeals were established a 100 years ago.

At the University of Kansas, Mrs. Tacha was an honor graduate in American studies. She was elected Phi Beta Kappa and Mortarboard and voted outstanding senior student. At Michigan Law School she was a member of the student senate and competed successfully in moot court activities.

Mrs. Tacha was appointed White House Fellow in 1971. In this capacity, she directed a task force on lawyers and trial examiners designing an adjudication system as part of welfare reform legislation. She served in the Office of the Secretary of Labor and represented the Secretary at several international meetings and conferences.

She was also an executive assistant to the Under Secretary of Labor for Manpower, Lawrence Silberman, who was recently confirmed by the Senate to be a circuit court judge on the D.C. Court of Appeals.

At law school, she taught oil and gas and communications law and served on numerous law school committees including placement and curriculum review.

As vice chancellor of the university, Mrs. Tacha has overall responsibilities for supervision of all academic programs and budgetary matters. She also served on numerous university committees including the blue ribbon committee on freedom of speech, academic affairs, affirmative action and title 9 self-evaluation.

In addition to all those other duties, she has been very active in the President's Commission on White House Fellows and a rape victim support service in Lawrence.

She also serves on the board for admission of attorneys to the Kansas Supreme Court.

In business affairs, she serves on the board of directors of the Alliance Life Insurance Co., and the Lawrence Federal Savings & Loan Association.

Mr. Chairman, it is very obvious that at the age of 39, she has been a very busy person. She is very well qualified. I understand she has had an opportunity to meet nearly every member of the Judiciary Committee. We are very pleased to be here on her behalf.

I would now like to ask my colleague, Senator Kassebaum to say a word.

The CHAIRMAN. We will be delighted to hear from Nancy.

[Prepared statement of Senator Bob Dole follows:]

PREPARED STATEMENT OF SENATOR BOB DOLE

Mr. Chairman, I am pleased and proud to be here today to introduce to you and the members of the Committee on the Judiciary Deanell Reece Tacha, who has been nominated by President Reagan to be a circuit judge for the Tenth Circuit Court of Appeals. Joining with me is my distinguished colleague from Kansas, Senator Kassebaum, and most likely thousands of Kansans and others who know and admire Deanell Tacha.

At the outset, Mr. Chairman, I again want to pay tribute to you and your colleagues for the truly impressive and conscientious manner in which you have handled the crushing workload which attends the nomination process for Federal judges. It is a difficult and heavy responsibility which you have shouldered. Every member of this body, those in the executive branch, the bench and bar as well as those who offer their qualifications and credentials for your scrutiny, know that you take this responsibility most seriously. I simply want to be on record, as a former member of this committee who for six years was close to the process, to recognize truly outstanding way in which you and your staff have led the Senate in discharging its constitutional role in giving advice and consent on the nominations placed before it.

Now, Mr. Chairman, to the business at hand. May I present Deanell Reece Tacha, her husband John and their three oldest children John, David and Sarah. Their youngest child, Leah, who is one and a half, is back home in Lawrence. Mrs. Tacha's parents, Maynell and Bill Reece, are also in attendance today.

Chancellor Tacha brings outstanding qualifications to you for review and approval. Her background in law, teaching, college administration, government and civic affairs is of the highest caliber. This background, combined with the fact that she is a working mother of small children, give her the education, experience, discipline, and temperament needed for effective service on the Federal bench.

Mrs. Tacha, if confirmed by the Senate, will become the second woman to be appointed to the tenth circuit bench and only the 17th in the hundred years since the circuit courts of appeal were established.

At the University of Kansas, Mrs. Tacha was an honor graduate in American studies. She was elected to Phi Beta Kappa and mortar board and was selected as an outstanding senior woman at the university and in the country. At the University of Michigan Law School she was a member of the student Senate, competed successfully in moot court competition and served on the student-faculty admissions committee.

Mrs. Tacha was appointed White House fellow in 1971. In this capacity, she directed a task force on lawyers and trial examiners designing an adjudication system as part of welfare reform legislation. She served in the office of the Secretary of Labor and represented the secretary at several international meetings and conferences. She also was executive assistant to the Under Secretary of Labor for manpower, Laurence Silberman, who recently was confirmed by the Senate to be a circuit judge on the D.C. Circuit Court of Appeals.

At the Kansas Law School, Professor Tacha has taught courses in administrative law, oil and gas law, and communications law. She has served on numerous law school committees including faculty recruitment, placement, curriculum and curriculum review.

As vice chancellor of the university, Mrs. Tacha has overall responsibility for supervision of all academic programs and budgetary matters. She also serves on numerous university committees including the blue ribbon committee on freedom of speech, academic affairs affirmative action and title IX self-evaluation.

The nominee has also been quite active on various external activities which include the Kansas Committee for the Humanities, the Kansas Woman's Sports Advisory Committee, the President's Commission on White House fellows and a rape victim support service in Lawrence. She serves on the board for admission of attorneys of the Kansas Supreme Court.

In business affairs, Mrs. Tacha serves on the boards of directors of Alliance Life Insurance Company and the Lawrence Federal Savings and Loan Association.

Mr. Chairman, I could go on for some time on the record and accomplishments of this outstanding young woman. However, her complete biographical information has been made available to the committee. I will not belabor the point, but will again reiterate my support for her nomination in the strongest terms I can. I urge her prompt approval by the Committee on the Judiciary and confirmation by the Senate.

STATEMENT OF HON. NANCY LANDON KASSEBAUM, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator KASSEBAUM. Thank you very much.

I can only second what Senator Dole has said. We are very proud of the work of Deanell at the university and her leadership throughout the State where she has represented many causes and concerns and activities. I think it has been extraordinary leadership combining the responsibilities that she has in academia as well as with her family. As Senator Dole has said, it is a family that has given much to the State of Kansas, and I know that vice-chancellor Tacha will give a great deal to the bench as well. It is a service that I think we can all be proud of when she assumes that position, and I highly recommend her to you.

Thank you.

Senator DOLE. Mr. Chairman, I failed to include in the record an editorial which appeared just today in the Kansas City Record. I would like to make that part of the record.

The CHAIRMAN. Without objection, that will be done.

[Editorial follows:]

[From the Kansas City Star, Nov. 13, 1985]

MS. TACHA'S POTENTIAL FOR FEDERAL BENCH

Senate confirmation of Deanell Tacha of Kansas to the 10th U.S. Circuit Court of Appeals would provide the federal judiciary with a talented and qualified individual. Beyond this, her appointment would help bring a better gender balance to the courts, now lacking women and minorities, too, in relation to their numbers in the population.

Her legal background, a basic for the bench, covers both private practice and more than a decade in educational pursuits, including teaching and administration, at the University of Kansas in Lawrence. Among other courses, she has taught property law at the KU School of Law, where she is a professor. Ms. Tacha, 39, served as associate dean from 1977 to 1979.

Her duties were then expanded to university-wide administration. Since 1981 she has been vice chanceller for academic affairs. That position, the chief academic officer of the university, is the highest ever attained by a woman at the KU executive level.

As a top administrator Ms. Tacha has been considered extremely able and sensitive, not only to the needs of women and minorities but to the necessity of a comprehensive educational program. She has, among other things, stressed liberal arts and sciences as fundamental to a balanced education, regardless of speciality. Such emphasis was somewhat lost in the late 1960s and early 1970s.

Those who have worked closely with Ms. Tacha know her as an outgoing, enthusiastic and insightful person with capabilities to analyze problems, and once the facts are in, the ability to make difficult decisions. Ms. Tacha, a native of Scandia, Kan., has excelled throughout her academic endeavors. She was named outstanding woman of the senior class at KU in 1986 and was elected to Phi Beta Kappa, the scholastic honor society. She was a White House Fellow in 1971 and 1972.

It is impossible to predict precisely what type of judge any candidate for the bench will be. It is possible to assess their potential, which in the case of Ms. Tacha is impressive.

Senator DOLE. I would like to underscore I am beginning to feel a little lonesome as a man from Kansas. I serve with Nancy Kassebaum, I live with Elizabeth Dole, and now hopefully we are going to confirm a circuit judge in Deanell Tacha, so you can understand that Kansas for the most part is in good hands.

The CHAIRMAN. The roses have since arrived.

Mrs. Tacha, I want to say you sit beside the most powerful man in the Senate, and you are sitting beside a very intelligent, charm-ing lady who is quite influential in the Senate. You are very fortunate to have both of these Senators from your State endorsing you.

Mrs. TACHA. May I say Kansas is very proud of them.

The CHAIRMAN. We are proud of them here, too. We congratulate you and with the fine Senators you have backing you and backing the nomination of the President, I congratulate you on that. We are sure you will make an excellent judge. We will call you back in the few minutes for a few questions.

Senator Simon, who is the watchdog for the Democrats, is here.

Senator DOLE. He is a nice watchdog.

The CHAIRMAN. We are glad to have you here, Senators. Please feel free to stay or leave.

Senator Quayle, I believe, is here. You have Mr. Robert Miller from Indiana.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Mr. Chairman and Senator Simon, it is a great privilege for me to introduce to you a good friend and a very well-respected judge from the State of Indiana, Judge Robert Miller. He hails from South Bend, IN, St. Joseph County. Senator Simon will be glad to know that he is a product of Northwestern University. He graduated from Indiana University School of Law in Indianapolis from which my wife and I both graduated.

Judge Miller has served on the county superior court for a number of years. In 1978, he was elected overwhelmingly for a 6-year term. In 1984, he stood for election again, and won by an even larger amount. The citizens of Joseph County are certainly very impressed with his stewardship.

I can attest from knowing Judge Miller, that he has not only the judicial temperament but he has the basic intellect, the integrity and the capabilities that will make him a very distinguished district court judge for what we hope will be a long, long time.

He is considered reasonably young. He has a wife and two daughters, one of them very young, who are accompanying him today. As a matter of fact, Mr. Chairman, they are younger than our children, and that is pretty young. His parents are here and other family members.

On behalf of myself and Senator Lugar as well, it is really our pleasure to introduce to you Judge Miller from Indiana. We hope you will find his credentials as impressive as we have. He has demonstrated a great deal of ability on the bench in St. Joe County, and we feel for the whole northern district of Indiana that he will make a great contribution to the already good Federal judges that we have.

We certainly ask your favorable consideration, and we thank you for this opportunity to be here, Mr. Chairman.

The CHAIRMAN. Senator, we are glad to have you here to endorse him. I congratulate him on his appointment by the President and by having your endorsement in person, and Senator Lugar has also endorsed him. With the splendid endorsement of your excellent Senators, I feel sure your nomination will go right through.

Senator **Simon**. I am happy to have an alumnus of Northwestern University here, Mr. Chairman.

The **Chairman**. Thank you very much.

[Prepared statement follows:]

Prepared Statement of Senator Dan Quayle

Mr. Chairman and Members of the Judiciary Committee, it is a pleasure to introduce to you Judge Robert L. Miller, Jr., who has been nominated to become a new U.S. District Court Judge for the Northern District of Indiana.

I have known Judge Miller for some time, and I am truly impressed with his credentials, his experience in the law, his integrity, and his commitment to justice. You could not ask for a better district court judge, and I have full confidence in Judge Miller's abilities.

As you know, Judge Miller is a native of South Bend, Indiana, where he will sit if confirmed. He received his bachelor's degree from Northwestern University and his law degreee from Indiana University School of Law in Indianapolis. Upon graduating, Judge Miller served as a law clerk to U.S. District Court Judge Robert A. Grant, before becoming a St. Joseph County Superior Court Judge in 1975.

For the last ten years, Judge Miller has been on the County Superior Court, and in 1981 and 1982, he served as Chief Judge. In 1978, the citizens of St. Joseph County voted overwhelmingly to retain Judge Miller for a six-year term. In 1984, the voters again agreed to retain Miller for another six years by an even larger margin. Clearly, the people of St. Joseph County are pleased with the way Judge Miller has conducted himself and believe him to be an impartial and fair judge.

The experience that Judge Miller has gained from ten years on the county court will hold him in good stead as a member of the U.S. District Court. Judge Miller sat during criminal, civil, and domestic relations trials, and he has a broad and deep understanding of the law. In addition, Judge Miller has remained active in professional associations, and he has participated in continuing legal education programs as a lecturer.

Finally, I would like to say that Judge Miller is an impartial judge, who has demonstrated his fairness throughout his tenure on the county court. He is committed to equal justice under the law for all, and he sees this as his guiding principle.

Mr. Chairman and Members of the Committee, I support Judge Robert L. Miller, Jr. for U.S. District Court Judge in the Northern District of Indiana. I support hem wholeheartedly and without reservation, because I am confident that he will continue the high standards of honesty, integrity, and impartiality that he has exhibited so clearly in his ten years as St. Joseph County Superior Court Judge.

The **Chairman**. Senator Warner, would you come around.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. Thank you for this opportunity, Mr. Chairman and distinguished Senator from Illinois.

It is my privilege to join today with the distinguished Senior Senator from Nevada, Mr. Laxalt, in endorsing unequivocally this distinguished individual for the position of Assistant Attorney General. By leave of the committee, I will put my statement in the record in its entirety.

Senator Laxalt has covered much of the vital curricula of this gentleman and, I would simply say from my knowledge of his responsibilities in the public and private sector, Mr. Bolton will bring to the Department of Justice exceptional qualifications and managerial skills. We are all comfortable in the Senate he will faithfully perform his duties as Assistant Attorney General in the Office of Legislative and Intergovernmental Affairs.

I thank the chairman and the members of the committee.

[Statement follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman, it is a pleasure for me to introduce to the Committee Mr. John R. Bolton of Virginia, for confirmation for the position of Assistant Attorney General for the Office of Legislative and Intergovernmental Affairs.

I have known John Bolton for several years and have had the privilege of working with him firsthand on several projects. His dedication to his duties were unfailing.

Mr. Bolton returns to public service from a distinguished law career with the Washington firm of Covington and Burling.

He was previously a member of President Reagan's Administration when he served with the Agency for International Development as its General Counsel and also as the Assistant Administrator for Program and Policy Coordination.

From his responsibilities in the public and private sector, Mr. Bolton brings to the Department of Justice exceptional qualifications and managerial skills. I am confident he will faithfully perform his duties as Assistant Attorney General for the Office of Legislative and Intergovernmental Affairs.

I wholeheartedly endorse his nomination.

The CHAIRMAN. Senator Warner, we thank you for your endorsement and with that of Senator Trible and Senator Laxalt, you should have no trouble going through this committee. We have high respect for all these people and we are very pleased to have you here.

I have a statement here by Senator East, Mr. Bolton, endorsing you. Do you know Senator East?

Mr. BOLTON. Yes, I have represented him.

The CHAIRMAN. You must represent him well. He endorses you highly.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR JOHN P. EAST

Mr. Chairman, I am pleased to speak this afternoon in support of the President's nomination of John R. Bolton to be Assistant Attorney General in the Office of Legislative and Intergovernmental Affairs at the United States Department of Justice.

As one who taught political science at the undergraduate level for sixteen years, I am most impressed by Mr. Bolton's record of excellence in the study of that subject at Yale University. He won election to Pi Sigma Alpha, the national political science honor society, and earned the James Gordon Bennett Prize for the best senior essay in international relations. Mr. Bolton's exemplary scholarship in political science also earned him high departmental honors. His overall academic performance at Yale College won him election to Phi Beta Kappa and he graduated summa cum laude in 1970.

Mr. Bolton's record of excellence continued when he entered the Yale Law School in 1971. He became an editor of the Yale Law Journal and, upon graduation in 1974, Mr. Bolton joined the prestigious Washington law firm of Covington & Burling.

Joining the Reagan Administration in 1981, Mr. Bolton pursued his interest in international relations as the General Counsel of the Agency for International Development (AID). Mr. Bolton's fine achievements in that position earned him a promotion one year later to be Assistant Administrator for Program and Policy Coordination at AID. In October 1983, he left AID to rejoin Covington & Burling as a partner.

Mr. Chairman, the post of Assistant Attorney General for Legislative and Intergovernmental Affairs requires a highly capable lawyer with strong administrative skills. John Bolton is just such a lawyer. His sterling academic record at Yale, his impressive tenure at Covington & Burling, and his strong performance at AID more than qualify him for the new position for which President Reagan has nominated him. I know Mr. Bolton personally, I have the highest regard for him, and I urge my colleagues on this Committee, and in the Senate as a whole, to act expeditiously in confirming his nomination.

Thank you, Mr. Chairman.

The **CHAIRMAN.** I believe a few more Senators are here. Would you gentlemen come around. We would be very pleased to hear from you all. We will take the Senator first.

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **BRADLEY.** Thank very much, Mr. Chairman

I have appeared before the committee on several occasions to express my concern about the enormous backlog in New Jersey's Federal courts. The judges are burdened with caseloads in excess of 450 matters pending at any given time. Our district has the fourth highest weighted caseload of any metropolitan district in the country, it has the highest number of criminal defendants. With the confirmation of Mr. Garrett Brown, the New Jersey district court will be at full strength for the first time in 3 years.

It is impossible to expect our judges to give the prompt and careful consideration expected of them under the circumstances I have cited. Because of the extreme backlog in New Jersey, I have urged the Governor to have long-standing vacancies in our district court filled. I am pleased the committee will have the opportunity to ease the current problems with the the approval of Garrett Brown.

You will note he has a broad background in both the private and public sectors. He served as Chief Counsel and Acting Director of the Maritime Administration. He has also served this administration as general counsel to the GPO. He served as assistant U.S. attorney and was in private practice with a prominent New Jersey law firm.

When Mr. Brown's nomination was first submitted by the President, I asked members of the bar of New Jersey and the judiciary about his reparation. He was consistently cited for his diligence and hard work throughout his legal career.

I hope the committee will give Mr. Brown's nomination prompt attention and give the people of New Jersey the full complement of judges to which we are entitled.

The **CHAIRMAN.** We would be very pleased to hear from Senator Lautenberg.

STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **LAUTENBERG.** I am pleased to introduce to the committee today Mr. Garrett Brown, Jr. He has been nominated to serve on the U.S. District Court for the District of New Jersey, and as my Senate colleague, Senator Bradley said, we need to fill those posts. The backlog is enormous. We are pleased to present Mr. Brown to you today.

Mr. Brown is now Acting Deputy Administrator of the Maritime Administration where he previously served as chief counsel. He also served as general counsel to the Government Printing Office and, before 1981, he was engaged in private practice of law in New Jersey.

Before entering private practice, he served as an assistant U.S. attorney for 4 years. He has received high praise from those who work with him. If confirmed, he would serve with great honor, and

I would say the most profound responsibility and his greatest responsibility would be he would be charged with dispensing judgment to all segments of our society. He will be charged with maintaining the public's respect of the law of the judicial system, at the same time not bending the law or the rights of individuals to hold unpopular opinions. He has shown that he has that capacity. He has expressed to me his appreciation and his desire to serve. I believe in that commitment.

Mr. Chairman, the State of New Jersey and the banks and bar welcome the committee's action to fill this remaining position on our courts. New Jersey's courts need the help and need it desperately. Mr. Brown is an able, experienced practitioner, and I am pleased to present him to the committee.

The Chairman. Mr. Brown, I want to thank you on your appointment by the President. I also want to commend you for having the high endorsement of both your New Jersey Senators. Both are Democrats and they come in and endorse you. You must be a good man.

Mr. Brown. I am deeply honored, Mr. Chairman.

[Prepared statement of Congressman Jim Courter follows:]

PREPARED STATEMENT OF REPRESENTATIVE JIM COURTER

It is a privilege for me to express my support for the nomination of Garrett Brown for Federal District Court Judgeship in New Jersey. I feel strongly that the President has been very wise in his selection of Mr. Brown to sit on the Federal bench.

I have known Garrett Brown for over four years, since he became general counsel to the U.S. Government Printing Office and subsequently as Chief Counsel and then Acting Deputy Administrator of the U.S. Maritime Administration. Throughout this time, I have been consistently impressed with his thorough method of examining situations from all angles, a trait which serves him well at the Maritime Administration, and which would be a tremendous asset on the bench.

Garrett Brown's expertise and commitment to the field of law are demonstrated by his impressive resume prior to coming to Washington, D.C. Raised in Orange, New Jersey, Garrett attended Lafayette College and Duke University School of Law. He was a law clerk to the Honorable Vincent Haneman, Justice of the Supreme Court of New Jersey, and then later head a series of positions in the United States Attorney's Office for the District of New Jersey. Garrett worked as a senior associate and eventually as a partner in the firm of Stryker, Tams & Dill for eight years before joining the U.S. Government Printing Office.

I feel confident that Garrett Brown will bring a balanced approach to the Federal bench. He is reasonable, objective and open, human qualities which are essential for one charged with the great responsibility of preserving constitutional principles of justice for those under his jurisdiction. I would urge this distinguished committee to support the President's nomination.

The Chairman. I will ask all of the candidates and the appointees to stand and be sworn. We will swear all of you at one time.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

[Chorus of yeses.]

TESTIMONY OF DEANELL REECE TACHA, OF KANSAS, TO BE U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT

The Chairman. The first appointee is Mrs. Tacha. Would you come around to the witness table, Mrs. Tacha.

We are very pleased to have you with us. I see you have had quite a bit of experience as a White House Fellow in 1971. Now you are vice chancellor for academic affairs and a professor of law.

Mrs. TACHA. That is right, Mr. Chairman.

The CHAIRMAN. At the University of Kansas.

Mrs. TACHA. That is right.

The CHAIRMAN. Mrs. Tacha, you presently serve as vice chancellor for academic affairs, as I stated, and professor of law. Have these positions prepared you for the challenging tasks that lie ahead as U.S. circuit court judge?

Mrs. TACHA. Yes, Senator, in my opinion, they have prepared me very well in combination with my practice and teaching in the legal profession and the job of vice chancellor for academic affairs which requires I analyze complex facts, listen carefully and attempt to be very fair in the decisionmaking process. In my opinion, those characteristics will serve me well on the Federal bench.

The CHAIRMAN. What branch of law do you teach?

Mrs. TACHA. I have been teaching property-related cases. Out in our part of the country, oil and gas are very important. I teach administrative law and I taught communications law.

The CHAIRMAN. Mrs. Tacha, as an appellate judge, you will be reviewing decisions of district court judges. What criteria do you intend to use in reviewing these decisions and trial records?

Mrs. TACHA. I would work very carefully with the record of the district court, limit myself to the facts of that case and to my understanding of the law and the precedents that would relate thereto.

The CHAIRMAN. Mrs. Tacha, we will hear testimony from Dr. Myra Hinman who alleges in your position as vice chancellor at the University of Kansas you have failed to actively support the employment opportunities of women and minorities and, Mrs. Tacha, would you tell the committee what your responsibilities are in the area of employment opportunities and how have you as vice chancellor implemented these responsibilities?

Mrs. TACHA. Mr. Chairman, I have submitted a statement for the record which speaks to this question. I would say, however, that as vice chancellor for academic affairs, I was one of several administrative officers responsible for compliance with the Federal Office of Contract Compliance Agreement. I am very proud of the record in complying with that agreement. I have in my statement submitted the statistics with respect to that, but in the year since I have been vice chancellor which was since 1981, the percentage of total appoint appointments that went to women varied from 31 percent to 45 percent and the percentage of minorities appointed to positions in those same years has gone up from 5 percent in my first year to 17 percent last year. It is a record of which I am very proud and one that I think has conformed with the spirit of and answer to the letter of compliance agreement.

The CHAIRMAN. I have some letters here. One from the president of the black faculty and staff counsel endorsing you and the last sentence reads, "We thought you and other members of the committee would be interested in knowing how much we appreciate Deanell and we will indeed miss her." It goes on to say, "She is understanding, compassionate and fair."

Without objection, that letter will be put in the record.

Another letter we have is from the director, Office of Affirmative Action from the University of Kansas. "It is clear to me any person questioning her commitment, actions, competence, or integrity does not know Dr. Tacha."

Without objection, that letter will be put in the record.

We have another letter here from the dean of the law school at the which says in part, "I think she would be a splendid addition to the bench. I would urge you and the committee to approve the nomination."

That will also go in the record.

I have a letter here from chancellor of the University of Kansas. The last line reads, "The record and academic past during her administration reflects her high degree of commitment to affirmative action goals."

Without objection, the entire letter will go in the record.

Here is a document signed by 128 women and minorities, faculty and staff which we will put in the letter.

Here is a letter from the academic faculty of the university reporting to Mrs. Tacha. They say, "These two points should be made. First is we the deans and our department chairmen were primarily responsible for hiring new employees and rewarding current ones. More important, Vice Chancellor Tacha has consistently used her authority to urge us to award women and minorities"

This is signed by all nine deans, I believe, at the University of Kansas.

So you come very highly endorsed and recommended.

Mrs. **Tacha**. Thank you.

[Letters follow:]

THE UNIVERSITY OF KANSAS
Black Faculty and Staff Council

November 7, 1985

Senator Strom Thurmond
218 Russell, Senate O.B.
Washington, D.C. 20510

Dear Senator Thurmond:

This is in reference to the nomination of one of our most able colleagues, Vice Chancellor Deanell R. Tacha, to the Tenth Circuit Court of Appeal. We were very delighted to know about this nomination and would like to support the same.

I have personally known Deanell in excess of fourteen years in several capacities. As the Vice Chancellor for Academic Affairs. Deanell has always supported our major organizational goal, that is, the recruitment and retention of Black (minority) faculty and students here at the University of Kansas. During her relatively short term of office as Vice Chancellor, she has done more than all previous Vice Chancellors for Academic Affairs to attract minority faculty to the University of Kansas. In addition she has helped to create minority post-doctoral visiting professorship at the University. Another case in point is that last year Deanell helped to recruit six black faculty members and several other minorities, males and females to the University. This is the highest number of minority faculty ever recruited at one academic year in the history of the University.

Another noteworthy endeavor of this nominee is her commitment to the American concept of cultural pluralism. She has not only exemplified this commitment at the University level but also in the public service sector. For the past five years Deanell and I have served as academic humanists in the Kansas Committee for the Humanities, an affiliate state organization of the National Endowment for the Humanities. As a member of the Membership Committee for this organization, Deanell has time and time again demonstrated her sensitivity to minority and female representation on the Board. Thus we appreciate Deanell's nomination to the Tenth Circuit Court of Appeal. Her records clearly indicate that she will be an excellent judge. She is understanding, compassionate and fair. We thought that you and other members of the Judiciary Committee would be interested in knowing how much we appreciate Deanell and that we will indeed miss her.

Sincerely yours,

J. Gordon

Jacob U. Gordon
President, Black Faculty
and Staff Council,
(organized in 1975)

JUG:dlh

cc: Senator Dole
Senator Kassebaum

THE UNIVERSITY OF KANSAS

Office of Affirmative Action
308 Strong Hall, Lawrence, Kansas 66045
(913) 864-3686

November 7, 1985

Mr. Duke Short
Senate Committee on the Judiciary
Room 246, Dirksen Senate Office Building
Washington D.C. 20510

To Whom it May Concern:

I am dismayed to learn that Deanell Tacha's actions and commitment to civil rights, equal opportunity and affirmative action have been challenged. At the University of Kansas, the Office of Affirmative Action and I, as Director of that office, are responsible for assuring full compliance with our equal opportunity and affirmative action responsibilities. My office has always had complete cooperation and support from Dr. Tacha. She has gone beyond what is minimally required to implement our policies. She has and has required her staff to live the spirit, not merely the letter, of the law. Her record in this area is impeccable and will withstand any reproach.

Specifically Dr. Tacha, once informed that one of the areas in her sector, Academic Affairs, has 'underutilized' women or minorities, has fully supported and assisted in efforts to recruit women or minorities to apply to the University of Kansas. Our records show a marked increase in the hiring of women or minorities in Academic Affairs under her leadership. She seriously supports the hiring policies by having her office monitor searches while working closely with my office. Academic Affairs personnel are encouraged to participate in the equal opportunity/affirmative action training programs. The Academic Affairs affirmative action committee is active and effective. Her office supports women and minority speakers. Deanell participates in functions for women and minorities. She finds ways to support and gives opportunities to women and minorities so they can be successful. She personally contributes financially to programs for minority students.

Deanell has been swift to correct injustices. In her role to correct wrongs as determined by our internal grievance procedures, she has objectively and fairly mandated corrective action with a spirit of respect to all parties involved.

I can look, without exception, to Dr. Tacha for support when what my office is trying to do is reasonable and respects the dignity of people. I cannot imagine anyone in her role being able to do more for women and minorities.

She is very active in the University, state and city communities. I am always amazed at her unflagging efforts in spite of her full calendar. A person with less integrity would allow concern for the less fortunate to slip away; however, that is not so of Dr. Tacha. It is clear to me that any person questioning her commitment, actions, competence, or integrity does not know Dr. Tacha.

Sincerely,

Robbi Ferron

Robbi Ferron, Director
Office of Affirmative Action

RF/jgd

THE UNIVERSITY OF KANSAS

School of Law
Office of the Dean
Lawrence, Kansas 66045-2380
(913) 864-4550

October 31, 1985

Hon. Strom Thurmond, Chairman
Senate Judiciary Committee
United States Senate
Room SR-218
Dirksen Bldg. N.W.
Washington, D.C. 20510

Dear Senator Thurmond:

I write to endorse strongly President Reagan's nomination of Deanell R. Tacha as an appointee to the United States Court of Appeals for the Tenth Circuit.

I have known Vice Chancellor Tacha for twelve years. When she first joined the University of Kansas law faculty I was a tenured, full professor and thus passed on her later promotion and grant of permanent tenure. When I was General Counsel of the University and she was first assistant in the Vice Chancellor's office, we worked as a team. For the last four years she has been Vice Chancellor for Academic Affairs and I have been Dean of this Law School, a relationship that made her my direct superior. So it is fair to say I have observed her from a number of perspectives.

Vice Chancellor Tacha is a gifted person. She has a first-rate mind and excellent ability to express herself both orally and in writing. She is a problem solver who can usually find the common ground, but if she fails to do so can stand as firmly as anyone for her position. She is both independent and fair, qualities that have made her an ideal administrator. I never believed that I received any special treatment because she was a friend from the Law School faculty; neither did I believe she ever leaned over backwards to prove to the rest of the University that she was independent from us. She thus handled a ticklish problem ideally.

Deanell has tremendous respect amoung her colleagues on the law faculty, members of the Kansas Bar, and Kansans generally. The qualities I have noted in the paragraph above make her, in my opinion, an ideal candidate for an appellate judgeship. While her political and judicial philosophy may more closely resemble yours than mine, I think she would be a splendid addition to the bench. Consequently, I urge you and the Committee to approve the President's nomination.

Sincerely,

Michael J. Davis
Dean

MJD:sp

THE UNIVERSITY OF KANSAS

Office of the Chancellor
223 Strong Hall, Lawrence, Kansas 66045-1500
(913) 864-3131

November 7, 1985

Senate Judiciary Committee
Strom Thurmond, Chairman
Dirksen Senate Office Building
Washington, D. C. 20510

Dear Members of the Senate Judiciary Committee:

Although I have written you previously endorsing the nomination of Deanell Reece Tacha to the Tenth Circuit of Appeals, because of recent developments I wish to clarify the record with respect to her commitment to affirmative action. As one of the chief administrative officers in the University Ms. Tacha is one among several administrators charged with the responsibility of carrying out the University's affirmative action goals pursuant to the conciliation agreement signed by the University in 1982. Ms. Tacha, through her personal example and her administrative policies, has been an aggressive advocate for the recruitment and retention of qualified minority and women faculty members. Deanell Tacha has been committed and diligent in instituting programs and policies that facilitate affirmative action goals. Along with other administrators in the University she has taken seriously and pursued vigorously the goal of bringing enhanced diversity to the University community. The record in Academic Affairs during her administration reflects her high degree of commitment to affirmative action goals.

If I can provide any further information, I would be happy to do so.

Sincerely,

Gene A. Budig

Gene A. Budig
Chancellor

GAB:jj

Main Campus, Lawrence
College of Health Sciences and Hospital, Kansas City and Wichita

To Senator Strom Thurmond, Chairman of the Senate Judiciary Committee

We, the undersigned, are colleagues of Deanell Reece Tacha at the University of Kansas. We submit to you, as women and minorities, faculty and staff, that Deanell Reece Tacha has comported herself admirably and with all due respect for law and equality in her role as Vice Chancellor for Academic Affairs and Professor of Law and before that as Associate Dean of the School of Law and Professor of Law. Her commitment to uphold the law and to foster the advancement of qualified women and minorities has been a credit to the ideals of this nation. Her actions in relation to women and minorities have been to emphasize affirmative action and equal opportunity in all the areas for which she has had responsibility. She has asserted leadership in the advancement of qualified women and minorities on this campus while being, herself, an exemplary model of quality. She has been honest and forthright in championing the commitment to affirmative action and equal opportunity while holding to standards that reflect the belief that there are among women and minorities pools of qualified individuals to fill university posts and that advancing or hiring women and minorities who are unqualified will, in both the short and long run, do a disservice to the ultimate aims of solidifying this nation's adherence to the spirit of equal opportunity that has informed the law and that represents the vitality of our society. We support the nomination of Deanell Reece Tacha for appointment to the 10th Federal Circuit Court of Appeals. Her record of fairness, of an understanding of the law and of balanced and honest action affirming the importance of equal opportunity for qualified women and minorities befit her for such service to this nation as is expected of a Federal Judge on the Court of Appeals.

recd 11/12/85
7:45pm
G

Signatories to This Statement

Name	Department or Unit at K.U.
Elaine Sharp	POLITICAL SCIENCE
	POLITICAL SCIENCE
Judy R. Kimmel	Occupational Therapy
Barbara Romzek	Public Administration
Kathleen G. Baldwin	Occupational Therapy
Karen Oberzan	Occupational Therapy
Frances Ingemann	Linguistics
Magdalene L. Coultas	Director of [illegible] School of Law
Sandy Patti	School of Law
Ellen E. Sward	School of Law
Mary D. Burchill	School of Law Library

Name	Department or Unit at K.U.
Edwyna Condon Gilbert	English + College Office
Janet Riley	Academic Affairs
June Michal	Academic Affairs
Carolyn Kelly	Academic Affairs
Carol Prentice	Academic Affairs
Jane Johnson	Chancellor's Office
Sandra S. Wick	University Governance
Linda Beville	Student Affairs
Kim Moreland	Research Support
Cindy A. Cross	Research Support
Sandra L. Bair	Academic Affairs
Susan J. Michel	Student Assistance Center

Signatories to This Statement

Name	Department or Unit at K.U.
Elizabeth Schultz	Department of English
[illegible]	ACC. Adm/Assoc VC of Acad. Affairs, Univ.
Fumiko Yamamoto	East Asian Lang & Lit.
Akira Yamamoto	Dept. of Anthropology
Lynn Bretz	Office of University Relations
Janet Hamburg	Dept of Music and Dance
Janine Cox	Health Education
Deborah Hickman	Health & Physical Education
Ann Schofield	Women's Studies / American Studies
Mary R. Davidson	English / Women's Studies
Dorothy Bowles	School of Journalism
[illegible]	[illegible]
Barbara Anthony-Twarog	Dept of Physics & Astronomy

Signatories to This Statement

Name	Department or Unit at K.U.
[illegible] Clair [illegible]	Art, Music Education & Music Therapy
Suzanne Collins	Dean's Staff, School of Education
Claudia Smith Orton	Secretary, School of Education
Martha J. Harris	Dean's Secretary, School of Education
Carol Van Natta	Dean's staff, School of Educati
Ronda Consolver	Secretary, Ed. Psyc. & Research
Marie S. [illegible]	Secretary, Ed. Psyc. Research
Margaret A. Anderson	Educational Psychology & Research
Eve Edmondson	Account Clerk, Curriculum & Instr
Nora Wyatt	Curriculum & Instruction
Ruth Noyce	Curriculum and Instruction
Nita [illegible]	Curriculum and Instruction
Belinda Braden	Curriculum and Instruction
Evelyn Swartz	Curriculum & Instruction

Signatories to This Statement

Name	Department or Unit at K.U.
Susanne Shaw	School of Journalism
Mary J Wallace	School of Journalism
Carole Dickey	School of Journalism
Karen Ortiz	School of Journalism
Amy Robbins	School of Journalism
[illegible] Boss	School of Journalism
Nancy K Harper	School of Journalism
Sue Forbes	University Daily Kansan
Linda Davis	School of Journalism
Adrienne Rivers-Washington	School of Journalism
Ethel Stewart	School of Journalism
[illegible]	School of Social Welfare
Edwin Black	School of Social Welfare
Rosalie Nieberger	School of Social Welfare

Name	Department or Unit at K.U.
Janice Lewis	School of Social Welfare
Marylee Brockmann	School of Social Welfare
Ann Weick	School of Social Welfare
Brenda Crawley	School of Social Welfare
Harold B. [illegible]	Social Welfare
[illegible] Smith	School of Social Welfare

Signatories to This Statement

Name	Department or Unit at K.U.
Marilyn V. Yarbrough	School of Law; Research, Graduate Studies
Theresa Mercer	Research, Graduate Studies
Karen Hobbs	Research, Graduate Studies & Public Service
Eveline Miller	Res., Grad. Stud. & Res.
Virginia Saylor	Graduate School
Frances Degen Horowitz	HDFL + Research + Graduate Studies
Beverly Kay Hamm	Research Support + Grants Administration
Edith M. Hayes	Research Support & Grants Admin
Janet A. Sorensen	Research, Grad Studies & Public Service

Signatories to This Statement

Name	Department or Unit at K.U.
[illegible] Ross	School of Fine Arts
Phyllis Brill	Music
Ron [illegible]	Music
Ron McCurdy	MUSIC
R. Denise Myers	music
Charles R. Jenkins	Performing Arts
Ellen S. Johnson	music library
Beth Meyers	KANU-FM
Alice Downs	Music
Linda S. [illegible]	Music and Dance
Susan Hicks	Music

Signatories to This Statement

Name	Department or Unit at K.U.
Altha Huston	Human Development
	Human Development
Judith M. LeBlanc	Human Development
Marion O'Brien	Bureau of Child Research
K. Eileen Allen	Human Development
Alita Y. Cooper	Human Development
Marie Z. Cross	Human Development
Ann M. Meyerhoff	Human Development
Kathryn Kruigi Kamp	Human Development
R. F. [illegible]	Bureau of Child Res.
Wilma J. Watt	Human Development
James Turner	Affirmative Action Office
Linda Marshall	Affirmative Action
Ann Turnbull	Spec. Ed / Bureau of Child Research

Name	Department or Unit at K.U.
Ruth Branham	Design
[illegible] Mann	Chair, Design Department
Eileen Murphy	Textile Design Area
Brenda Pierce	School of Fine Arts
Lois E Greene	Department of Design - KU
Vicki L. Eudaly	Department of Design
Roger Shimomura	Dept of Art
Sandra Jo McKenzie	Law
Karlyn Kohrs Campbell	Director, Women's Studies Program
Leonie R. Marx	Dept. of Germanic Langs.
[illegible] [illegible]-Jones	Communication Studies
Ellen Reid Gold	Communication Studies

Signatories to This Statement

Name	Department or Unit at K.U.
Joey Sprague, Asst Prof.	Sociology
Beatrice A. Wright, Professor	Psychology
Shirley J. Harkess, Assoc. Prof.	Sociology
Susan Kemper	Psychology
Dana E. Gutierrez	Psychology
Mary K. Zimmerman, Assoc. Prof.	Health Administration
Barbara A. Ballard	Student Affairs/Counseling
Rosalie Ferron	Office of Affirmative Action
Vernell Spearman	Office of Minority Affairs
Nona Tollefson, Professor	Educational Psychology & Research
Caryl K. Smith	Student Affairs

THE UNIVERSITY OF KANSAS

School of Law
Office of the Dean
Lawrence, Kansas 66045-2380
(913) 864-4550

November 7, 1985

Hon. Strom Thurmond, Chairman
Senate Judiciary Committee
United States Senate
Room SR-218
Dirksen Bldg. N.W.
Washington, D.C. 20510

Dear Senator Thurmond:

The signatories to this letter are Deans of the principal academic units at the Lawrence campus of the University of Kansas. As such we report directly to the Vice Chancellor for Academic Affairs, Deanell R. Tacha, whose presidential nomination for a position on the United States Court of Appeals for the Tenth Circuit is currently pending before the Judiciary Committee.

We write because it has been reported in Kansas newspapers that a University faculty member has, through her attorney, sent the Committee a letter alleging that as Vice Chancellor Ms. Tacha has paid little regard to the rights and aspirations of women and minorities. As those who have worked most closely with her during her tenure as Vice Chancellor, we assure you that our experience has been very much the contrary.

Two points should be made. First it is we, the Deans, and our department chairmen who are primarily responsible for both hiring new employees and rewarding current ones. More important, Vice Chancellor Tacha has consistently used her authority to encourage us to hire and appropriately reward women and minorities. She made success in meeting the University's equal employment and affirmative action goals

Main Campus, Lawrence
College of Health Sciences and Hospital, Kansas City and Wichita

a principal criterion in her annual evaluation of each of us. She created financial incentives for academic units that successfully attracted minority faculty. And she consistently used her substantial powers of quiet persuasion to move us, and the greater University, toward a more diverse faculty and staff.

The charge that Vice Chancellor Tacha has held back the progress of women and minorities seems specious on its face when juxtaposed with her own career. We who have had the best opportunity to observe believe it is specious in fact as well.

Sincerely,

Michael J. Davis
Michael J. Davis
School of Law

Jerry C. Moore
School of Fine Arts

W. Max Lucas
School of Architecture & Urban Design

William Smith
School of Engineering

Robert L Lineberry
Robert L. Lineberry
College of Liberal Arts and Sciences

Paul A. Haack
Paul A. Haack
School of Education

Del Brinkman
Del Brinkman
School of Journalism and Mass
Communications

Howard E Mossberg
Howard E. Mossberg
School of Pharmacy

John O Tollefson
John O. Tollefson
School of Business

The CHAIRMAN. Both of your Senators testified for you and these letters are from your present faculty and deans and others at the University of Kansas where you work.

I think those are all the questions I have.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

We welcome you here.

I think you answered the one question that is of principle concern and that is the affirmative action question.

I note in going through material here that the minority of the bar found you not qualified. Do you have any comments as to why that might be? Do you have any observations on that?

Mrs. TACHA. I do not know the reasons or any particular committee member's opinion. I think it is related to a limited trial court experience.

I would say, however, that it is my opinion that I have had substantial enough trial experience and understand the pragmatics of the practice of law and pursuit of a case. I spent almost a year in practice here in Washington, DC, and then 1 year in a very small practice in Concordia, KS, and then my first 3 years on the faculty of the law school were as director of the Legal Aid Committee in which I supervised many students every year for those 3 years, both at the trial court level and some limited cases at the appellate level under the Kansas student practice rule, so I have had a total of 5 years, but I am sure that is why the finding of the bar committee.

The CHAIRMAN. Senator Simon, there is an amendment on the floor. I have to go. Would you mind carrying on?

Senator SIMON. I would be pleased to.

Mrs. TACHA. Before you leave, Senator, I would like to thank you for your time. Thank you very much.

The CHAIRMAN. Thank you, and we are very glad to have you with us. I see you have handsome children. I see they favor their mother. I have four children and they are handsome and all favor their mother.

Senator SIMON. You mentioned limited trial experience. Do you think that will be a barrier to you serving effectively on the Federal bench?

Mrs. TACHA. No, Senator, I do not. I believe I have had enough to qualify me for the Federal bench.

Senator SIMON. I have no further questions, and we thank you very much and wish you the very best.

Mrs. TACHA. I would like to thank the committee, and I would like to introduce a couple of other individuals. The personal representative of the University of Kansas, Richard von Endek, University Kansas, and a longtime personal friend of mine; former dean of women at the University of Kansas, a member of the ACE staff and very interested in programs for women, Dr. Emily Taylor.

Thank you very much.

Senator SIMON. Thank you, and I might add your chancellor happens to be be an old friend who called and spoke very highly of you. Thank you very, very much.

TESTIMONY OF GARRETT E. BROWN, JR., OF NEW JERSEY, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Senator SIMON. Mr. Garrett Brown of New Jersey.

If I may, I will ask three questions for the chairman.

His first question, Mr. Brown: Would you tell the committee how you would handle an incident in which counsel for one of the parties in your court is not actually a skilled litigator and was not prepared to fully represent the interests of his or her client?

Mr. BROWN. In a situation where a counsel was not a skilled litigator, I think the best way would be to call a recess and discuss with that counsel the possibility of associating with a skilled litigator to assist during the trial of the case, because a judge must be more than a mere moderator. A judge must also see that justice be done. This is true both in civil cases and especially in criminal cases.

Senator SIMON. The second question from the chairman: Mr. Brown, Chief Justice Burger has stated, and I am quoting now: "Notice those who look to judges, especially tenured judges for remedies available if the world shaped by the judicial process is not to their liking." That is the end of the quote of the Chief Justice. Could you tell us in your opinion what the Chief Justice meant by that.

Mr. BROWN. I think he is referring to the separation of powers. The judicial branch is the only unelected branch, the only branch not responsible to the will of the people. Obviously, if those judges go beyond interpreting the law, in order to make the law consistent with their view of what is public policy, the electorate at large does not have any remedy, nor does the legislature, except for, of course, restricting the jurisdiction of the court.

Senator SIMON. The final question from the chairman: Mr. Brown, one of the characteristics of judicial activism is often said to include a tendency by the judiciary to impose itself in a matter with continuing oversight responsibility. Would you give the committee your views on this criticism.

Mr. BROWN. Senator, I don't view the judicial role as an activist one. The courts are ill-equipped to administer other institutions and do not have the constitutional mandate to do so. The role of the judiciary is to interpret and apply the laws to the facts of a particular case or controversy which is properly before the court, rather than to address perceived general problems or issues which the Constitution has properly left to the legislative branch.

Senator SIMON. Now on my own questions here, Mr. Brown, you served as general counsel of the Government Printing Office. During that time, the Public Printer was engaged in a dispute with the Joint Committee on Printing, and there was a suit involved, and the court held for the Joint Committee on that dispute. My background sheets indicate there was the granting of furloughs and refusal by the Government Printing Office to abide by the resolution of the Joint Committee.

First of all, was the decision by the Government Printing Office recommended by you?

Mr. BROWN. That decision certainly was, sir. We consulted with the Department of Justice and with the Office of Personnel Management and determined that the personnel practices in question were covered under certain legislation that otherwise applied to the executive branch, particularly under the Civil Service Reform Act. Based upon that, as I said, with the concurrence of both OPM and Justice, we determined that the Public Printer had the legal authority to issue such a furlough.

Senator SIMON. The next step as I understand it, the Joint Committee made a determination and then the Government Printing Office decided to ignore the Joint Committee. Is that a correct recitation of the facts, and did you concur then with the Government Printing Office in ignoring the resolution by the Joint Committee on Printing?

Mr. BROWN. I don't think that that decision was made to ignore the resolution, Senator Simon. The question was really whether the executive branch or legislative branch governed that particular issue. That issue subsequently went to litigation and the district court found that it was a legislative branch function.

Thereafter, of course, we had the *Chadha* decision which talked about legislative veto. The separation of powers issue was recognized by the Justice Department when they handled the above case. So I can't say that I made the decision. The decision was that of the Justice Department in handling that case, but I concurred in it, sir.

Senator SIMON. One of the canons of the American Bar Association is that a lawyer has a responsibility and I am quoting now "Every lawyer regardless of professional prominence and professional workload should find time for participating in serving the disadvantaged." Can you tell me how you have lived up to that particular canon?

Mr. BROWN. Yes, Senator. When I was in private practice, I encouraged and accepted assignments of indigent defendants unable to obtain counsel and I also took cases of people unable to pay customary legal fees so that they could have assistance of counsel in presenting meritorious claims and defenses.

Also, when I have been in public service, I have tried to act in such a way as to ensure the rights of all parties were protected.

Senator SIMON. I thank you. I have no further questions. There may be some additional questions. If you could stay a few minutes, another member of the committee may have some questions.

Mr. BROWN. I would be happy to, sir.

TESTIMONY OF ROBERT L. MILLER, JR., OF INDIANA, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF INDIANA

Senator SIMON. Mr. Robert L. Miller, Jr., of Indiana.

The first three questions, Mr. Miller, are from the chairman of the committee.

First, I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on that subject.

Mr. MILLER. I think Senator Thurmond is correct. Among the qualities I consider to be the three most important, especially for a judge, are, first, courtesy to everyone in the courtroom—litigants, lawyers, jurors, witnesses, victims and those just watching—second, patience, and third, a recognition that the lawyers probably know more about that particular case than the judge does, and I think that that is a working definition of judicial temperament, and I think it is an important quality.

Senator SIMON. Judge Miller, how does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection of the law?

Mr. MILLER. I think the first step is to look at the language being considered and, secondly, to look at the cases decided under those provisions. I think, as a trial judge, I would give particular emphasis to those cases because a trial judge is required by stare decisis to follow precedent wherever he can.

Senator SIMON. A third question of the chairman: A Mr. Miller, one of the criticisms of judicial activism is the tendency by the judiciary to use individual plaintiffs as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals. Do you feel this criticism is valid and would you explain your answer?

Mr. MILLER. Just from observing, as a State judge trying to observe the Federal system, it seems there is some validity to it. It is an approach which makes me uncomfortable in the sense that I am far more comfortable with the type of case where Smith is suing Jones, and nobody cares much about it other than Smith and Jones. I don't know a simple answer to it because of the nature of the Federal judiciary, but Federal judges are required to make a judicial review of administrative actions that will impact upon large numbers of people affected by that agency, but it is something that does make me uncomfortable as I see it.

Senator SIMON. Judge Miller, you have a minority of the bar association standing committee who have felt that you were not qualified. Do you have any reason to guess why they might have come to that decision?

Mr. MILLER. It is my understanding that the American Bar Association seeks judges who are at least 35 years of age with at least 12 years of experience, if at all possible. I am a week shy of 35 years of age and another year and a half shy of 12 years experience. I considered it something of a compliment that a substantial majority of the bar's committee considered my other qualifications and achievements sufficient to outweigh that to find me qualified.

Senator SIMON. In the process of being named, you were questioned by the Justice Department. Were you questioned by any other organizations other than the bar associations?

Mr. MILLER. The FBI did their investigation of me but none other than that.

Senator SIMON. Did anyone in the Justice Department ask you questions that you felt were improper?

Mr. MILLER. No, sir.

Senator SIMON. No one asked you how you would rule on a case if it came up?

Mr. MILLER. No, sir; I was not asked a question such as that.

Senator SIMON. I have no further questions and I thank you.

Mr. MILLER. May I take a moment to introduce my family?

Senator SIMON. Please do.

Mr. MILLER. I would like to introduce my wife, Jane, who is holding my youngest daughter, Amanda; next to her is my older daughter, Elizabeth; my father, Robert Miller, Sr., his wife, Joyce, her daughter, Margo, and my sister, Pamela. Thank you for your time.

Senator SIMON. Incidentally, Mr. Brown, I neglected to ask you to introduce the members of your family when you were here.

Mr. BROWN. Thank you, Senator.

I would like to introduce to the committee my wife, Carolyn, and daughter, Rebecca, who are here.

Senator SIMON. Thank you. We appreciate having all of you here.

Mr. BROWN. Thank you, Senator.

STATEMENT OF JOHN R. BOLTON, TO BE ASSISTANT ATTORNEY GENERAL (OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS)

Senator SIMON. John Bolton.

Mr. Bolton, the chairman has five questions for you here.

First, Mr. Bolton, as Assistant Attorney General in the Office of Legislative Affairs, you will be in direct contact with members of this committee. Is it your view that the committee will have access to the Department of Justice personnel?

Mr. BOLTON. Senator, I have had the privilege to litigate a number of cases involving the separation of powers. I think I have a good appreciation of the responsibilities of this committee for oversight and, if confirmed, when I arrive at the department I plan to review the existing procedures, and work as cooperatively as possible with the committee to provide the appropriate access.

Senator SIMON. Second, this is a question from the chairman: Do you anticipate initiating any new procedures in regard to responding to congressional inquiries and, if so, what would those procedures be?

Mr. BOLTON. Senator, as I understand it now, there is good communication between the committee and the Department, but I am more than open to any suggestions Senators may have to improve those communications.

Senator SIMON. Third, part of your responsibility will be to keep the committee advised on the Department of Justice's position on various matters. Do you have any thoughts on how this information can best be conveyed to the committee on a regular basis?

Mr. BOLTON. Senator, I believe through the normal channels of letter-writing, and so on, advising the committee of the Department's position, that is in good shape now. But I believe personal meetings between members and appropriate department officials are also useful and I would like to be as responsive as I could in that capacity, if confirmed.

Senator SIMON. The next question from the chairman: Mr. Bolton, as the Assistant Attorney General for Legislative Affairs, you will speak for the Department of Justice. Your statements to members of the committee should not be opinions. They should be statements that have been approved by the Attorney General. Have you received any guidance from the Attorney General with respect to your authority?

Mr. BOLTON. Senator, when I spoke to the Attorney General about this position, he made the point very strongly to me he felt that in order to advocate the Department's views most effectively on the Hill, the person who holds the job to which I have been nominated should also participate in the making of the policy. The Attorney General feels very strongly that the Department should speak with one voice and, if confirmed, I will speak authoritatively for him.

Senator SIMON. Finally, from the chairman, if you were requested to appear to testify before any duly constituted committee, would you do so?

Mr. BOLTON. Yes, I would.

Senator SIMON. May I add just one other concern. There is a concern expressed to me from time to time, and I am sure you have seen it, about the quality of Federal judicial nominees. For example, I spoke to the black lawyers at a meeting in New York the other day and the only round of applause I got in my address was when I said if I were a black lawyer, I would be paying close attention to the quality of the Federal judiciary so that we maintain the kind of high quality and high expectations we should have. Do you have any thoughts about what could be done working with the Judiciary Committee and working with the Senate to see how we can maintain quality in the Federal judiciary?

Mr. BOLTON. Senator, I think it is critical for the respect for the Federal court system that is required so that its orders be carried out, that the people who sit on the Federal bench have the very highest qualifications possible. I think the Attorney General has tried very hard and will continue to try very hard to pick the best qualified nominees. The Department is open to any suggestions from anyone about prospective nominees or steps that might be undertaken to assure the highest quality of nominee.

I am a former student of the late Alexander Bickel. He taught all of us who studied under him that the quality of judicial nominees is critical for the long-term success of the judicial system, and I carry his lesson with me.

Senator SIMON. Thank you very much. We have no further questions for you.

We have two additional witnesses. I would ask them to appear together, Dr. Myra Hinman, professor of English, University of Kansas and Reverend D.D. Miller, president, NAACP, Wichita, KS.

Mrs. HINMAN. It appears I am the only one.

Senator SIMON. I understand Reverend Miller will not be here.

TESTIMONY OF DR. MYRA HINMAN, PROFESSOR OF ENGLISH, UNIVERSITY OF KANSAS

Senator SIMON. Dr. Hinman, would you take the stand. Raise your right hand. Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. HINMAN. So help me God.

Senator SIMON. We will put your full statement in the record. We want to limit you to approximately a 5-minute summary of that statement and then we will follow it with any questions.

Mrs. HINMAN. I will try my very best.

Mr. Chairman, and members of the Senate committee, and other interested persons, I am here today to oppose the confirmation of

Deanell Tacha to be a U.S. district judge of the Tenth Circuit Court of Appeals.

I love the University of Kansas. I have spent almost half my life there, but we cannot see it held back or hold back the time in an environment of elitism and prejudice, wasting the human potential of young Kansas minority groups. It is a fine school, but I believe political appointments to academic posts are wrong. I know Mrs. Tacha has university support in part because I have opposed her appointment. The university may in return ask support especially in its civil rights cases. There are five of them, three are pending at the district level, two have failed and will be going to appeals.

I would ask you to remember that the business of the politburo is primarily and first of all to preserve the politburo.

Administrators are apt to want the status quo. It is easier.

Deanell Tacha is obviously a woman. However, mere gender does not guarantee that any single woman will be sensitive to minority rights, women's rights, or even to civil, and constitutional rights.

Let me pose some relevant questions: How many faculty members hired by the University of Kansas during the tenure of Tacha were black or Hispanic? Percentages will not do when you start with one or two members.

Does the Department of Philosophy have any women faculty? How many? If so, for how many years?

Why do so few minority persons choose to take terminal degrees at the University of Kansas?

Has the *Women's Athletic* case under title IX been settled?

Why did the University of Kansas pioneer in an attempt to make title IX apply only to students and not to faculties seeking equity?

It seems to me that Mrs. Tacha's attitude on civil rights matters suit perfectly her environment.

I have tried to put the readily available facts before you in my written statement to show that Deanell Tacha has actively and voluntarily intervened in situations to inhibit equity and academic responsibility. Her behavior does not dispose an observer to believe she will behave differently as a Federal appeals judge. We cannot ignore that the university under her tenure as vice chancellor of academic affairs has been found by the Department of Federal Contracts Compliance Programs, Department of Labor to be in serious violation of affirmative action and to have thereby been made to sign a conciliation contract with that office even though another similar conciliation contract with the Kansas Commission on Civil Rights had only just expired.

These facts taken together show Mrs. Tacha and the University of Kansas to have exhibited flagrant disregard for the tenets of our Constitution and will you now allow her to swear to uphold them and to expect her to do so? I am fearful of such consequences.

An appeals court has just upheld the local rule of the Northern District of Illinois. The rule bars novice lawyers from Federal courtrooms and "limits partition in the Federal courts to experienced attorneys."

According to U.S. News & World Report, "The District and three others have adopted experience rules based on the belief that young attorneys, like young physicians, must first be trained by experienced practitioners," 11 November 1985, page 91.

Yet President Reagan has chosen a prospective judge——

Senator SIMON. I don't mean to interrupt you. We have a roll-call on and you have exceeded the 5-minute rule here.

Let me ask you just a couple of quick questions.

You mention in your statement that the nominee is not sensitive to civil rights. As I heard the statistics on the growth, that sounds like a fairly substantial growth. Compared to most universities, this record indicates more favorable growth than you find at most universities. Do you have any comment on that?

Mrs. HINMAN. The hearing was so hurried. Although Dean Logan announced that it would be on the 13th, we could not get any information from Washington as to when that confirmation hearing would be held until about a week before it was scheduled. I have not had time to do that.

Senator SIMON. You mentioned in your statement, "I have suffered a reign of terror and retaliation since 1973 under George Worth and George Sutter"—I am not sure how to pronounce his name. Mrs. Tacha came in 1981; is that correct?

Mrs. HINMAN. Yes.

Senator SIMON. So your problems did not originate with Mrs. Tacha; is that correct?

Mrs. HINMAN. My case was filed in 1978. After the filing of that in Federal district court, I have suffered harassment. After 17 years, tenure-breaking reprimands, harassment, retaliation, I think improper merit salary raise evaluations and I have remained unheard, and the retaliation has persisted up to the time of our new chairman a year or so ago.

Senator SIMON. This harassment that you talk about, did that begin after you filed your suit? Did that begin when Mrs. Tacha took over her position?

Mrs. HINMAN. It did not begin but it did continue.

Senator SIMON. I have no further questions and thank you very much for coming.

Senator Mathias will not be able to be here, Mr. Brown. We will keep the record open and we may have further questions for any of the nominees or the witnesses who were here.

[Prepared statement follows:]

80N

Myra Hinman

1932 Maine Street

Lawrence, Kansas 66046

913 841-1316

SENATE JUDICIARY COMMITTEE

WRITTEN STATEMENT TO OPPOSE CONFIRMATION OF DEANELL TACHA AS U. S. COURT OF APPEALS JUDGE

I wish to oppose the confirmation of Deanelle Tacha on two grounds. The first is her lack of active experience in the area of law (approximately one year's practice). She is a "paper person." She has distanced herself from the law as an assistant (usually elevated by title to "Associate Dean"). She has been an assistant (Associate?) Vice Chancellor, 1971-81, and, from 1981 to the present, Vice Chancellor of Academic Affairs. She is either an administrator in higher education or a career lawyer, but she has now been away from the law for about seven years. She simply is not qualified. Secondly, I oppose her as a person wholly unfriendly to Civil Rights. In her tenure as Vice Chancellor, after she had been in that office for two years before promotion to full Vice Chancellor, she showed herself to be a powerful politician, especially as the daughter of the Kansas Rupublican Committeewoman, Mrs. Reece, and in her own right, but not sensitive to civil rights. Four faculty women had sex discrimination suits with KU in federal district court, two of them from my department. She ignored us and our pleas for just treatment.

In May, 1985, she actually testified against a woman faculty member, a colleague. In her testimony, she admits she is responsible for employment, salary, sabbatical leave, and so on. It is widely known, and at least once published in our campus paper, that the administrators here are the most highly paid of those in any Big Eight school. The American Association would have current statistics. Administration is rewarded as service. The plaintiff was limited in her pleadings to the Department of Political Science. Tacha in her answers could have been telling the truth only if she meant the over-all campus, including the Medical Center in Kansas City. She testified "service" was not as highly rewarded as teaching or research.

In our department service is the most highly rewarded activity--it is very highly rewarded, as it is in the central administration, costing Kansas tax-payers thousands of dollars a month.

I worked for many years, at least a decade, with my late husband , Charlton Hinman, who was one of the first two University Distinguished Professors for KU, on a contracted, complete, modernized edition of Shakespeare's works. My late husband was probably the most highly regarded internationally known textual scholar in Shakespeare, having worked a decade in the basement of the Folger Library, and

3

having invented a machine, the Hinman Collator, now used throughout the world. (Consult John Andrews at NEH or O. B. Hardison, Jr., at George Washington University.) He died in 1977. While he was alive, I was never told that my part of the editing was not suitable research for promotion and salary, especially as my husband continued to be awarded large merit raises. My husband was horrified at my salary and work demands, and made my first appointment for me at the Kansas Commission on Civil Rights, where KU has had a conciliation agreement (76-81?). I began to fight for equity in pay in 1973. In 1976, I filed with EEOC. In 1978, I filed a suit in Federal District Court, with a 1975 determination by KU that I had been "discriminated against historically on no basis other than sex," an EEOC right-to-sue letter, and a U.S. Department of Justice right-to-sue letter. By local rule, pre-trial hearing is crucial; testimony must be taken within 120 days after this hearing. My hearing was in 1982 or 83. I have taught under my supervisory adversaries, and been evaluated by them for "merit" for all these years. I have not been promoted (for lack of research!) for eighteen years. I have been here going on 26 years with one sabbatical. And yet the other collaborator with my husband was hired here (instead of promoting me) for $25,000. At the time in 1971, I was making $11,300, and it was frozen at that rate.

George Worth has published a book or two, neither sensational, and published them at the University of Kansas

4

Press--in a very political university. Gerhard Zuther, who does not have a terminal degree in English, and is thereby unqualified to evaluate work in English studies, a Hitler Youth Movement member, a volunteer in the Nazi Army, published a book in Munich or Bonn, in Germany in German, which seemingly consists of a Comparative Literature doctoral thesis re-worked and published by, as I understand, a vanity press. He has published no book in English; at least neither he nor George Worth mentioned one in their depositions. Our comparative salaries in 1985-86 are:

Worth: $47,283
Zuther: 43,339 (as chairman, 84-85, $47,777 + $2000)
Hinman: 27,245.

When, after my husband's death, W. W. Norton cancelled publication (consult my former probate lawyer, Judge Peter Messitte, Rockville, Md., and Mark Budig, copyright lawyer for Rembar and Curtis, NYC, for details), these chairmen fell upon me for a "book." Men have often been promoted in the department without a "book."

Deanell Tacha has been a "company man"; she has signed my salary, not investigated my lack of sabbaticals, my lack of applications for research grants, never talked to me in spite of merit review appeals. In short, she has denied me the most elementary due process.

But knowing that service is inordinately rewarded at KU, she testified against a fellow woman colleague to the contrary. Sure, engineers, lawyers, and physician associate professors make more than English teachers or a woman full professor in Political Science (whose last book by Yale University Press is widely reviewed and highly regarded). This is a close to perjury as I have ever seen any one come. It is pathetic, too, because she helped to lead astray a jury who would not expect a high official at the University of Kansas to lie to them. I believe that Tacha knowingly and willingly misled that jury in her answers. She also testified that raises did not accompany promotions. My enclosed salary profiles show otherwise.

During her tenure, the Department of Labor, Office of Federal Contract Compliance Programs, came to KU and foun us not to be in compliance in classified (workmen and secretarial staff) and unclassified (faculty and administrators) in veteran, minority or women utilizati An article in the Daily Kansas, (our KU newspaper) led believe there had been an unfavorable review by the OF but I have been unable to find out. The Affirmative Office is crippled because the AA people are kept un and work at the pleasure of the Central Administrat Between breakfast and lunch they can become unemplo they try; they really do. In our Department, as I women are counted if they are not tenure track em are merely temporary or part-time faculty. We hi tenure track woman last year; we haven't had a c hire more because we haven't been given the opp

6

hire lately. I have faith in our present chairman, but under Gerhard Zuther and Deanell Tacha, we turned down the services of a Negro, Chairman of Black Studies, even though his half-time offered service would have been paid by the Department of Black Studies. This is not the spirit of the conciliation contract Deanell Tacha is charged to implement. I believe our present chairman, Michael Johnson, is serious about women's rights but his hands are currently tied. In any event, we have no minority men.

We are evaluated subjectively, said evaluation is turned into merit points. Then the points become a set percentage of individual professor's salaries. Compare 3% of my salary of $27,000 with 3% of Worth's salary at $47,000. The Department of Labor Arbitration Section has told me that it is unequal pay for equal work. Yet Deanell Tacha blithely signs these merit salary raises, which are probably illegal. I doubt if she's ever investigated how the Department of English does its merit raises.

Suppose Deanell Tacha is confirmed. My cases are surely lost at the federal court level. I have asked my judge to recuse himself (by letter) from the sex discrimination case because I just found out that he is, or was, on the Board of Governors of the KU Law School, and Mike Davis, Dean of the Law School has concerned himself in this case, as the University's General Counsel. This judge has also been a Director of the KU Alumni Association, run by the KU Endowment Association, whom I am suing over matters related to the probate of my husband's estate. The KUEA got into my husband's will, using as a hold over him a supply of drugs not yet approved by the FDA, and the judge has just refused to recuse himself in that related suit. With such conflicts of interest by my judge, all unknown to me when I filed under him, I cannot now delude myself my cases can win.

I have suffered a reign of terror in retaliation since 1973 under George Worth and Gerhard Zuther until last year when the review committee refused to re-appoint Gerhard Zuther. Zuther once told me over coffee in the Student Union that Nazism had to have something in it or he would never have believed in it. We know what the Nazi movement thought of women! I have lost thousands and tens of thousands of dollars in salary; to save anything I had to spend much of my husband's estate and substance. Deanell has stood by and ignored my plight, even during such a sorrowful time. Must I again face Deanell's disregard for justice, equity, and civil rights when my cases go to appeal? These people out here don't recuse themselves!

My protest is not wholly personal. Tacha asked the Attorney-General for defense of faculty members in a suit when one of these persons was, and is, under continuing sanctions by the National Institutes of Health for violations of the human rights of research subjects. Senator Gore knows something of this NIH sanction.

8

Deanell is, to my view, just the sort of person President Reagan would have chosen to aid in his campaign to turn the clock back on civil and constitutional rights. People caring and working for civil and constitutional rights in Kansas are terribly worried by this turn of events, and Tacha is only thirty-nine years old. Think of the lives she could ruin before she is seventy years old! The loss of human dignity, and of a sense of fair treatment at work, and of self-esteem, and of belief that law somehow equates with justice.

The salary profile of Gerhard Zuther should show that he was promoted in 1965-66, and received a raise from $8700 to $10,000 for 1966-67.

A. A3 is a letter to Professor Willner from Earl Nehring. It's her evaluation for 1981.

Q. And C3?

A. Is another letter to Professor Willner from Professor Nehring. It's her evaluation for 1979. E3 is another letter, same people, evaluation for 1978. And H6 is Professor Willner's evaluation for 1976.

Q. And are you custodian of those documents?

A. Yes.

MS. MUDRICK: We would offer Exhibits A3, C3, E3 and H6.

MR. PHILLIPS: No objection as to foundation.

THE COURT: All right. A3, E3, C3 and H6 will be admitted. All right. You may step down. You may call your next witness.

DEANELLE TACHO,

called as a witness on behalf of the Defendant, was sworn, and testified as follows:

EXAMINATION

BY MS. MARINO:

Q. State your name for the Court.

A. Deanelle Tacho.

Q. And where do you live?

A. In Lawrence, Kansas.

Q. What is your position at the university at the present time?

A. I'm vice chancellor for academic affairs.

Q. Do you also have a faculty position at the university?

A. Yes, I'm a professor of law in the School of Law.

Q. What is your educational background?

A. I graduated from Scandia Rural High School in Scandia, Kansas; then was an undergraduate at the University of Kansas with a Bachelor of Arts Degree in American Studies. From there I went to the University of Michigan and received a Juris Doctorate at the University of Michigan in Ann Arbor.

Q. And in addition to your position as vice chancellor for academic affairs at the university, do you also teach classes still?

A. Yes. I teach the beginning property courses at the law school.

Q. How long have you held the position as vice chancellor?

A. Since April of 1981.

Q. And prior to that time, did you hold any other administrative position?

A. Yes. From '79 to '81, I was associate vice chancellor for academic affairs. From '77 to '79, I was associate dean of the law school. And from '74 to '77, I was director of the Douglas County Legal Aid Society.

Q. Then you're familiar with how the University of Kansas structure and organization is?

A. Yes.

Q. Could you briefly describe that---

MS. WILLNER: Excuse me. She's out of this case. She wasn't there in 1981.

THE COURT: You may proceed.

Q. (BY MS. MARINO) Would you describe to the Judge and the jury what the organization of the university is and where your position of vice chancellor for academic affairs fits into that?

A. Yes. The chancellor is the chief executive officer of the university. The chancellor, of course, reports directly to the Kansas Board of Regents on the Lawrence campus. Below the chancellor is executive vice chancellor. The executive vice chancellor is the administrative officer responsible for the Lawrence campus. To him report three vice chancellors. I'm one of those three vice chancellors. One is for student affairs. One is for research and graduate studies, and one is for academic affairs. And then in the organizational structure below me-- I am that third vice chancellor. Below me are the deans of all of the academic units and the directors of all of the academic units who report directly to me. Then below that are the departmental chairpersons. So it's a pyramid from chancellor to the executive vice chancellors to vice chancellors to deans to department chairpersons.

Q. And then of the deans that report to you, is the dean of the College of Liberal Arts and Sciences one of those division heads?

A. Yes, he is.

Q. What are the responsibilities of the dean of the college?

A. The dean of the College of Liberal Arts and Sciences is the chief administrator both as an administrative matter and as a curriculum matter, the academic policies and administrative procedures in the College of Liberal Arts and Sciences. The college is made up of several departments, all of which are headed by department chairpersons who report directly to the dean. The dean has responsibility for such things as budgetary allocations, curriculum and faculty decision making, all of the issues related to equipment, merit salary, other operating expenses, facilities, faculty hiring, promotion and tenure, sabbatical leaves, all of the issues that relate to the faculty within the College of Liberal Arts and Sciences.

Q. Is it your office that is responsible for the terms of offered employment to prospective faculty members?

A. Yes. In the initial offer, my office-- I sign the initial offer letter that goes to faculty, I and my predecessors in this office. We sign them and, therefore, we set the initial terms which typically are the rank, the tenure and the salary.

Q. What responsibilities other than hiring does your office have then?

MR. PHILLIPS: Your Honor, I'm going to object on the grounds of relevance. As I understand it, she was not the academic vice chancellor during any of the period in controversy. She came later.

MS. MARINO: Well, she---

THE COURT: I'm not sure that's the problem. She is outlining to us the structure and the way the matters take place. Overruled.

A. I think your concern was---

Q. (BY MS. MARINO) Other than offering employment, what other responsibilities do you have?

A. Typically, it's described as the chief academic officer of the institution; that is, it is the highest post in the institution that is held by an academic for academic policy and academic budget decisions. So that the responsibilities of my office are very broad with respect to all of the academic units. We just-- among the responsibilities are budget allocations, including all of the aspects of the budget for the academic units. Again, that's all the schools in the College of Liberal Arts and Sciences. That would be such things as merit salary funds, equipment funds, other operating expenses. I serve and my office serves as staff for-- as staff, and I serve as ex officio chairperson of the university committee on promotion and tenure. We serve as ex officio chairman of the Sabbatical Leave Committee, all policies related to academic faculty appointments, to the terms of employment. We represent the academic officers at the Regents-- I do. We are involved in any curriculum determinations, ultimately involved in any of the academic policies of the university.

Q. Then, in your position, what specific part do you play in that process of annual merit salary increases?

A. Merit salary dollars are appropriated by the legislature to each of the region's institutions. Then, within the institution in that organizational structure that I have just described, the chancellor and the executive vice chancellor allocate proportions of that merit salary appropriation to each of the vice chancellors. I would, for example, get the allocation for all of the academic units. Then I would make individual allocations to each of the professional schools in the College of Liberal Arts and Sciences in a bulk; that is, the merit salary dollars that are available are then divided among the academic units, and I do that allocation process.

Q. And are the funds that are available for merit salary increases different according to what year we're talking about?

A. Oh, certainly. The legislature-- the legislature always appropriates quite different percentages, and it depends on the appropriation for a particular fiscal year by the legislature.

Q. What system is in effect at the University of Kansas, and has been since you have been there at the university, for awarding salary increases on an annual basis?

MR. PHILLIPS: I'm going to object, Your Honor, unless we specify a time. I think any time after the events in controversy would make her testimony immaterial.

Q. (BY MS. MARINO) You have been in the office of academic affairs since-- what was the time?

A. April of '81.

Q. April of '81. Before that were you---

A. I was an associate.

MS. MARINO: So she's familiar.

THE COURT: Yes, overruled, go ahead.

A. The basis for allocation of merit salary dollars is on a merit only evaluation of the faculty members. Now, each department and each school has differing processes by which they arrive at the merit salary evaluation and the ultimate merit salary recommendation, but we evaluate all of our people on the basis of merit only.

Q. (BY MS. MARINO) Are you familiar with the criteria by which merit salary increases are awarded at the University of Kansas?

A. Yes.

MR. PHILLIPS: Object unless we specify a time period, in case we're talking about 1983-84.

THE COURT: I think she's giving us the general picture here. I realize it's changed some, but overruled.

A. Actually, the standards at the university for many years have been the same. They are an evaluation of teaching, research and service, with somewhat greater emphasis placed on the first two, teaching and research, and that's-- the merit is established with respect to all three of those categories. I might say that differing departments and schools might evaluate teaching, research and service in somewhat differing ways, but the university policy is quite clear.

Q. (BY MS. MARINO) At what level within the university is it decided what merit salary increase will be allocated to a particular faculty member?

A. Typically, in those schools where there are departments, it is done at the departmental chairperson level. Some units have salary committees that make recommendations to the chairperson, and in some departments it's done by the chairperson, him or herself. The responsibility for a merit salary recommendation lies with the chairperson, then the dean, then I, then the chancellor.

Q. And who does make that final decision on an individual's salary?

A. The final decision up until this year has been a function of the Board of Regents' approval of the full budget. This year the policy has changed somewhat, and the chancellor is the final authority.

Q. Does rank in and of itself of a faculty member affect the amount of salary increase that person will receive in a year?

A. Rank, no. You mean whether they're an assistant, associate or full---

Q. Yes.

A. No. The rank is not critical at all to the merit salary determination. It is the merit determination on that individual for that particular evaluative period.

Now, with respect to research, some departments take a somewhat longer view - but again, oh, typically, no longer than three years of the research productivity of an individual - and then measure the progress in that particular evaluative year, but rank is not a factor.

Q. Does a full professor always make more than, say, an associate professor?

A. Oh, no. There would be a significant number of associate professors in the university who would make more than a full professor.

Q. Do you know whether or not Ann Willner is a tenured professor?

A. Yes, she is.

Q. And are you familiar with how many tenured faculty members have been terminated at the University of Kansas in the history of the university?

MR. PHILLIPS: I object. I think that's irrelevant.

THE COURT: Well, overruled.

A. I have not ever known of a tenured faculty having been terminated at KU. It is possible prior to the records of our office that that occurred but not in the recent past.

Q. (BY MS. MARINO) And do you know if the University of Kansas' experience with non-termination of tenured faculty is the same as across the nation with other universities?

A. I think it's quite typical.

MS. MARINO: No further questions.

EXAMINATION

BY MR. PHILLIPS:

Q. Ms. Tacho, you became the academic vice chancellor?

A. Yes. It's Tacho.

Q. Tacho, I'm sorry. And that was in the spring of 1981?

A. Yes.

Q. All right. And wouldn't you agree that, in most departments in the university, the full professor ordinarily will make more money than the associates and the associates--- isn't that the general trend within the departments?

A. It would be very difficult to generalize, because, as you probably know, there are a host of factors that enter into that. The merit salary determination over the years is a very important one as well as, of course, what the entry level salary was.

Q. Okay. Wouldn't you agree full professors are going to make more money because they have been promoted? At the time of promotion, there are usually substantial increases?

A. Oh, well, that's not the case in all

departments and all units. That varies as well with the unit.

Q. One of the benefits in promotion is usually a higher salary, isn't that right?

A. Some units have the practice of adding to the salary and some don't. Promotion and rank in academic circles is a recognition of the past activity, not necessarily any indicator of that particular merit salary year.

Q. Okay. So Doctor Willner was given a promotion in 1970. That promotion would reflect her past activity, wouldn't it?

A. Presumably, yes.

Q. And didn't the Political Science Department in 1970 and '71, during that period in the early '70s, late '60s, give increases with-- at the time of promotion?

A. I'm not qualified to answer that question.

Q. All right. And you're familiar with the salary data at the University of Kansas, are you not?

A. I am.

Q. Isn't it true over the period from '71 to the time you came in 1981-- became the vice chancellor for academic affairs, that women made less than men on the whole?

A. Oh, I don't think that generalization could be made on that basis only. There could be a series of factors in the determination of what the salary figures are.

Q. Wouldn't you agree women professors have made less than male professors over the years? Isn't that true at the University of Kansas and most institutions in the country?

A. One would have to do a full analysis of the merits of each individual because it is not true that it is systematically a function of male or femaleness.

Q. Well, salary levels were different, weren't they, over the ten-year period?

A. For each individual the salary level might be different from another individual, but they are a function of individual merit.

Q. Well, now, it would be allocation of monies for salaries-- would allocation of equal percentages be a-- would that be in compliance with the merit system if the department allocates money to faculty members on the basis of equal percentage for everyone or equal dollars?

A. If they gave equal dollars or equal percentages, that would seem to me to be a factor that would mitigate against a merit determination. On the other hand---

Q. All right. Is that right?

A. Well, if they're all equal. However, if there are any supportive factors that says the merit is equal, then it's possible it could come out that way.

Q. Didn't Political Science, prior to '81, have a system whereby monies were allocated on the basis of equal percentages or equal dollars?

A. Again, I'm not qualified to answer that question.

Q. You're not familiar with how the Political Science Department operated?

A. Before 1969?

Q. Before 1981.

A. I would say, yes, before 1981.

Q. Well, in '77 to '81, didn't the department allocate money on the basis of equal percentages?

A. Oh, no, I don't think so.

Q. Or equal dollars for everyone?

A. No.

MR. PHILLIPS: That's all I have.

THE COURT: Anything further of this witness?

CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Kellie L. Spriggs, a Certified Shorthand Reporter in and for the State of Kansas, duly commissioned as such by the Supreme Court of the State of Kansas, do hereby certify that I was present at and reported in shorthand the foregoing proceedings had at the aforementioned time and place; further that the foregoing 15 pages is a true and correct transcript of my notes requested transcribed.

IN WITNESS WHEREOF, I have hereunto affixed my Official Seal this _____ day of___________ , 1985.

KELLIE L. SPRIGGS
CERTIFIED SHORTHAND REPORTER

SALARY AND RANK BY EMPLOYEE--DEPARTMENT OF ENGLISH - [illegible]

YEAR	RANK	SALARY	
1961-62	Asst. Prof.	$7180	Chair, Albrecht Assoc. Chair,W
1962-63	"	7880	"
1963-64	Assoc. Prof.	8500	Acting Chair, promotion
1964-65	"	12500	
1965-66	Professor	13500	Chair
1966-67	"	15000	"
1967-68	"	16900	"
1968-69	"	18240	"
1969-70	"	20000	"
1970-71	"	21200	"
1971-72	"	21200	"
1972-73	"	22500	"
1973-74	"	25000	"
1974-75	"	25000	"
1975-76	"	30300	",Sabbat., full pay
1976-77	"	33000	" + $1000
1977-78	"	34700	" + $1000
1978-79	"	37100	" + $1000
1979-80	"	32,750	Chair,Zuther, For. Assoc. Ch.
1980-81	"	35720	"
1981-82	"	38140	"
1982-83	"	40910	"
1983-84	"	45226	Chair,Johnson
1984-85	"	47283	"

Sabbaticals and summer pay (research) not always listed by department.

SALARY AND RANK BY EMPLOYEE--DEPARTMENT OF ENGLISH

YEAR	RANK	SALARY	
1961-62	Asst. Prof.	$6200	Chair, Albrecht Assoc. Chair,W
1962-63	"	7100	"
1963-64	"	7500	Assoc. Ch. for Worth
1964-65	"	4100	"
1965-66	"	8700	"
1966-67	"	10000	"
1967-68	"	11100	"
1968-69	"	12500	" +1 June, $1389
1969-70	Professor	13800	"
1970-71	"	14835	"
1971-72	"	14825	" Sabbat., full pay
1972-73	"	15475	"
1973-74	"	17200 –	"
1974-75	"	17200	"
1975-76	"	21500	" + 1 June, $2388.
1976-77	"	24000	" + $2667
1977-78	"	25815	" + $2868
1978-79	"	27750	" + $3083
1979-80	"	38650	Chair,Zuther, For. Assoc. Ch. +$2000
1980-81	"	41910	" +2000
1981-82	"	44670	" +2000
1982-83	"	47777	" +2000
1983-84	"	47777	" +2000
1984-85	"	43339	Chair,Johnson

Zuther not reappointed by review committee

Sabbaticals and summer pay (research) not always listed by department.

SALARY AND RANK BY EMPLOYEE--DEPARTMENT OF ENGLISH - Myra [illegible]

YEAR	RANK	SALARY		
1961-62	Instructor	$5800		Chair, Albrecht
1962-63	"	6300		"
1963-64	Asst. Prof.	6700		Chair, Worth (sal. set by Alb.)
1964-65	"	7200		Worth
1965-66	"	7300		"
1966-67	"	8800		"
1967-68	"	9300		"
1968-69	Assoc. Prof.	10000		"
1969-70	"	10600		"
1970-71	"	11300		"
1971-72	"	11300		"
1972-73	"	11700		"
1973-74	"	12350		"
1974-75	"	12350	Grievance	"
1975-76	"	16225		"
1976-77	"	Leave w/o pay		"
1977-78	"	17840	Grievance	"
1978-79	"	18850		Chair, Zuther (sal. set by Worth)
1979-80	"	19500		(Z. former assoc. chair)
1980-81	"	22370		"
1981-82	"	23689		"
1982-83	"	23689		"
1983-84	"	26005		Chair, Johnson
1984-85	"	27245		"
1985-86	"			

- Sabbaticals and summer pay (research) not always listed by department.

Nothing but the facts from KU and Lawrence

25¢

Plumber's Friend

February, 1985 Issue no. 24 Tim "Hogwash' Miller, editor

TERMINAL DESTINATIONS

A month before word reached the public, some—maybe as few as three—city officials knew that the Union Pacific railroad planned to tear down its North Lawrence depot. The UP asked the city manager if anyone wanted to do anything with the old building; the answer was no. At most one commissioner was informed about the railroad's plans; things were kept carefully under wraps. One presumes that the scheme was to wait until the building bit the dust to inform anyone about it.

The UP was surprised to learn that there was sentiment in favor of saving the historic structure. As things turned out, the UP immediately looked like the bad guy, the wrecker; but the railroad had actually provided at least some notice and had been informed that it should go ahead with its plans. That the J-W broke the story just before the intended demolition really botched the plan. (Given the paper's editorial hostility to historic preservation, notably in this case, is the news side in trouble for breaking the story which just might lead to saving the building? Probably.)

The building will be hard to save at best. It will cost a lot of money, and we've spent so much subsidizing the developers this year that saving our history may prove to be out of reach. In any event, with the staff resolutely opposed to a preservation project, it's going to be very difficult indeed to get anything rolling.

Same song, ten thousandth verse: the elected officials are supposed to make policy, and appointed officials are then to carry it out. But in fact just the opposite is happening under this best of all possible systems of government.

* * *

NEW HORIZONS IN JUSTICE

We were glad to see GOP Gubernatorial Candidate Bob Stephan straighten the Board of Regents out on the open meeting law. It's an old law, and it strains credulity to believe that the regents were not entirely familiar with it. But there's punishment for breaking the law, and then there's punishment. A new level of justice was reached with the deal in this case: admit you broke the law, the AG bargained, and that itself will be your punishment.

We're going to keep the new standard of punishment in mind the next time we decide to break a law. It sure beats the other options.

ANTHROPOLOGICAL DIGS

Here's a late communication from the anthropology wars. The lawsuit of Michael Crawford against his colleague Henry Lundsgaarde and students Elizabeth Murray and Nancy Sempolski had ended up with a hung jury and was due to be retried when a settlement was reached. The word from Topeka is that the settlement, if payment is approved by the state, will involve Lundsgaarde's agreeing to pay Crawford $10,000, a sum that will actually come out of state funds. (The state had been defending the case; the principle here is that Lundsgaarde was acting as a state employee on official duty.) The other defendants, reportedly, won't have to pay anything. The tit for tat? Well, another lawsuit is in the hopper, this one involving Murray and Sempolski against various faculty members and administrators. Under the overall agreement, several persons, including Crawford, will be dropped from that suit, leaving several anthropologists as defendants. Ironically, the suit will press onward, despite the fact that Crawford and the KU hierarchy, the original targets, are now out of the picture.

Another strange twist: Deputy Attorney General Bruce Miller had represented Lundsgaarde, Sempolski, and Murray when Crawford sued them. But when Murray and Sempolski sued the anthropologists and others, who should show up at KU as a fact finder but Bruce Miller? He asked to interview those named in the new suit, in order to gather facts which might be used by the Attorney General's office to help decide whether or not to represent the defendants. Funny thing, the newly named defendants didn't have much interest in talking to the guy who only moments earlier had been on the other side of the table.

. . . AND SOME TOUGH TALK FROM THE AG

When Attorney General Stephan announced that he wouldn't defend KU faculty members who had been sued, he was hard as nails. Eventually, though, he awoke to political reality. Thus when he wrote to the daughter of the Republican National Committeewoman for Kansas, he became quite conciliatory:

Dear Deanell:

When I talked to you I was not in a position to change my opinion in regard to my representation of some faculty members. I want you to know it was a difficult decision. Because of my great respect for the Chancellor I wanted to make it clear to him that the University could spend its own funds but I must continue to refuse representation from this office.

It was not my intention to embarrass the Chancellor and I believe that the matter has been worked out to the satisfaction of all concerned. Thank you for your interest.

Very truly yours,

Bob Stephan

Robert T. Stephan
Attorney General

RTS:pc

TESTIMONY OF RICHARD VON ENDE, EXECUTIVE SECRETARY, UNIVERSITY OF KANSAS

Mr. SHORT. Would the executive secretary of the University of Kansas please stand and raise your right hand. Do you swear the testimony you are about to give is the truth, whole truth, and nothing but the truth, so help you God.

Mr. VON ENDE. Yes.

My name is Richard Von Ende. I am the executive secretary of the University of Kansas. I appear here today as official representative of the University of Kansas——

Mr. SHORT. Would you limit your testimony to 5 minutes, please.

Mr. VON ENDE. Yes, I will—and as personal representative of the university's chancellor.

I appear in support of the nomination of Deanell Reece Tacha to the bench of the Tenth Circuit Court of Appeals and rebut the statement offered to the committee by Professor Hinman.

In her written statement, Professor Hinman has alleged that Deanell Tacha in her role as vice chancellor for Academic Affairs at the University of Kansas has thwarted opportunities for women and minorities. In my opinion, based on personal observations as administrator of the University and as attested in documents filed with the committee, the basis is blatantly ridiculous. Since the time when Professor Hinman's written statement was received by the committee, several officers and faculty members of the University of Kansas have responded with statements contradicting Professor Hinman's allegations. In particular, the following statements have been made. Chancellor Budick has written the following.

> Miss Tacha through her personal example and administrative policies has been an aggressive advocate of recruitment and retention of qualified minority students and faculty members.

Miss Robbi Ferron, representing the University's Office of Affirmative Action, has written:

> My office has always had complete cooperation and support by Dr. Tacha. She has gone beyond what is minimally required in our policies. She has required her staff to live by the spirit, not merely the letter of the law.

Dr. Jacob U. Gordon, president of the University's Black Faculty Council, has written,

> During her relatively short time in office as Vice Chancellor, Deanell Tacha has done more than all previous Vice Chancellors for Academic Affairs to advance minority faculty at the University of Kansas.

Miss Ann Victoria, general counsel for the University of Women:

> From almost daily contact for over 5 years, I believe I am qualified to comment on Deanell Tacha's teaching of principles embodied in our Nation's laws and regulations.

I do not know personally the reasons for Professor Hinman's allegations. Clearly as stated by those whom I have quoted, based on my own personal observations and the administrators at the University, there is no basis in fact for such allegations.

If you will permit, I would like to add a personal note. I have been privileged to know Deanell Tacha for nearly 20 years. She is exceptionally bright yet blessed with an extraordinary amount of common sense. She is thoughtful and pensive and deeply involved in the administration of the laws of this Nation. She is analytical, yet deeply caring about people.

I believe absolutely in the American system of government and justice, the system that is based, in the words of political theorist Robert Dahl, if I do not agree with the decision made by this body, at least I agree with the process by which that decision is made.

I am convinced that you could do no better than Deanell Reece Tacha to fill the position for which President Reagan nominated her to the judgeship on the Tenth Circuit Court of Appeals. She will serve with distinction, with absolute honesty, with a feeling for people with an appreciation of our history, and with total commitment to the conduct of our Government based on a government of laws that depends on the consent of the governed. As I said, it is my opinion you can do no better than Deanell Tacha.

Mr. SHORT. Thank you. The chairman appreciates your coming here in behalf of the witnesses and the hearing now stands in recess subject to the call of the chair.

[The committee recessed at 3:10 p.m., to reconvene subject to the call of the Chair.]

[Prepared statement follows:]

PREPARED STATEMENT OF RICHARD VON ENDE

Mr. Chairman and Members of the Committee, my name is Richard von Ende and I am the Executive Secretary of the University of Kansas. I appear here today as an official representative of the University of Kansas and as a personal representative of the University's chancellor, Dr. Gene A. Budig. I am appearing in support of the nomination of Deanell Reece Tacha to the bench of the Tenth Circuit Court of Appeals and to rebut the statement offered to the Committee by Myra Hinman.

In her statement to the Committee, Professor Hinman has alleged that Deanell Tacha, in her role as Vice Chancellor for Academic Affairs at the University of Kansas, has thwarted opportunities for women and minorities. In my opinion, based on personal observations as an administrator at the University of Kansas and as attested in documents filed with the Committee, those allegations are baseless and blatantly ridiculous.

Since the time when Professor Hinman's written statement was received by the Committee, several officers and faculty members of the University of Kansas have responded with statements contradicting Professor Hinman's allegations. In particular, the following statements have been made:

1. Chancellor Budig has written: "Ms. Tacha, through her personal example and her administrative policies, has been an aggressive advocate for the recruitment and retention of qualified minority and women faculty members. Deanell Tacha has been committed and diligent in instituting programs and policies that facilitate affirmative action goals."

2. Ms. Robbi Ferron, director of the University's Office of Affirmative Action, has written: "My office has always had complete cooperation and support from Dr. Tacha. She has gone beyond what is minimally required to implement our policies. She has and has required her staff to live the spirit, not merely the letter, of the law. Her record in this area is impeccable and will withstand any reproach."

3. Dr. Jacob U. Gordon, president of the University's Black Faculty and Staff Council, has written: "During her relatively short term of office as Vice Chancellor, [Deanell Tacha] has done more than all previous Vice Chancellors for Academic Affairs to attract minority faculty to the University of Kansas. . . . Her records clearly indicate that she will be an excellent judge. She is understanding, compassionate, and fair."

4. Ms. Ann Victoria Thomas, General Counsel of the University, has written: "From . . . almost daily contact for over five years, I believe I am qualified to comment on [Deanell Tacha's] commitment to the principles embodied in our nation's laws and regulations. Any suggestion that she is not committed to equal opportunity for all persons cannot be supported by the facts."

I do not know the reasons for Professor Hinman's allegations. Clearly, as stated by those whom I have quoted and based on my own personal observations, there is no basis in fact for such allegations.

Now, if I may, I would like to close on a personal note. I have been privileged to know Deannell Tacha for nearly 20 years. She is exceptionally bright, yet blessed with an extraordinary amount of common sense. She is thoughtful and pensive, yet deeply involved in the life of her community, state, and nation. She is analytical, yet deeply caring about people.

Each of us is privileged to know a few people in whom we place ultimate trust. If I were to have to leave this planet for 20 years or so, I would feel totally comfortable and safe leaving all my affairs in her hands. I know they would be returned to me in perfect order when I returned. Similarly, I know I could always count on her for total honesty, fairness, and justice.

I believe absolutely, Mr. Chairman and Members of the Committee, in the American system of government and justice—a system based, in the words of political theorist Robert Dahl, on the consent of the governed. Consequently, I am convinced you could do no better than Deanell Tacha for the position for which President Reagan has nominated her, a judgeship on the Tenth Circuit Court of Appeals.

She will serve with distinction, with absolute honesty, with a feeling for people, with an appreciation of our history, and with a total commitment to the concept of justice based on a government of laws. As I said, in my opinion, you can do no better than Deanell Reece Tacha.

BIOGRAPHIES

DEANELL REECE TACHA

NOMINEE, U.S. CIRCUIT JUDGE, TENTH CIRCUIT

Birth: January 26, 1946, Goodland, KS.

Legal Residence: Kansas.

Marital Status: Married to John Allen Tacha, 4 children.

Education: 1964-1968—University of Kansas, B.A. degree. 1968-1971—University of Michigan Law School, J.D. degree.

Bar: 1971—Missouri, 1973—Kansas.

Experience: 1971-1972—White House Fellow (assigned to the Department of Labor, Special Assistant to the Secretary of Labor). 1973—Hogan & Hartson, Washington, D.C., Associate. 1973-1974—Thomas J. Pitner Law Firm, Concordia, Kansas, Associate. 1974-1977—Douglas County Legal Aid Society, Director. 1974-present—University of Kansas Director of Legal Aid Clinic and Associate Professor of Law (1974-1977). Associate Dean and Professor of Law (1977-1979). Associate Vice Chancellor for Academic Affairs and Professor of Law (1979-1981). Vice Chancellor for Academic Affairs and Professor of Law (1981-present).

GARRETT E. BROWN, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Birth: March 20, 1943, Orange, NJ.

Legal Residence: New Jersey.

Marital Status: Married to Carolyn Ann Powling Brown, 2 children.

Education: 1961-1965—Lafayette College, A.B. degree. 1965-1968—Duke University, School of Law, J.D. degree.

Bar: 1968: New Jersey. 1972—District of Columbia. 1980—New York.

Experience: 1968-1969—Law Clerk to Hon. Vincent Haneman, Justice, Supreme Court of the State of New Jersey. 1969-1973—United States Attorney's Office, District of New Jersey Asst. U.S. Attorney (1969-1971) Dep. Chief, Criminal Div (1971-1972) Executive Assistant (1972-1973). 1973-1981—Stryker, Tams & Dill, Senior Associate (1973-1975), Partner (1976-1981). 1981-1983—U.S. Government Printing Office, General Counsel. 1983-present—U.S. Maritime Administration, Chief Counsel (1983-present), Acting Deputy Administrator, (1985-present).

ROBERT L. MILLER, JR.

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF INDIANA

Birth: November 21, 1950, South Bend, IN.

Legal Residence: Indiana.

Marital Status: Married to Jane Woodward Miller, 2 children.

Education: 1968-1972—Northwestern University, B.A. degree. 1972-1975—Indiana University, Indianapolis Law School, J.D. degree.

Bar: 1975—Indiana.

Experience: 1975—Law Clerk to Hon. Robert Grant, Senior Judge, U.S. District Court No. District of Indiana. 1976-present—Judge, St. Joseph Superior Court, St. Joseph, Indiana.

JOHN R. BOLTON

NOMINEE, ASSISTANT ATTORNEY GENERAL (OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS)

Birth: November 20, 1948, Baltimore, MD.

Legal Residence: Virginia.

Marital Status: Divorced.

Education: 1966-1970—Yale College, B.A. degree. 1971-1974—Yale Law School, J.D. degree.

Bar: 1975—District of Columbia.

Military Service: 1970-1974: Army National Guard. 1974-1976—U.S. Armed Services, Sergeant.

Experience: 1974-1981—Covington & Burling Associate. 1981—White House Counsel's Office, Legal Counsel. 1981-1983—Agency for International Development. (1981-1982)—General Counsel. (1982-1983)—Assistant Administrator for Program and Policy Coordination. 1983-present—Covington & Burling Partner.

CONFIRMATION HEARING ON: SIDNEY A. FITZWATER, ALBERT I. MOON, JR., GEORGE H. REVERCOMB, ALAN B. JOHNSON, AND JEFFERSON B. SESSIONS III

FRIDAY, NOVEMBER 22, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a. m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Heflin, Denton, Simon, Simpson, and McConnell.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today to consider the nomination of certain individuals to be U. S. district judges.

Our first is Judge Sidney A. Fitzwater, of Texas. Senator Gramm is here, and I believe Congressman Bartlett is here. We would be very pleased if you gentlemen would come to the table, and Senator Gramm, we would be glad to hear from you first.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr. Chairman, let me first say I appreciate the opportunity to be here with Judge Sid Fitzwater, who is my seventh nominee for a Federal judgeship since I have been in the U.S. Senate.

I have been proud of the process we have established in Texas, which has been a process of having a standing committee of 12 of the most distinguished practicing, academic, and retired attorneys in our State, who go through a comprehensive process of rating those who have asked to be considered for Federal judgeships. I think that process has served Texas well in the past 10 months, and it was that process that first brought Sid Fitzwater and his qualifications to my attention.

Though I think it is fair to say that my previous six nominees have all been quality people, that I believe Sid Fitzwater is probably the best-qualified person I have sent forward to the President since I have been in the U.S. Senate.

Sid Fitzwater was a remarkable student at Baylor University, was an outstanding student in the law school there, had a successful practice of law, was the youngest person ever appointed to the State district bench in Texas. When a bar survey was taken of those who practiced in Judge Fitzwater's court and in the courts of other judges at the Federal, district, State, and county level in Dallas County, not only was Sid Fitzwater rated by the people who practiced before his court and those who observed his qualities and credentials as the No. 1 judge of all judges practicing in that area of the State, but the rating was on the basis of five different areas of qualifications; and not only did Judge Fitzwater rate first in the poll, he rated first in all five areas.

I believe that Sid Fitzwater will make an outstanding Federal judge. I believe that not only will he be a credit to the Federal bench, but I believe he will rise in the judiciary and will be a credit to the Nation and to the President, and I am here, Mr. Chairman, to strongly recommend him to you.

He has everything I have tried to look for in a Federal judge. No. 1, he is a student of the law. I think the ratings he has received, the positions he held in law school, and the position he has held as a member of the State bench, show that Sid Fitzwater is a student and in fact a scholar of the law.

No. 2, he shares with the President and shares with me a belief in the strict construction of the Constitution. He believes it is the duty of the courts to enforce the laws and not to make them. He believes that it is important to look at victims' rights as well as criminal rights. And I am strongly in support of his nomination.

Finally, let me say, Mr. Chairman, that the bar association, in reviewing Mr. Fitzwater's qualifications, decided to go with a favorable recommendation despite the fact that Sid Fitzwater is 32 years old and will be the youngest Federal judge if approved. I believe that the decision by the bar to waive the normal requirement of 12 years before the bar is an indication of the qualifications this young man has. There were those initially who raised concern about someone 32 years old being on the bench, but I remind members of the committee that Judge Fitzwater has been a State district judge for 3 years and that he potentially brings to the Federal bench, if he is approved by this committee and by the Senate, a great number of qualifications that I believe will make him an outstanding Federal judge.

The CHAIRMAN. Senator Gramm, thank you very much. You have certainly given him a glowing recommendation.

I believe I see Congressman Steve Bartlett, from your district. We are very pleased to have you with us, to come from the House to the Senate to testify in behalf of this gentleman, and we would be glad to hear from you at this time.

STATEMENT OF HON. STEVE BARTLETT, A REPRESENTATIVE IN CONGRESS, FROM THE STATE OF TEXAS

Mr. BARTLETT. Thank you, Mr. Chairman. I appreciate the courtesy that this Committee extends to me in giving me the chance to come over here and to bring the message from the people of Dallas County and particularly people who have practiced before Judge

Fitzwater's court. I come because of the exceptionally high regard in which Judge Fitzwater is held in Dallas among the bar, among other judges, and among people who know him and have practiced before him. When Judge Fitzwater was appointed, as Senator Gramm said, to the State district bench, within 18 months he had not only far exceeded the bar poll but won it in all five areas.

I would indicate to the committee that he was competing against, in a sense, the over 100 other judges on that poll who were also rated. Judge Fitzwater, at a young age chronologically, has demonstrated such an incredible maturity and temperament and expertise in the law that I think he will indeed make one of the finest judges on the Federal bench.

I have personally talked with a number of attorneys who practice regularly, noted attorneys in Texas who practice regularly in Dallas County—people who do not have any ax to grind or any political bent—and they universally say that Judge Fitzwater is the best and the brightest, and I bring their commendations to this committee for his appointment.

The CHAIRMAN. Judge Fitzwater, I want to congratulate you upon your appointment by the President. I want to also congratulate you for having the high endorsement here of Senator Gramm, who is held in such high esteem in the Senate, and Congressman Bartlett, who is also a very fine Congressman. You are fortunate to have the very high recommendations of these people.

Judge FITZWATER. Thank you, Mr. Chairman.

The CHAIRMAN. I am also pleased to inform you that Senator Bentsen has endorsed you, too.

Now, if you will stand aside, we will take some others, and come back to you a little later.

And Senator and Steve, if you are able to stay, we are glad to have you, but if you are busy, you may be excused.

I see Senator Wallop is here, so if you will come around, Senator, and bring your nominee. I understand Senator Simpson is on the way.

On behalf of Judge Alan B. Johnson of Wyoming, Senator Wallop, we would be pleased to hear from you.

STATEMENT OF HON. MALCOLM WALLOP, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator WALLOP. Thank you, Mr. Chairman.

I realize the effort that you have made by convening at this early hour, after that early morning that we had last night. Senator Simpson will be here shortly.

I want to begin by saying that it is really a privilege for me to introduce to this committee President Reagan's nominee for the district of Wyoming, Judge Alan B. Johnson.

I might say that Judge Brimmer, the sitting district judge in that district, called yesterday and asked if the committee could finish its work and Judge Johnson be confirmed by late this afternoon, they have that crowded a docket. I told him that as enthusiastic as I thought everyone might be for this, it was not likely that it would happen today.

But I would like to give you a little of the background as to how Alan Johnson comes in front of you this morning.

As soon as that judgeship was created, I invited Senator Simpson and Congressman Cheney to participate with me in the selection of a nominee for President Reagan's consideration. We set up a merit selection system in the following manner. Each of us selected a prominent member of the Wyoming Bar, and then I appointed the former Chief Justice of the Wyoming Supreme Court, Judge Raper, and the President of the Wyoming Bar Association, and we announced the merit selection panel and solicited applications. There were 13 applications, all of whom completed forms that were patterned on applications suggested by the Federal judiciary and the Wyoming judiciary.

The application process included an appearance by grievance committees of the Wyoming Bar Association. The merit selection panel acted in the following manner. Each candidate was interviewed by them. The panel members reviewed the applications individually, and then they met and reviewed the candidates collectively, and they recommended their three top choices to the delegation.

When we began to act, we reviewed all of the applications as well, and the recommendations, and I consulted one final time with former Chief Justice Raper, who was chairman of the merit selection panel. We selected, as did the panel, Alan Johnson. He was their unanimous first choice, and he is the unanimous first choice of the delegation. We passed him on to the President as a single name, and he passed the clearance process in the White House with the highest marks.

Judge Johnson is a native of Cheyenne, WY and a graduate of the Wyoming public schools, with a bachelor of arts degree from Vanderbilt University and a doctor of jurisprudence from the University of Wyoming. He has 3 years in the Judge Advocate General Corps, over 7 years in the general practice of law, local, State and Federal courts, civil and criminal practice. He is a part-time U.S. magistrate for the U.S. district court and a part-time municipal court judge. He has experience on the bench, Mr. Chairman. He was appointed by former Gov. Stan Hathaway in November of 1974 to serve as district judge in the first judicial district of Wyoming.

He has over 10 years as a trial judge in the first district and frequently has substituted on the Wyoming Supreme Court.

He has completed resident and graduate sessions at the National Judicial College, 1975, 1978, 1979, 1980, and 1982. He is generally considered the best of the trial judges in the State of Wyoming. He has consistently been rated as the State's finest judge by the Wyoming Bar Association.

He is a husband and the father of two teenage girls and an active man in his community, a member of the Wyoming National Guard.

At 45, it is likely that he will be able to serve Wyoming for many years to come. And as perhaps the most widely respected judge in our State, he got there because of a keen intellect, because of sound judicial temperament, because of fairness, and importantly, because of his unquestioned integrity, because he is diligent, because he is hardworking, because he is energetic.

The merit selection system that we put together has produced the very best candidate that Wyoming has to offer. I, and I think the delegation, unanimously urge his prompt confirmation.

I just want to say a couple of other things, Mr. Chairman. It is a rare privilege, as you know, to be able to select a nominee to the Federal bench. It is the first opportunity that I have had since I have been in the Senate. It really turns out to be a nice experience when that man happens to be your friend, happens to be somebody whom you have long respected and who has been selected by his peers as being the most qualified, the best that this State has to offer.

I come before you this morning with the best of all possible worlds, to introduce to you a scholar, to introduce to you a friend, to introduce to you a widely respected judge in the State of Wyoming, to be nominated and approved by the Senate for the new judgeship in the judicial district of Wyoming.

The CHAIRMAN. Senator, thank you very much. We appreciate your personal appearance here. I am sure Senator, in view of the fine standing and the high esteem in which you are held, you will be of great benefit to this nominee.

I understand Senator Simpson has endorsed Mr. Johnson as well, and if he comes, we will give him a chance to say a word. If he does not, we will place his statement in the record, if he so desires.

Senator Wallop, if you wish to stay for the hearing, we will be glad to have you; if you are busy and wish to leave, we will understand that.

We thank you again for your high endorsement.

Senator WALLOP. I thank you very kindly, Mr. Chairman. We appreciate it.

The CHAIRMAN. Our next nominee is Albert I. Moon, Jr. I believe the distinguished and able Senator from Hawaii is here. Senator Inouye, we would be glad to have you come around at this time.

Mr. Moon has been nominated by President Reagan to be a district judge in Hawaii.

Senator Inouye, we are glad to have you with us. Please proceed.

STATEMENT OF HON. DANIEL K. INOUYE, A U.S. SENATOR, FROM THE STATE OF HAWAII

Senator INOUYE. Thank you, Mr. Chairman.

Mr. Chairman, I have been a member of this distinguished body for over 23 years, and during those many years, I have had the occasion and the opportunity to appear before many panels to testify for or against legislation, or to testify in behalf of nominees. Without question, this appearance this morning is my most difficult and sad.

Mr. Chairman and members, early this week, I sent a letter to you and to each member regarding the nomination of Mr. Albert Moon to serve as a judge in the Federal District Court of the District of Hawaii.

I would like to, as part of my testimony, read this letter and to have it placed in the record. The letter is addressed to:

Hon. STROM THURMOND,
Chairman of the Committee on the Judiciary,
Washington, DC.

DEAR MR. CHAIRMAN: On October 15, 1985, President Reagan nominated Mr. Albert Moon to fill one of the two vacancies on the Federal District Court Bench in the District of Hawaii. Immediately upon being notified of this nomination, I advised the Chairman that I stood in opposition to this confirmation by the Senate.

I wish to explain to you my reasons for opposing Mr. Moon's confirmation. First, I have never had any professional contact with him; therefore, I cannot speak as to his legal skills. I have never socialized with him, so I am not aware of any social or domestic shortcomings. And I have had no business dealings with him, so I cannot at this point evaluate him in this regard.

My opposition instead results from the following. In early 1978, I was approached by Mr. Moon who, speaking on behalf of the Hawaii Bar Association, suggested that the time had come for the establishment of a Citizens Judicial Selection Commission to take the process out of the smoke-filled rooms. This suggestion was made at a time when Democrats had a majority in the United States Senate and a Democrat was President. But I agreed with him and indicated my willingness to give up prerogatives in favor of participation in a bipartisan Judicial Selection Panel, anchored by the designees of the Hawaii Bar Association.

Mr. Moon was very persuasive as to the need for such a reform. Mr. Moon drafted a charter for the proposed commission, and after a few meetings I indicated my readiness to approve a revised version of the charter, and the Hawaii Federal Judicial Selection Commission became a reality.

My very distinguished colleague, Spark M. Matsunaga, joined me in this approval of this charter. I have enclosed for consideration a copy of the Commission's charter. I am certain this charter is now in your record.

Due to the retirement of our senior judge and the creation of an additional seat on Hawaii's Bench, two judgeships became available in Hawaii last year. The Commission was therefore convened and invited applications from those who were interested in serving on the Federal Bench in Hawaii. Many distinguished members of the State Bench and Bar submitted themselves to the processes established by the Commission's charter. These processes included personal interviews, research into the applicants' experience and standing in the community, and the transmission of extensive background information. After a thorough review of each applicant, the Commission submitted its recommendations to the President, with the endorsement of Hawaii's Senators.

I can personally assure you that the recommended candidates, who included members of the State Circuit and Supreme Court Bench in Hawaii, were made without consideration of favor or party and represented an earnest and genuine attempt by the Commission to identify the best qualified individuals.

Mr. Moon, although he was the author of the Commission's charter and effective initiator of the Commission, decided not to subject himself to this process. Instead, he used the techniques of the smoke-filled back rooms for his judicial nomination.

After his nomination, Mr. Moon requested that the Judicial Selection Commission ratify his qualifications for the post, although this procedure was contrary to the charter he had helped draft.

Mr. Moon's request for post hoc evaluation was denied as contrary to the Commission's charter, and unfair to those who had complied with it in good faith. Some might suggest that by initially bypassing the Commission and therefore reducing the risk of his rejection, Mr. Moon made a politically astute move. I view it as an attempt to hypocritically manipulate a system he had helped to establish.

In my 23 years of service in this body, I have heard the phrase, "person of integrity and high character", so often that it has become somewhat worn. But I sincerely believe that judges must be such persons of unquestionable integrity and unblemished character. I do not feel that a person who passionately argued for and was instrumental in creating a system of objective judicial selection, but resorts to the smoke-filled back room when it would satisfy his purposes can be considered a person of high integrity and character.

Mr. Moon's actions in this regard are widely-known in Hawaii's legal community. Respect for the judiciary, the judicial process, and the man himself will not be enhanced by their knowledge of the manner which Mr. Moon used to obtain his nomination.

I have never before opposed the confirmation of anyone nominated to serve in the State of Hawaii. However, I am taking the unprecedented step of opposing this confirmation for reasons I have explained.

I ask you to join and assist me in this opposition.

DANIEL K. INOUYE, U. S. Senator.

Mr. Chairman, I am authorized to advise the committee that my distinguished colleague, Senator Matsunaga, shares my sentiment and approves the contents of that letter.

Mr. Chairman, the formation of the Hawaii Federal Judicial Selection Commission represents a good-faith attempt on the part of the Hawaii State Bar, Senator Matsunaga, and myself to assure that judicial selection for our State is not made on the basis of ideology or political machinations. While I recognize that such standards cannot be imposed upon the President, I do not believe that it is too much to expect that a man who served as an originator and principal proponent of the system be held to his word, and I do not believe that the Senate should confirm a person who consciously deviates from representations to two U.S. Senators on an issue directly related to the office to which he has been nominated to serve.

Therefore, I respectfully request that this committee oppose the nomination.

The CHAIRMAN. Senator, you are held in very high esteem by the Senate, and I personally hold you in high esteem. Now, the President has appointed this gentleman, and as I understand, you felt that he should go before this commission that considers these judges?

Senator INOUYE. Mr. Chairman, as I pointed out in my letter, this commission was created after discussions were initiated by the nominee. I did not initiate the discussions. It was at a time when the so-called "blue slip" was in operation, and U.S. Senators at that moment had the power literally to confirm or defeat any Presidential nominee. But Senator Matsunaga and I were convinced that the time had come to take this out of the "smoke-filled back room" and present it through a nonpolitical, nonpartisan panel of citizens to make such a determination. This was how it was done.

The charter, I believe, is well-drafted, and it covers just about every point that one can consider. My concern is that the originator of this charter, the originator of this commission, knowingly bypassed its processes. And I do not believe he has an excuse for bypassing that.

The CHAIRMAN. Did Judge Fong appear before this commission when he was appointed judge, Judge Harold Fong?

Senator INOUYE. No, sir. If you recall, at that time the commission had submitted to this body and to the President a man who had been selected. The President of the United States, from a list of six names, picked the name of Mr. Heen. And if you will recall, Mr. Chairman, as a result of certain arrangements made in this committee, that nomination, although it lay before this committee for many, many months, was set aside to satisfy certain requirements of certain members of this body. After that, we had a change in administration, and having received the request from my former senior colleague, Senator Hiram Fong, requesting that this nominee be permitted to go through, I could not object to it. There were not "blue slips"; as you know, "blue slips" were not in operation, and my "blue slips" would not have had any bearing on the process of this committee.

Therefore, I discussed this matter with the Judicial Selection Commission. They felt that Judge Fong had met the qualifications and suggested that I not object to it. But in this case, there was ample time for the commission to advertise, which they did. They received more than 20 applicants. More than 20 applicants were interviewed. More than 20 applicants' backgrounds were studied and scrutinized.

The **Chairman**. President Reagan has selected this gentleman to be a Federal judge.

Do you know of any other reason why he should not be appointed?

Senator **Inouye**. As I pointed out in my remarks, since I have not had any professional dealings with Mr. Moon—it has been a long time since I have been in the courtroom—I am not aware of his legal skills. I have not had any business dealings with Mr. Moon, so I cannot speak in this regard. I have not had the occasion to socialize with Mr. Moon, so I am not aware of any shortcomings of his personal or domestic life.

I am not in any way competent to discuss these matters. But I believe I am competent to discuss with you that period in my career when Mr. Moon came to me and convinced me we should get this out of the smoke-filled back rooms.

I do not think that speaks too highly of his character, sir.

The **Chairman**. Do you know of any actions that he took in this connection that are improper to get this nomination? Do you know whether the President just selected him, or did he take maneuvers or follow some procedure that you know of which was improper?

Senator **Inouye**. I am not aware of any illegal procedure that was followed by Mr. Moon. That is not the charge that I am making, sir.

The **Chairman**. As I understand, the point you are making, then, is that he concurred in this commission but did not go before it when this vacancy occurred, to be appointed; did I catch the point?

Senator **Inouye**. It is not a question of concurring, sir. He drafted the charter. He convinced the two Senators of Hawaii of the real need for reform, and we two Senators who at that time had the power of the "blue slip", and a Democratic majority in the Senate and a Democratic President, voluntarily gave up our prerogatives. Now that the situation has changed, he decided to just bypass the commission that he created.

The **Chairman**. Do you know of any reason other than that as to why he should not be approved? He has been appointed by the President. Even though he drafted this charter, and even though it may have been customary to go before it, there was no legal obligation to go before it as I understand.

Senator **Inouye**. At this stage, may I suggest most respectfully that we hear from the nominee?

The **Chairman**. I will be glad to, in just a few minutes. Could you wait until he testifies?

Senator **Inouye**. Surely.

The **Chairman**. We will get to him in just a few minutes. I want to take these Senators quickly and get their statements on the other judges. So we will come back to this in just a few minutes.

Senator **Inouye**. Yes, sir. Thank you.

The CHAIRMAN. I notice Senator Simpson has arrived, the distinguished assistant majority leader and a distinguished member of the committee.

Senator, we have heard from Senator Wallop concerning your nominee, Mr. Johnson, from Wyoming, and we would be very pleased to hear from you.

STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Mr. Chairman, it is not often I get to sit on this side of the table on the Judiciary Committee. I prefer to be up there. And I think we should all greet our colleague, Malcolm Wallop, and welcome him back to the Judiciary Committee. He served on this committee for 2 years.

The CHAIRMAN. He ought to be on it now.

Senator SIMPSON. I know you would like that, Mr. Chairman.

The CHAIRMAN. As well as you.

Senator SIMPSON. Yes. He was the first nonlawyer ever to serve on the U.S. Senate Judiciary Committee, and now we have several.

My remarks are very short, Mr. Chairman. I thank my senior colleague from Wyoming and regret that I was not timely here. I closed the shop down at 1:30 while you were resting last night. Fortunately, we were able to conclude our business at that hour.

I was involved in the practice of law in Wyoming for 18 years and enjoyed that thoroughly, and I enjoy my service on this Judiciary Committee. I chaired the judiciary committee in the Wyoming House of Representatives, so I have watched the judicial selection process. It is a rare honor and a real treat to present this nominee, Alan Johnson, who has been nominated by the President for the U.S. District Court of the District of Wyoming.

Throughout his entire tenure as a trial judge and as a practicing attorney, he has shown an uncommon degree of common sense, legal competence and ability. He has consistently been very fair-minded and deliberate in reaching his decisions. All the lawyers I have spoken to who have practiced before this man in the State of Wyoming give him the absolute highest ratings. Malcolm Wallop was kind enough to include our Congressman Dick Cheney in the process, and we all were extremely impressed by this man.

So he brings these attributes, as well as another attribute that can never be overlooked in the trial arena, and that is that he is courteous and polite toward the litigants, the witnesses, and the lawyers alike. And all of us who have practiced law know what a tremendous additional bonus that is to practice in that kind of an arena.

I will not go through his background—others have done that—but he served and practiced with two of the eminent law firms in Wyoming, and he was judge advocate in the Air Force. In addition to all of those impressive credentials, Alan Johnson is a man of principle and integrity and rare intelligence.

So it is without any reservation whatsoever that I join with my senior colleague in recommending this nomination be reported out by the Judiciary Committee without delay and acted upon favorably by the entire U.S. Senate.

I thank my chairman and my good colleagues on the committee. Thank you.

Senator McConnell [presiding]. Thank you, Senator Simpson. Senator Warner.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. I thank the Chair.

Mr. Chairman, I ask that my statement in its entirety be made a part of the record.

The **Chairman**. Senator Warner, we are very pleased to have you come before the committee and will be glad to hear from you.

Without objection, your entire statement will go in the record, and you may add any additional remarks.

Senator **Warner**. Thank you very much, Mr. Chairman.

I wish to be brief, as a courtesy to the chairman, to the committee and to my colleagues who are waiting.

Mr. Chairman, it is my distinct honor and privilege this morning to present to the committee Judge George H. Revercomb. I have had the privilege of knowing this candidate for over 30 years. We attended law school together, and we have combined our lives of public service ever since that period.

Mr. Chairman and members of the committee, I know of no other individual who has offered more of his life to our judicial system or is more qualified to serve on the bench for the District Court of the District of Columbia, than Judge Revercomb.

During his 14 years on the Superior Court of the District of Columbia, Judge Revercomb has presided over hundreds of jury trials, thousands of nonjury trials and proceedings, and cases most complex. He has earned the respect and admiration of his colleagues on the bench and those who have appeared before him.

Mr. Chairman, I think you are well aware of the fact that he is the son of a former U.S. Senator, and a member of this committee during the course of his long and distinguished service in the U.S. Senate.

I thank the chairman and members of the committee for your very expeditious handling of this case.

[Statement follows:]

Prepared Statement of Senator John Warner

Mr. Chairman, it is my distinct pleasure to present to the Committee Judge George H. Rivercomb who has been nominated for a position on the U.S. District Court for the District of Columbia.

I first came to know Judge Revercomb when we attended the University of Virginia Law School together. For thirty years I have known him to be a person of impeccable character and unquestionable integrity.

His distinguished career has been marked by his service to our country as a First Lieutenant with the Air Force, and his dedication to our judicial system through endless time devoted to improving court delay and litigation costs.

Among his many contributions are his service as the Vice Chairman of the United States Delegation to the 4th United Nations Congress on the Prevention of Crime and Treatment of Offenders, a Fellow of the American Bar Foundation, the Chairman of the National Conference of State Trial Judges, and the American Bar Association Joint Committee on Professional Sanctions.

Along with the heavy caseload that confronts the court system today, and his public service to his profession, Judge Revercomb has found time to pass on his wealth of knowledge and experience to young adults as a visiting lecturer at the University of Virginia.

Mr. Chairman and members of the Committee, I know of no other individual who has offered more of his life to our judicial system or is more qualified to serve on the bench for the District Court of the District of Columbia.

During his 14 years on the Superior Court of the District of Columbia, Judge Revercomb has presided over hundreds of jury trials, thousands of non-jury trials and proceedings, Civil I branch cases known for their complex civil and criminal cases, and hundreds of felony cases.

Mr. Chairman, Judge Revercomb's career exemplifies his dedication to our judicial system, and I endorse his nomination to be a U.S. District Judge for the District of Columbia without reservation.

The **CHAIRMAN**. Mr. Revercomb, I want to congratulate you upon your appointment by the President. I also want to commend you for having Senator Warner come here in person to endorse you. Senator Trible from Virginia has also endorsed you. With all the recommendations of these able Senators and your appointment by the President, it seems you will have no trouble being confirmed.

We are very pleased to have you.

Senator **WARNER**. Thank you, Mr. Chairman.

The **CHAIRMAN**. If any Senator wishes to ask any of these Senators any questions, do not hesitate to speak out.

Senator **HEFLIN**. Well, I think we all ought to ask Senator Warner, how did you get the President to mention your name in his speech last night? [Laughter.]

Senator **WARNER**. You have really caught me flat, Senator. I do not have an answer.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Senator Heflin and Senator Denton, we will now take up the nomination of Jefferson B. Sessions III, of Alabama.

Do you care to make a statement, Senator Heflin?

Senator **HEFLIN**. Let Senator Denton go ahead, and then I will add my words.

The **CHAIRMAN**. Senator Denton, we would be very pleased to hear from you.

STATEMENT OF HON. JEREMIAH A. DENTON, A U.S. SENATOR, FROM THE STATE OF ALABAMA

Senator **DENTON**. Thank you, Mr. Chairman and members of the committee.

Today I have the distinct pleasure and honor of introducing Jefferson Beauregard Sessions III, of Mobile, AL, our President's nominee to be U.S. District Judge for the Southern District of Alabama.

Jeff is uniquely qualified by his background and experience and will make an outstanding addition to the Federal bench. He was born in Selma, AL. He attended the public schools in Camden, AL and graduated from Wilcox County High School in 1965.

He then went on to Huntington College in Montgomery, where he served as student government president, receiving a B.A. in history in 1969. In 1973, he graduated from the University of Alabama School of Law. After law school, Jeff became associated with the Russellville, AL firm of Guin, Bouldin, and Porch. He joined the prestigious smalltown law firm after the senior partner, the Honorable J. Foy Guin, was named as a Federal judge in Birmingham.

During that association, Jeff was involved in a wide variety of legal issues including probate, domestic relations, criminal defense, real estate, and civil litigation.

From February 1975 through 1977, Jeff served as an assistant U.S. attorney for the southern district of Alabama, and during that time handled a full array of litigation. On the civil side, he defended two wrongful death cases; collected criminal penalties for pollution; he defended Social Security appeals and prisoner habeas corpus petitions. In the criminal area, Jeff tried a number of complex cases involving fraud, firearms violations, forgeries, embezzlement, bank robberies, and drug violations.

In 1977, Jeff became associated with Stockman and Bedsole in Mobile. In 1981, he was elevated to partner. Again, Jeff found himself deeply involved in significant civil cases including complex Federal litigation.

In recognition of Jeff's experience as an assistant U.S. attorney and as a civil attorney, he was appointed U.S. attorney for the southern district of Alabama in 1981. Since his appointment, the office has established a highly successful record. As U. S. attorney, Jeff has personally tried to judgment some 17 criminal cases. These have not been mere cameo appearances. For the most part, he has personally prepared and tried these cases, and either written or supervised the appellate briefs for the Government. He has undertaken to prosecute personally some of the most important and difficult cases in the history of that district. He personally prosecuted what is probably the most important judicial corruption case in the history of the State of Alabama, resulting in the conviction of two Mobile county judges, a former candidate for Mobile County District Attorney, a bail bondsman, a supervisor for the Alabama Beverage Control Board, and a car salesman on racketeering charges involving bribery.

He was ably assisted at trial by Assistant U.S. Attorney Thomas Figures, from whom you will be hearing later. This was a complex and difficult case which was aggressively defended by able trial attorneys. After several weeks of trial, the jury convicted every defendant on every count in the indictment. One of the defendants received a separate trial which lasted 2 weeks. Jeff became the sole prosecutor and tried this case, which resulted in a conviction on all counts.

Now, these, I would say parenthetically, were frontpage news in the Mobile newspapers for many, many months.

In another important case, he tried as sole prosecutor a 5-week case against a bank president, an attorney, and an Alabama State senator on fraud charges. The jury returned a verdict of guilty against the attorney on all 10 counts against him; the bank president on 13 of 15 counts, and deadlocked on the State senator.

Few U.S. attorneys in this country have carried such a heavy trial load with such remarkably successful results. He has proven his mettle against skilled attorneys in very significant cases, and I must say that these people he prosecuted often were backed by extremely powerful special interests, and no one else had the courage to touch them.

It has been established that U.S. attorneys are a party to 40 percent of the litigation in Federal courts. Much of it involves civil litigation. Jeff reviews and assigns all civil cases and discusses strategy and settlement of those cases with his attorneys.

Because of his hard work, lustre has indeed been added to the reputation of the U.S. attorney's office in Mobile, AL. Courage and integrity are now its hallmarks. Jeff has received wide recognition throughout the State for his work and has earned the respect of the law enforcement community and the defense bar as well.

Although he has been an aggressive advocate and a regular litigator throughout his career, I think it is important to note that Jeff never had a conviction reversed by an appellate court. And in fact, of all the criminal cases tried by his office while he has been U.S. attorney, only one case has been reversed.

During his tenure as U.S. attorney, the number of defendants found not guilty is less than 4 percent.

Another statistic which you may find significant is that in 1984, Jeff's office tried more defendants before a jury trial than any other U.S. attorney's office in the four-State region of Alabama, Georgia, Tennessee, and Mississippi. This is true despite the fact that the Mobile U.S. attorney's office is the smallest in the area, with an average of 7.1 assistants, while one office has 24 assistants, and one, 37 assistants.

Another example of the volume and quality of the office's work is demonstrated by the fact that during the two years of 1983 and 1984, official U.S. attorney statistics show that his small office had more criminal appeals favorably terminated than any other U.S. attorney's office in the region.

It has been suggested that the Mobile office has discriminated against blacks. I am informed that of the 198 defendants tried and convicted by office prosecutors, only 40—less than 20 percent of the defendants—were black. Except for the *Perry County* case, which I hope, and I am sure my colleagues will ask Jeff about, almost all of his many major cases have been against white people, many of whom were prominent and extremely influential. The charges of discrimination just will not wash, ladies and gentlemen, and in my view serve to sully the reputation of a truly outstanding prosecutor.

He is an active member of the Methodist Church, serving as chairman of the Council on Ministries, chairman of the Administrative Board, and for the past several years has served as church lay leader. He is widely known for his integrity and dedication to public service. I met his mother and father-in-law in Huntsville at the burial of Senator Sparkman and they are as devoted and as high on him as are his family in Mobile and his friends there and throughout the State.

It is unfortunate, but perhaps in Washington here, we will resolve the issue which has been unfairly posed respecting his participation in the case which I know will be brought up here, because I am absolutely sure that he is going to be cleared, and the case is going to be clarified and put in the proper context.

Mr. Chairman, I am indeed personally pleased and very proud for my State that President Reagan has nominated such an outstanding individual to our Federal bench. I commend Jeff to the committee.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator, we are very pleased to have you here in person to endorse this appointee. I congratulate him on his appointment by the President.

We will now be glad to hear from the senior Senator from Alabama, better known as "Judge" Heflin.

STATEMENT OF HON. HOWELL T. HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Mr. Chairman, today I join in introducing to the committee a fellow Alabamian, Jeff Sessions, who has been nominated by the President for the position of U.S. district judge for the southern district of Alabama.

The confirmation process is one of our most important responsibilities as U.S. Senators, and I take this constitutional mandate of advice and consent very seriously.

Jeff Sessions is a native Alabamian. He graduated from Huntington College in Montgomery, AL, and received his juris doctorate degree from the University of Alabama School of Law. After graduating from law school, Jeff Sessions practiced law with the law firm of Guin, Bouldin, & Porch, in Russellville, AL. From 1975 to 1977, Jeff served as an assistant U. S. attorney in the southern district of Alabama, a position which he left in 1977 to return to the private practice of law.

Jeff became an associate with the law firm of Stockman & Bedsole and later became a full partner with that firm.

Since 1981, Jeff Sessions has been the U.S. attorney for the Southern District of Alabama.

I approach these confirmation hearings with the theory that the President is entitled to have his nominations confirmed unless the nominee is unqualified or unfit, or it would be detrimental to the best interests of the United States for the nominee to serve in the capacity for which he is nominated.

I am here today to listen and to participate in these hearings with an open mind.

Jeff Sessions, I congratulate you on your nomination, and I wish you the best of luck throughout the confirmation process.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Now, if all the appointees will stand up, raise your hands, and be sworn at one time, that the testimony you will give in this hearing will be the truth, the whole truth and nothing but the truth, so help you, God?

Mr. FITZWATER. Yes.

Mr. JOHNSON. Yes.

Mr. MOON. Yes.

Mr. REVERCOMB. Yes.

Mr. SESSIONS. Yes.

The CHAIRMAN. Thank you.

First, Mr. Fitzwater, do you care to introduce any family or friends you may have here?

Mr. FITZWATER. I do not, Mr. Chairman.

The CHAIRMAN. Now, Senator Gramm, I believe you had a further comment?

Senator GRAMM. Yes, Mr. Chairman. I wanted to say, since our colleague, Senator Simon was not here, that I am honored to be here with a district judge from Texas that I suggested to the President for appointment.

Sid Fitzwater was an outstanding law student. At the age of 28, he was appointed as the youngest State district judge in the history of Texas. He has served in that capacity for 3 years. He has been uniformly rated as the most outstanding district judge in Dallas County. When he was rated by the local bar association last year on his performance, not only was he rated higher than any Federal, district, or county judge practicing in that area, but they were rated on five different areas, and he was rated the highest in all five areas.

There was a question raised at the time that I sent his name forward about his age, and I suggest to the committee that of all problems, that is the only one that we are all guaranteed, if we live long enough, to outgrow.

I think it is instructive to note that in spite of the fact that Sid Fitzwater will be the youngest Federal judge if confirmed by the Senate, that he was found qualified by the American Bar Association on the basis of quality. He is an outstanding State district judge and I believe will be an outstanding Federal judge.

Thank you, Mr. Chairman.

TESTIMONY OF SIDNEY A. FITZWATER, OF TEXAS, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS

The CHAIRMAN. Judge Fitzwater, I believe you sat as a judge for the 298th Judicial District of Texas for 3 years?

Judge FITZWATER. That is correct, Mr. Chairman.

The CHAIRMAN. This is a trial court of general jurisdiction, with a preference for civil matters. Judge, I understand you are only 32 years old; however, during your service on the court, you received the highest overall performance rating—a 97—of any Federal, State or county judge in the Dallas area. That is quite commendable, regardless of age.

Now you have been nominated to be a U.S. district judge for the northern district of Texas. Do you feel that your past experience has prepared you for the challenging task that lies ahead as a Federal district judge?

Judge FITZWATER. I do, Mr. Chairman. In the 3½ years that I have been a State judge, I have had the opportunity to dispose of in excess of 4,500 cases; I have presided over in excess of 100 jury trials to verdict, and over 200 nonjury trials. That, coupled with the fact that I have been in court, either in trial or in contested hearings, virtually every day for this 3½ year period, I believe has given me a basis to be prepared for the position.

The CHAIRMAN. Judge Fitzwater, do you feel that a judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge FITZWATER. I do believe that it is an obligation of a judge to take control of a case in order that the litigants get their day in court as soon as possible. I do not believe it is the role of a judge to act arbitrarily or to deprive any party of its rights in order to do that.

In other words, there needs to be a justifiable, sensible basis in order to take control of a case. And I also do not mean, Mr. Chairman, that the judge should in effect become a lawyer for one of the sides. But it is the obligation of the judiciary to see that litigants receive their day in court, because as is often said and I believe is true, justice delayed is often justice denied.

The CHAIRMAN. Judge Fitzwater, would you please tell the committee your role in the posting of election material at various polling places in the Dallas, TX area which informed voters of the consequences of voter fraud and what events, if any, prompted you to place this material?

Judge FITZWATER. Mr. Chairman, two days before the general election in November 1982, I was contacted by a judge on the Dallas Court of Appeals who asked me to participate in an effort to minimize voter fraud. He informed me that it would be an effort that would take place throughout Dallas County, that it was approved by the Texas secretary of state and by the Dallas County sheriff. He indicated to me that there were volunteers who were going to participate, but not enough volunteers to handle every precinct. He indicated that the sheriff, through his deputies, would post some of the voter fraud signs in certain precincts and that judicial candidates were needed to post the remainder of the signs.

I agreed to do this under those conditions. I took, after I was given, signs for three precincts. The night before the election, I posted three of the signs at one election location and went to the other two that were on my list, but signs had already been posted there, so I did not.

Thereafter, a lawsuit was brought against four judges, the Texas secretary of state, the Dallas County election administrator, and the sheriff. After certain discovery was done, the plaintiffs voluntarily dismissed their cause against me, against another State judge, and against the Texas secretary of state. Shortly thereafter, the entire case was dismissed by the U. S. district court.

The CHAIRMAN. What did the signs say that were posted?

Judge FITZWATER. The signs had three basic ingredients. The first said that you could be imprisoned for certain offenses under the Texas election code. It then listed certain offenses such as voting without being registered; accepting money to vote or not vote; letting a person vote who was not registered.

The CHAIRMAN. In other words, all the statements on there were in accordance with the law, were they?

Judge FITZWATER. That is correct. And then it finally said, "Don't risk it; obey the law," or something to that effect.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

First of all, let me say that my colleague, with whom I do not agree on everything, in the one other instance that I recall brought to this body a man who I have every reason to believe will make a fine Federal judge.

Mr. Fitzwater, I note that the bar association gave you a mixed "Qualified" and "Not Qualified" rating, though one of the members of the Texas delegation in the House gave me an editorial from a Dallas newspaper that gave you exceedingly high remarks.

Do you think that your age is the reason for some of them voting "Not Qualified"?

Judge **Fitzwater**. Senator, I cannot put myself in the shoes of that committee, but if I were to speculate, I would speculate that the age had something to do with it.

As you well know, the American Bar Association has the so-called 12-year guideline, and I have now been out of law school 9 years and have been admitted to the bar almost 9, but not 9. And I think that the age probably had something to do with it.

Senator **Simon**. Do you think either the bar association or this committee should have any kind of a guideline?

Judge **Fitzwater**. I do not know that the guideline is a particular problem, Senator, as long as it is not utilized to prevent persons who are otherwise qualified from being appointed to the district bench.

Senator **Simon**. There is a case, *Margie Nell Walker et al.* v. *Zurich American Insurance Company*, in which you filed an order requesting disciplinary actions, that was later withdrawn. Do you want to make any comments on that particular case?

Judge **Fitzwater**. Senator, in that case, the question came before me in connection with my capacity as a judge, supervising the proceeds of a settlement that involved a child. My duty under such circumstances is to make sure that the money that is received by the child is placed in the court registry and is available to the child when the child becomes an adult. In that particular case, a motion was filed with me requesting the withdrawal of the money.

I wrote the lawyer back and indicated to the lawyer that I wanted an amended motion that would set forth the detailed uses proposed for the money, because I felt that if I did not have such a showing that it would be inappropriate to release it. I indicated that I would hold the original motion pending receipt of the amended motion.

I did not receive an amended motion by return mail; I received a letter which indicated surprise at my actions and which addressed me personally. In the over 4,500 cases I have disposed of, this is the only lawsuit where personal criticism has been addressed to me by a court officer.

I also carefully reviewed the matter with my court reporter and with the guardian ad litem whom I had appointed to represent the child. Neither my court reporter nor the guardian ad litem could show that the statements made in the attorney's letter were correct and that, coupled with the personal criticism, I felt, required that I take action.

I did not summarily reprimand the attorney, however, Senator. I gave the attorney an opportunity to explain the basis for the letter and for the remarks. The attorney by return mail explained the basis for the remarks and the content of the letter. At that time, I terminated any further inquiry and I released the proceeds to the guardian of the minor child.

Senator **Simon**. In the process of being selected, has anyone asked you questions that you felt were improper or unethical?

Judge **Fitzwater**. Not at all, sir.

Senator SIMON. Finally, canon 2 of the American Bar Association's code of professional responsibility says that, "Every lawyer," and I am quoting, "regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Can you tell me how you have lived up to that canon?

Judge FITZWATER. In one matter as an attorney, I handled on a pro bono basis a Social Security claim on behalf of a disadvantaged person. Other than that, I cannot think of a specific example during the 5 years that I practiced law.

Since that time, in the 3½ to 4 years since then, I have been on the bench and of course, have not been permitted to practice law.

Senator SIMON. What about outside of the practice, helping the disadvantaged in society in any way?

Judge FITZWATER. Yes, Senator, I have. Through my church, I have undertaken efforts to help people. In one particular case, I helped a young man who was the first in his family to graduate from high school. He was not able to afford the cost of the graduation gown or the announcements, and I paid for those personally. I have undertaken other efforts, principally through my church in Dallas.

Senator SIMON. I have no further questions, Mr. Chairman.

I thank you very much, Judge.

The CHAIRMAN. Thank you.

Those are all the questions I have. I hope you enjoy your tenure on the bench. And the fact that you have practiced for 9 years to me is not significant. I would have to say that because I was selected as a judge myself after only 8 years as a member of the bar.

Senator GRAMM. And you outgrew the lack of seniority.

The CHAIRMAN. As the distinguished Senator said, time takes care of that.

Mr. FITZWATER. Thank you, Mr. Chairman.

Thank you, Senator.

The CHAIRMAN. Now, Mr. Moon, we will take you next, and Senator Inouye can come forward.

Senator Inouye was a hero in World War II, and he and I took a trip in 1960. We started out, I believe, in Holland and went all over and ended up in Japan. While we were there, some of his ancestors gave him a sword about 6 feet long. I remember that sabre. Do you still have it, Senator?

Senator INOUYE. Yes, sir.

The CHAIRMAN. I know you are proud of that.

It has been a pleasure to be with you all these years.

Mr. Moon, you have been sworn.

Now, Mr. Moon, would you respond to Senator Inouye's concern that you were nominated by the President for the position of district court judge for the district of Hawaii without applying to the Hawaii Federal Selection Commission? I believe he said that you wrote the charter for it and so forth, but that when the vacancy came, that you did not apply to that commission for consideration.

TESTIMONY OF ALBERT I. MOON, JR., OF HAWAII, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF HAWAII

Mr. MOON. Yes, Mr. Chairman.

First of all, I would like to state that I believe that Senator Inouye gives me too much credit with respect to this Federal Selection Commission that he has described. I was not the author of that charter for the commission, although I certainly was a participant in drafting it. And although the Senator and I have a little bit different versions of exactly what happened, I want to assure this body that there is no question that I was a strong supporter of the formation of the commission in Hawaii, and as he stated, this took place back in the years 1977-79; when the charter was finally signed, I believe it was in 1979.

So there is no question, despite the differences of opinion as to exactly what happened, there is no question that I was a supporter of that commission.

Now, as far as my nomination this year to this particular judgeship, I did not go through the commission procedures as set up. The reason for that is as follows. This spot, this vacancy to which I have been nominated, was a result of the act that was passed by Congress, I believe, in August of last year, August 1984, creating a third Federal district judgeship for the district of Hawaii. I was encouraged by various friends on both the bench and the bar in Hawaii to put forth my interest in the nomination for that vacancy, and after some discussion with my family and friends, I decided to do that.

The process that I followed was merely writing a letter to the White House, evidencing my interest in being considered for this nomination.

I did not go to the commission. My name was submitted to the White House as a list of five candidates by the leadership of the Hawaiian Republican Party, which I was very gratified that they did so. This took place approximately 1 year ago. I believe it was in this month of November 1984.

I had not been aware that this selection commission that the Senator has described was even in operation at that time, and the reason I assumed that it probably was not was just because of the situation which you, Mr. Chairman, asked the Senator about, namely, the last Federal judge that was appointed in Hawaii, Harold Fong, who is now the chief judge of the district of Hawaii. Mr. Fong was nominated I believe 4 years ago, and he did not go through this Federal Judicial Selection Commission process that was set up in Hawaii.

Initially, it is my understanding that both of the Senators from Hawaii opposed his nomination, but that at a later date they subsequently, as Senator Inouye has described, did support him so that when he appeared at his confirmation hearing before this committee some months subsequent to his nomination, he had the support of both of our Senators—this, despite the fact that he had not gone through the selection commission.

So when my name was sent back to the White House in the fall just 1 year ago, I assumed that this commission was not operating. And the reason for that is the charter of this commission itself specifically states that it will take action with regard to supplying candidates to our two Senators within 60 days of a vacancy occurring. Now, as I understand it, this particular vacancy for which I am being considered occurred in August 1984; by November, I had heard nothing of any action being taken by this commission, and because of what happened with Judge Fong. I just sort of assumed, well, maybe they are just not going to do something that they consider maybe spinning wheels. So I did not go before the commission.

I did not, very frankly, feel that I had a very good chance of receiving the nomination. Even though I was one of five who was suggested by the Republican Party leaders, I was not a very well known person in Hawaii. Outside of the legal profession itself, I am not very well known. I was not a Republican leader, although I have been a Republican practically all my life. I was not a luminary in the local political scene in Hawaii. I have concentrated since moving to Hawaii on my professional skills as a lawyer.

So I really did not think I had much of a chance, frankly, for the nomination, although I was very pleased that my name was submitted by the Republican Party.

When I was informed—I have subsequently learned, even though I do not recall it myself—that the selection commission advertised in the local papers in Honolulu in March and April of this year in order to obtain candidates that they could consider for the vacancy. Despite the fact that their charter said 60 days, this was almost 7 or 8 months later that I understand they advertised.

Now, I must honestly say I do not recall seeing those advertisements, but I do not dispute that they were in the paper. But frankly, I probably would not have paid much attention to them because I really did not think I was one of the leading candidates, even though my name was on that list from the Republican Party.

I have been informed that on May 21 of this year, the commission submitted its list of suggested candidates to our two Senators under its procedure. It was not until about the first week of June that I personally found out that I was being seriously considered for the nomination. Obviously, at that time when I did find out that I was not such a long-shot after all, it was too late to do anything with regard to the commission anyway. They had already submitted their names to our two Senators. So I did not go before the commission. It was certainly not in any way an attempt to avoid the commission. In fact, I have every confidence that the commission would have found me qualified and would have recommended me to our two Senators.

I know the attorney members of that commission fairly well; in fact, I have dealt with many of them professionally, and I believe that they are my friends, and I believe that they considered me to be well-qualified. In fact, after I was nominated last month, in a conversation I had with Senator Matsunaga, he informed me that he personally had been told—I do not remember his exact words—but in essence, "I have heard some very good things about you from the lawyers and other people in the legal community in Hawaii, and I am sorry that I will not be able to support you because you did not go before this commission."

He, in fact, suggested to me that I go to the commission and say, "Would you now look at me and my qualifications and recommend me to our two Senators," after the fact.

I did take him up on his suggestion, because I felt confident that I would be recommended. No one has at any time indicated to me that there is any reason to show that I am not qualified for this particular position.

So I went to the commission; I asked them to consider me. About a week later, I received a letter from the chairman of the commission saying that because their charter states that all this action has to be taken 60 days after the vacancy, et cetera, they did not feel it would be appropriate to consider me at this time, and so they declined my request to be considered.

In summary, I was not trying to avoid the process of that commission. At first, I felt that it was not—I just assumed it probably was not even operating. And then, when I did find out it was, by then my name had already been submitted by the Republican Party, and I really did not think I had much of a chance. And by the time I found out I was seriously being considered, it was too late anyway.

The CHAIRMAN. Now, you are a Republican?

Mr. MOON. Yes, I am.

The CHAIRMAN. And you were nominated to the President by the Republican Party in Hawaii.

Mr. MOON. That is correct. This was the same process that was used by the party leaders in Hawaii when Judge Fong was nominated 4 years ago, and this was the same process that they used this time, coming up with a list of names who they felt were well-qualified.

The CHAIRMAN. In other words, you are a Republican nominated by the Republican Party in Hawaii and appointed by a Republican President.

Mr. MOON. That is correct.

The CHAIRMAN. Now, I notice from this charter here, it provides that the senior Senator from Hawaii will appoint three members, and the junior Senator shall appoint two members—that is five—and the other four members come from the bar. So the two Senators have a majority on that commission, don't they?

Mr. MOON. That is my understanding, yes.

The CHAIRMAN. Well, if both Senators were Democrats, and they did not want a Republican to get the appointment, it would be impossible for the commission probably to appoint them, wouldn't it?

Mr. MOON. I cannot answer that, Mr. Chairman. It is my understanding that they do appoint the majority of the members of the commission.

The CHAIRMAN. There is nothing that would prohibit the President from considering their appointment or not considering it; if they did make nominations to the President, they were considered, I presume, but they decided to follow the Republican Party in Hawaii rather than to follow this commission where the two Democratic Senators had a majority on the commission.

Mr. MOON. That is my understanding.

The CHAIRMAN. Senator Biden, do you have——

Senator INOUYE. Mr. Chairman.

The **Chairman**. Senator Inouye.

Senator **Inouye**. At this juncture, may I make a statement, sir?

The **Chairman**. Yes, sir.

Senator **Inouye**. Mr. Chairman, I listened to Mr. Moon's testimony with obvious interest. He stated in response to your question that I gave him too much credit, that his role in drafting the charter was minimal—I think he used that word, "minimal"—and that he was not the originator or the drafter of this charter.

I would like to for the record read to the committee first a letter dated April 1, 1978. This is to Daniel H. Case, president of the Hawaii State Bar Association, P.O. Box 26, Honolulu. The original of this letter is in the files of the Hawaii State Bar Association.

It reads as follows, Mr. Chairman:

> **Dear Dan**: Pursuant to your request, I have undertaken the project of developing a proposal for a merit selection plan for the Federal Judiciary here in Hawaii. As a result, I have drafted such a plan and enclosed for your review a copy of the proposed "Charter of the Federal Judicial Selection Commission of Hawaii".
>
> In order to obtain background information data, I reviewed recent literature concerning the subject and wrote letters of inquiry to the senior Senators in those States which presently have such plans. I obtained responses from many of these Senators, including copies of their various charters, news releases, and other data.
>
> I am also enclosing a chart summarizing some of the plans used in other States.
>
> In addition, I have had two conversations with Senator Inouye, discussing this project and my proposal. He has indicated his agreement with and support of the idea, and I feel confident that he will endorse any such proposal made by the HSBA.
>
> I have not yet discussed the matter with Senator Matsunaga. I will be glad to meet with you and the Board of Directors or any other appropriate group to discuss this proposal in more detail.
>
> Sincerely yours,
>
> **Albert I Moon**, Jr.
> (Signed) Al.

The next letter is dated June 13, 1978. It is addressed to me.

> **Dear Senator Inouye**: I am transmitting herewith a number of copies of a proposed charter of the Federal Judicial Selection Commission of Hawaii for your review and consideration.
>
> Mr. Albert I. Moon, Jr., drafted the proposal and informed us that he had previously spoken with you about such a proposal and that you expressed an interest in establishing such a Commission.
>
> This proposal was submitted to the Hawaii State Bar Association for its approval, and this was given unanimously by the Executive Board at its meeting held on June 1, 1978. As a matter of fact, the Executive Board was extremely enthusiastic about the prospects of establishing such a Commission for recommending nominees for vacancies on our Federal courts and for appointments as U. S. Attorney.
>
> The Bar Association is submitting a merit selection proposal to the 1978 State Constitutional Convention, and would be delighted to have the merit selection principle established for all our courts.
>
> Although Mr. Moon had not had an opportunity to discuss this matter with Senator Matsunaga, I am sending him a copy of the proposal, together with a copy of this letter to you, and I am hopeful that he, too, will be interested in supporting such a proposal.
>
> I would be pleased to hear from you after you have had an opportunity to review the matter.

Mr. Chairman, I met with Mr. Moon yesterday, and at that meeting he said, "I believe I met with you on only one occasion, and my involvement with this process was just to review the charter as prepared by the bar association. "And that is what he told Mr. Short, also.

Now, if you wish, I can have the original of this copy brought in from the Hawaii State Bar Association. This charter was not my baby, as we say, Mr. Chairman. It was initiated by Mr. Moon, it was drafted by Mr. Moon, and that is what he says.

Now my concern is the members of the legal community of Hawaii were aware of what transpired, and I think for our judicial system and our legal system to succeed, the citizens of a community, and especially those who practice before the judiciary, must have sufficient faith in the man or the woman who sits up on the bench. With this sort of exchange, I have some doubts, sir.

The CHAIRMAN. Would you care to respond to that, Mr. Moon?

Mr. MOON. I do not think there is much I can add, Mr. Chairman. I certainly agree that that exchange of correspondence took place. My memory still tells me, my best memory, that despite the fact that I drafted that original matter, it was subsequently handled by a committee of the State bar association of which I was not a member. And I was not even involved in the final preparation of the final version of that, which was eventually signed by the bar association and our two Senators.

But in any case, as I say, I believe that is unimportant at this point, because there is no question—I certainly agree that I was one of the strong proponents of that commission initially, and I was very heavily involved in it and had those discussions with Senator Inouye.

The CHAIRMAN. The distinguished Senator from Delaware.

Senator BIDEN. I am confused, Mr. Moon. I thought you said just earlier you were not heavily involved in drafting it.

Mr. MOON. I am sorry, Senator, if I gave you that impression. I was heavily involved at the beginning, but not at the end. In other words, my first discussion with Senator Inouye took place in August 1977, at which this idea was first brought up, as far as I can remember.

Apparently, we then met again sometime in early 1978. I had done this—I certainly remember doing the investigation of sending off to get copies of what had been——

Senator BIDEN. What prompted you to do all that back in 1977—or 1978? Did you have a burning interest in this issue, or did you just pick up the paper one day and thought, "I see they did it in California; maybe we should do it here," and make an inquiry? I mean, was it something important to you?

Mr. MOON. I was impressed by—as a layman in the political processes, I had always been concerned by the factor of politics that goes into the appointment of Federal judges, because that was my profession as a lawyer. I had certainly been in many trials before both Federal and State judges, and I was concerned about the quality of our Federal judges.

I was impressed by what I had heard about our senior Senator, Senator Inouye, from the fact that he, in the past, had been—even though he was part of the political process—had been more interested in quality as opposed to somebody's name or something like that. And when I had my initial discussion with him in August of——

Senator BIDEN. Excuse me. I am sorry. I did not want to get into all that. I mean, what was the genesis of your concern? It seems to me that, being a lawyer myself, practicing law, having been involved with my bar association, that when a member of the bar who is not on any committees that are relevant, apparently, to the issue of judicial selection would initiate to the president of the bar association, saying that he had independently made inquiries and independently drafted a proposal, that that usually in my little old State of Delaware would signal that somebody had a keen interest in the subject matter.

Mr. MOON. Oh, certainly, I had an interest in it, and it arose as a matter of fact from the standpoint of, in those particular years of 1977 and 1978, I was the chairman of the Hawaii Lawyer Delegation to the Ninth Circuit Judicial Conference. In that position, I had been requested to look into the situation involving the selection of new judges—this was right at the time, as you may recall, that what later become the Omnibus Judgeship Bill Act was being considered by Congress. So I was asked, in my position with the Ninth Circuit Judicial Conference, to look into this.

Senator BIDEN. When you made your original recommendation, what proposal did you make concerning the membership of the committee?

Mr. MOON. I frankly do not remember, Senator. It went through several different drafts, and in fact, the draft as I recall, to the best of my ability to remember, I believe the draft that was referred to in these letters by Senator Inouye—I think there were some revisions made before it became final. But I honestly do not remember what the recommendation was in there as far as the selection of the members.

Senator INOUYE. May I be of assistance, sir?

Senator BIDEN. Yes, please.

Senator INOUYE. The original draft submitted for my consideration called for three appointments by the bar association and three apiece by each Senator. I suggested in order to have greater citizen participation, we should have three for the senior Senator, two for the junior Senator, and four for the bar association.

Senator BIDEN. So it was four and four you recommended?

Senator INOUYE. And a further provision that if the person in the White House be of a party different from the Senator, then specifically, all four must be members of that President's party.

Senator BIDEN. How did it get changed? By the bar association?

Senator INOUYE. I recommended that.

Senator BIDEN. Yes. But I mean, as I understand it, ultimately, the Commission was made up of three—was it three by the senior Senator, two by the junior, and four by the bar; is that correct?

Senator INOUYE. That is right.

Senator BIDEN. That is ultimately how it turned out.

You know, Mr. Moon, Senator Thurmond has been around here longer than any of us, and in spite of the fact that I am not the oldest man here, I have been around here 13 years. And, Senator Inouye has a reputation in this place, in both political parties. Whenever we have had a tough problem, we have handed it to Inouye, in large part, if not in whole, because to the best of my knowledge there is not anybody on either side of the aisle that ever questions his integrity, his toughness, and his willingness to do a number of things that are unpalatable to others of us around here.

It concerns me that for the first time since I have been on this committee, this Senator has come before us, or quite frankly, any

Senator has come before us so forthrightly. A lot of Senators do not pass in their "blue slips," as we call them, in the past, but they do not like to step up to the ball. It disturbs me that Senator Inouye suggests that you are being somewhat disingenuous, at the least. And I just want to make it clear before I yield to my colleague—and then I will come back for a couple of questions, if I may, with the permission of the chairman—that this whole issue, as far as I am concerned, goes to one of the three aspects of the person's qualifications to be on the bench, and that is their judicial temperament.

We have sat so many times in this body over the past 13 years, listening to people failing to remember important facts, that we sometimes are skeptical.

But let me just say that at this moment and yield to the Senator from Illinois, and then the Senator from South Carolina, and then I have a couple more questions, if I may.

Senator SIMON. First, Mr. Chairman, if I may comment on the precedent here. I would like to quote from January 1979, Senator Paul Laxalt, our colleague, who said—and I am quoting:

> I personally think it would be a sad day in the committee and in the Senate for there not to be insured Senatorial prerogative, not from the standpoint of preempting anybody, but from assuming our responsibility. That is why we are here—Senators, that is—to call these tough shots within our States. If we finally get through the selection process, and somebody comes down here who, for whatever reason, is obnoxious or otherwise is not acceptable, I think as a matter of Senatorial responsibility we should preserve that right. I feel strongly about the "blue slip" process, since it has not been abused, that it should be retained.

I think that when the Senators involved are willing to say publicly what the two Senators from Hawaii have said, that this committee ought to listen to them very, very carefully.

In one instance so far this year, frankly, one Senator from one State came to me and said, "I would like you to stop a judicial nominee." But he said he did not want to be saying anything publicly about it. Well, I am not interested in doing that. But when the Senators are willing to stand up, I think we have a responsibility to be very, very careful in reviewing that nominee.

You mentioned, Mr. Moon, you were greatly surprised at being selected. I noted that among your past associates has been a Mr. William Clark, of California. Is that the same Mr. William Clark who has been on the Washington scene?

Mr. MOON. Yes, it is, Senator.

Senator SIMON. Have you had any discussion with him about this judicial nomination?

Mr. MOON. Not about the nomination per se. When I was selected by the local Republican Party leaders last fall, I did write to Mr. Clark, who was in Washington at that time, and indicated to him what had happened and that I would appreciate any comments or support he could give to me. And he graciously said, "Fine. I will see what I can do."

I have not heard whether he actually did anything or not, frankly.

Senator SIMON. Have you at any point had difficulties with the bar association, or been disciplined in any way?

Mr. Moon. The only time that there has ever been any question or matter that came up was back about 10 years ago—I am not sure of the date, but I think it was around 1976—a complaint was made against me to the Disciplinary Council of the State of Hawaii, on the basis that I had communicated with a party to a lawsuit who was represented by counsel without that counsel's permission, contrary to ethical rules. And as a result of that complaint, I was given an oral admonition when I explained the situation to them.

The situation, very briefly, was that I was representing a developer of a condominium in a lawsuit that had been brought by the apartment owners' association against the developer and others for construction defects in the building. An individual owner of one of those apartments who was a client of our law firm and a personal friend of my senior partner came to us and said, "Would you write a letter to the board of directors of the association, telling them, or expressing my concern"—his, the client's, concern—"with the cost of this litigation?"

I agreed to do it. I reviewed the matter with my senior partner. And he said fine, go right ahead. I did send the letter, and that was the result of—because I sent this letter to the board of directors, who technically were the representatives of the apartment owners' association in this lawsuit, I received this oral admonition.

In retrospect, I agree that technically, there was a question there, but because I was relatively new to the islands and had discussed it with my senior partner, and I did not see anything particularly wrong, I went ahead with the letter.

I would certainly not do it at this time. I have learned from that experience.

Senator Simon. And at that point, did you send a copy to the attorney representing this association?

Mr. Moon. Well, no. The attorney representing the association was the one who made the complaint. In other words, as soon as the letter was received by the directors——

Senator Simon. It was received by the group, and then they referred it to their attorney—or, did you send a copy to their attorney?

Mr. Moon. No. The board of directors received the letter and immediately turned it over to their attorney, who immediately filed a complaint against me.

Senator Simon. In the process of your being nominated, has anyone asked you questions that you felt were unethical in any way?

Mr. Moon. Not that I am aware of.

Senator Simon. Have you been questioned by any groups other than the bar association and the Justice Department?

Mr. Moon. The only other people I can think of are some reporters who questioned me after the nomination was made public.

Senator Simon. I have no further questions, Mr. Chairman.

The Chairman. Thank you, Senator.

Mr. Moon, I was going to ask you about your experience and so on, but I think your biography here gives account of that, and I see nothing in the record that is detrimental to you, so I think it is unnecessary to go into any other questions.

Senator Biden indicated that he had——

Senator **Inouye**. Mr. Chairman, Mr. Chairman.

The **Chairman**. Senator Inouye.

Senator **Inouye**. Would it be appropriate for me to address an inquiry to chief counsel? May I ask Mr. Short a question?

The **Chairman**. That would be all right, yes, sir.

Senator **Inouye**. Mr. Short, in the investigation and interview conducted by your office of Mr. Moon's nomination, did Mr. Moon tell you that the only extent to which he was involved in the drafting or the preparation of the charter was a simple review after the charter had been drafted by the bar association?

Mr. **Short**. Senator, it was my understanding that—that is basically correct—that the initial commission that was established to look into the proposal, that Mr. Moon was not a member of that commission. Now, that occurred after he had contacted your office and Senator Matsunaga's office, that he was not appointed to that commission. He was then asked to review the proposed commission that they were setting forth.

Senator **Inouye**. So he had no part in drafting, as he says in this letter?

Mr. **Short**. I was not aware of that, no.

The **Chairman**. Any other questions?

Senator **Biden**. Yes, I have a question—oh, I am sorry. You mean Senator Inouye, I think.

Senator **Inouye**. Mr. Chairman, I would like to submit these two letters for the record, sir.

The **Chairman**. Without objection, that will be done.

[Documents follow:]

HAWAII STATE BAR ASSOCIATION

[illegible]

HONOLULU, HAWAII 96810

TELEPHONE 537-1868

OFFICERS
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

ABA HOUSE OF DELEGATES
C. FREDERICK SCHUTTE

EXECUTIVE BOARD
DARAL G. CONKLIN
DAVID L. FAIRBANKS
CHARLES W. KEY
ROY K. NAKAMOTO
ALFRED W. H. WONG
WALTER T. YAMASHIRO

EXECUTIVE DIRECTOR
ELEANOR L. PIERCE

June 13, 1978

The Honorable Daniel K. Inouye
United States Senator
Room 6104
PJKK Federal Building
Honolulu, Hawaii 98613

Dear Senator Inouye:

I am transmitting herewith a number of copies of a proposed Charter of the Federal Judicial Selection Commission of Hawaii for your review and consideration. Mr. Albert I. Moon, Jr. drafted the proposal and informed us that he had previously spoken with you about such a proposal and that you expressed an interest in establishing such a commission. This proposal was submitted to the Hawaii State Bar Association for its approval and this was given unanimously by its Executive Board at its meeting held on June 1, 1978. As a matter of fact, the Executive Board was extremely enthusiastic about the prospects of establishing such a commission for recommending nominees for vacancies on our federal courts and for appointments as U.S. Attorney. The Bar Association is submitting a "merit selection" proposal to the 1978 State Constitutional Convention and would be delighted to have the "merit selection" principle established for all of our courts.

Although Mr. Moon had not had an opportunity to discuss this matter with Senator Matsunaga, I am sending him a copy of the proposal, together with a copy of this letter to you, and I am hopeful that he too will be interested in supporting such a proposal.

I would be pleased to hear from you after you have had an opportunity to review the matter.

Very truly yours,

Daniel H. Case

Daniel H. Case
President

DHC:ht
Enc.
cc: Senator Spark M. Matsunaga (w/enc.)

OCT 15 '85 12:01 SEN INOUYE HONOLULU HAWAII P.01

TO: BRIAN FR: LINDA

APR 24 1978 HSBA 10

CLINTON R. ASHFORD
A. JAMES WRISTON, JR.
ALBERT H. OGAWA
JOHN JUBINSKY
CHARLES B. DWIGHT, III
GALEN C. K. LEONG
JOHN R. ROLLS, JR.
ALBERT I. MOON, JR.
WAYNE NASSER

DOUGLAS W. MACDOUGAL
JOHN A. LOCKWOOD
CUTLER E. SHAW
CAROL Y. ABAI
MICHAEL W. GIBSON
DAVID B. DOWNS

ASHFORD & WRISTON
ATTORNEYS AT LAW
P. O. BOX 131
HONOLULU, HAWAII 96810

SIXTH FLOOR
338 QUEEN STREET

TELEPHONE 524-4787
AREA CODE 808

April 21, 1978

Daniel H. Case, President
Hawaii State Bar Association
P. O. Box 26
Honolulu, Hawaii 96810

Dear Dan:

Pursuant to your request, I have undertaken the project of developing a proposal for a merit selection plan for the federal judiciary here in Hawaii. As a result, I have drafted such a plan, and enclose for your review a copy of the proposed "Charter of the Federal Judicial Selection Commission of Hawaii."

In order to obtain background information and data, I reviewed recent literature concerning the subject, and wrote letters of inquiry to the senior senators in those states which presently have such plans. I obtained responses from many of those senators, including copies of their various charters, news releases, and other data. I am also enclosing a chart summarizing some of the plans used in other states.

In addition, I have had two conversations with Senator Inouye, discussing this project and my proposal. He has indicated his agreement with and support of the idea, and I feel confident that he will endorse any such proposal made by the HSBA. I have not yet discussed the matter with Senator Matsunaga.

I will be glad to meet with you and the Board of Directors, or any other appropriate group, to discuss this proposal in more detail.

Sincerely yours,

al

ALBERT I. MOON, JR.

AIM/~~gmr~~

Enclosure

The CHAIRMAN. Senator Biden.

Senator BIDEN. Mr. Moon, do you feel as strongly today about the requirement of a judicial selection commission as you did, in 1977?

Mr. MOON. Let us put it this way, Senator. I feel that such a commission is something that would generally be very helpful in most States to have that type of a body considering it. Under the circumstances that have existed in Hawaii, I am not sure that it would be effective as long as we have a Republican administration, frankly.

Senator BIDEN. I see. In other words, State party hacks are better qualified to determine who should be recommended for Federal judgeships than elected U.S. Senators. Is that what you are telling me?

Mr. MOON. In no way, sir——

Senator BIDEN. I do not understand your position, then.

Mr. MOON. What I am saying, Senator, is that based upon the experience that we went through with Judge Fong, it appeared obvious to many people in the State of Hawaii that this Federal selection commission frankly just did not have very much power and there was some questionable effectiveness of it.

Senator BIDEN. I see. What would your recommendation be—if you are appointed to the bench, and you are then appointed to an advisory commission within your circuit to make recommendations to the Congress, as often happens, or to the judicial conference to make recommendation to us, if you were asked by the Chief Justice to draft on behalf of the courts a recommendation on what policy should be toward selection commissions, what would you now recommend to this body—or, what would you now recommend as the position the bench should recommend to this body on judicial selection commissions?

Mr. MOON. Well, first of all, I am not sure that it is appropriate for a Federal judge to be involved in the selection process for other Federal judges——

Senator BIDEN. Well, you are all the time. You should know more about the bench you are about to go on. The fact of the matter is, you all are very, very, very willing to give us your advice.

Mr. MOON. I am well aware of that, Senator; I know that. But as far as being directly involved in any kind of selection commission, I question whether that would be appropriate——

Senator BIDEN. No, that is not my question. Would you recommend, to enhance the administration of justice, the establishment of a policy of national selection commissions, commisions like the one you originally put forward, or keeping it the way it is now, which is to the best of my knowledge, to generally disregard the commission in any State?

Mr. MOON. I would want to study it a little bit more, but frankly, I think the idea of having bipartisan commissions is a good idea for any State. My only concern would be in a situation such as we have here in Hawaii, where that commission does not comport with political reality, namely, that the majority of the members of the commission where there is a Republican President, who has the constitutional right and duty to nominate the potential judge, where he is of a different party from the other two Senators, such as in Hawaii, to have the other two Senators have the ability to appoint the majority of the commission, I think, does not comport with political reality.

I would certainly agree with the idea of a commission. It is just a question of how it be made up in order to meet the needs of everyone.

Senator BIDEN. How would you characterize the caliber of the Federal bench at this time, since that had been a worry of yours in 1978?

Mr. MOON. As far as I am concerned, the caliber of the Federal bench is very high. I can say that in Hawaii which, of course, is where I am used to practicing law as a trial lawyer, that to my knowledge, it is almost a universal opinion that the quality of our Federal judges over the years has been very high. For example, compared to our State courts, there is no question that it is of higher quality than our State court system.

Senator BIDEN. Well, then, I am a little confused. What was it that concerned you so much in 1978? If there was such a high quality on the Federal bench, why were you moved, as you originally testified—and we could get the reporter to read it back at some point—my recollection is that you were concerned about the quality of the Federal bench, particularly in your circuit, and you thought there was a need for a commission, and that is why you on your own went out, made inquiries, drafted a proposal, and sent it to the president of the bar association.

Now you tell us you were convinced that uniformly, there has been a high quality in your State and in your area, and for as long as you can remember.

I am confused. I am trying to get at what makes you click.

Mr. MOON. Well, I am not sure that I can tell you what makes me click, but as far as the idea of a commission, it is basically because of the fact that we are not always going to have—as far as I am concerned, we cannot count on having—Senators of the quality of Senator Inouye as far as——

Senator BIDEN. You did not have much doubt about that in 1978, did you? Let us talk about reality here. The fact of the matter was, in 1978, the only question everybody was talking about with Senator Inouye was whether or not he was going to win by 85 percent of the vote, or 90, or 81. I mean, unless you were worried about him getting hit by a truck or something—I am serious—there was not any—you see, I am not sure you are leveling with us.

Let me just lay it out for you, and you can respond. Here is a fellow who comes along in 1977 with, apparently, a caliber Federal bench already in place and says, "We need a judicial selection commission that is nonpartisan, and we should have one put in place; it is a good idea," and promotes it. Whether or not he ultimately put his stamp on it because he was or was not a member of a commission, he promotes it. He felt strongly about it, and took an initiative to do it. Time is money for us lawyers; lawyers do not spend time writing letters, making inquiries for which they do not bill—most lawyers do not. So you obviously felt strongly about it.

Then along comes a change in administration, and you are selected as one of five by the Republican Party. You called, then, the single most powerful man in Washington, or you write a letter to the single most powerful man in Washington, the man that everybody in America said is the only man who has the President's ear any time and every time he wants it; the man that everyone says is the guy the President most relies upon—a guy named Clark. And you write him a letter, having apparently been an associate or a friend or an acquaintance of Mr. Clark.

Mr. Clark writes back and says, "I will see what I can do to help you."

Now, I do not know about you, but if I wrote a letter in the Carter administration to Hamilton Jordan, and Hamilton Jordan wrote back and said, "Joe, I will see what I can do about helping you," I would be very doubtful that at a minimum the President of the United States would not hear his request. It is not likely that that would not get to him.

And then comes along the Judicial Selection Committee, and it is your turn in the barrel. And you say to us, "Well, I knew it was there, but I was not sure it was so effective, and the way the Fong thing was handled, I thought it may not be relevant anymore, and I did not think I was really very likely to be a candidate anyway, and that is why I did not do anything." And, "Gee whiz, here I am now, and gosh, fellows, I do not know how it all happened."

Seriously, that is how it all comes across to me. I sit there and I do not know you; I just hear that story. But I know this guy; and I say to myself—which I have got to do—"Who do I believe?"

So, unless you can clear up for me a little bit why my perception, which I just outlined, is not accurate—well, anyway, do you get the picture?

Mr. Moon. Well, Senator Biden, going back to the origin of this selection commission, when I first talked to Senator Inouye in 1977, as I say, it was a result of my being a chairman of the Hawaii delegation to the Ninth Circuit Judicial Conference. And I was personally asked by the committee in the conference to act as a selection commission to give names for potential ninth circuit judges to our two Senators.

I went to the Senator, I talked to him about this situation, and obviously, it was very ego-gratifying to be asked to do something like that. But by the same token, I was concerned about one individual such as myself—even though I consider myself to be fairly knowledgeable about the lawyers and judges in Hawaii, I was concerned about one individual taking upon himself this task. And when I discussed it with Senator Inouye, he was gracious enough to say he would consider anybody that it came up with. And at that time, we discussed the potential of forming such a commission, which I still believe is far preferable to one individual making that decision.

Senator Biden. I have just been handed a note, and I apologize, Mr. Chairman. I do not want to get in the spot we got in yesterday, apparently—I do not want to have to pay for the transcript. I am told that there has been an objection to our meeting beyond the time of 11:15, and it is now 11:20, and I have been going for 4 minutes, and I hope it is on-the-house, because I do not have the money.

I cease asking questions. I am sorry. There has been an objection to us meeting beyond 11:15, Senator, and I have just been passed that note. And we got into quite a hubbub, apparently, on the floor yesterday about that, and I will be guided by the chairman's wisdom here.

Senator **INOUYE**. Mr. Chairman, can I just make a closing statement?

The **CHAIRMAN**. Surely.

Senator **INOUYE**. Mr. Chairman, it was suggested that because the senior Senator appoints three, the junior Senator appoints two, and the bar association appoints four, that it would be "loaded."

No. 1, the six persons that were recommended by this judicial selection commission are made up of two Democrats. I made it a point to check to see if any of them were Democrats or Republicans. Two were Democrats. The Republicans' suggestions outnumber the Democratic ones by this commission of ours.

Of my three appointees on the commission, one is a member of the Democratic Party of Hawaii; one is a very conservative businesswoman; the other is a newspaper publisher. Neither of the two are active in any political party. The businesswoman is a very active member of the Chamber of Commerce of Honolulu.

Senator **BIDEN**. Not known for being Democratic?

Senator **INOUYE**. I think you are correct, sir.

The **CHAIRMAN**. Senator, I would like to ask you this question. President Reagan, under the Constitution, is responsible for making these appointments. Do you feel he is bound by any commission of any kind, anywhere? I do not know of any law——

Senator **INOUYE**. I have never suggested that, Mr. Chairman. The President of the United States is not bound by any of the recommendations made by this judicial selection commission; he can ignore it completely.

But here is a person who, by his own words—although he told your assistant here that all he did was review a charter that was prepared by someone else—"Pursuant to your request, I have undertaken the project of developing a proposal. I have drafted such a plan." And he goes on and on.

And now, my question is, with the legal fraternity in Hawaii, the legal community, being aware of what has transpired, when one considers the importance of faith and trust in the judiciary as the basis for the success of our judicial system, then I most respectfully contend, Mr. Chairman, that we must go out of our way to select a person who will enhance that trust. And my respectful contention is that this nominee will not.

The **CHAIRMAN**. Since the President has the power of appointment, it seems to me now the question arises as to whether this gentleman has the qualifications, the legal qualifications as to the law, the qualifications of patriotism, integrity and any qualities you would consider in the appointment of a judge.

At any rate, the information that you bring will be called to the attention of the full committee.

Senator **SIMON**. Mr. Chairman, there is one other fundamental question and that is, what is our procedure going to be, do we follow the precedents of the Senate?

Senator **BIDEN**. Well, Senator Stennis says, "Are we President's men or Senate men?" That is the question.

The CHAIRMAN. Well, of course, the Senators will have to judge on the testimony presented as to what they wish to do.

Now, as to the other nominees who are here today, we will submit questions, and you can answer for the record, but if there is objection, we will have another hearing after the recess as to these other two. That will give time—I understood you wanted time, anyway, to investigate more——

Senator BIDEN. That is correct. I think we ought to do that.

Senator INOUYE. Thank you very much, Mr. Chairman.

The CHAIRMAN. We will now stand adjourned.

[Whereupon, at 11:25 a. m., the committee was adjourned.]

BIOGRAPHIES

SIDNEY A. FITZWATER

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF TEXAS

Birth: September 22, 1953, Olney, MD.

Legal Residence: Texas.

Marital Status: Married to Nancy Jane Ware Fitzwater, 3 children.

Education: 1971-1975—Baylor University, B.A. degree. 1974-1976—Baylor University, School of Law, J.D. degree.

Bar: 1977—Texas.

Experience: 1976-1978—Vinson & Elkins Associate. 1978-1982—Rain Harrell Emery Young & Doke, Associate. 1982-present—Judge, 298th Judicial District of Texas, Dallas County, TX.

ALBERT I. MOON, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF HAWAII

Birth: January 25, 1931, Tucson, AZ.

Legal Residence: Hawaii.

Marital Status: Married to Mary Massey Moon, 3 children.

Education: 1948-1952—Carnegie Institute of Technology, B.S.M.E. degree. 1958-1961—U.C.L.A., J.D. degree.

Bar: 1962—California. 1971—Hawaii.

Experience: 1961-1962—William P. Clark, Esq., Associate. 1962-1965—The Aerospace Corporation, Assistant Counsel. 1965-1970—Holmes & Narver, Inc., Corporate Counsel. 1970-1971—O.N.C. Motor Freight System, Vice President, Administration and General Counsel. 1971-1984—Ashford & Wriston, Partner. 1984—Private Practice. 1984-Present—Lawhn & Keever.

GEORGE H. REVERCOMB

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF COLUMBIA

Birth: June 3, 1929, Charleston, WV.

Legal Residence: Virginia.

Marital Status: Married to Mary Collins McCall Henderson.

Education: 1946-1950—Princeton University, A.B. degree. 1950-1951—University of Viriginia. 1953-1955—Law School, J.D. degree. 1980 & 1981 (summer.)—LLM. degree (1982).

Bar: 1955—Virginia, 1956—West Virginia, 1959—District of Columbia.

Military Service: 1951-1953—United States Air Force.

Experience: 1955-1956—Hazlegrove, Shackeflord & Carr, Associate. 1956-1957—Revercomb & Price, Associate. 1957-1958—Southern Railway System, Attorney, Law Department. 1958-1959—Federal Communications Commission, Legal Assistant. 1959-1961—Revercomb & Price, Partner. 1961-1962—Vandeventer, Black, Meredith and Martin, Associate. 1962-1964—Sole practitioner. 1964-1969—Reeves, Harrison, Sams and Revercomb, Partner. 1969-1970—U.S. Department of Justice, Associate

Deputy Attorney General. 1970-present—Associate Judge, Superior Court of the District of Columbia.

ALAN B. JOHNSON

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF WYOMING

Birth: January 14, 1939, Cheyenne, WY.

Legal Residence: Wyoming.

Marital Status: Married to Linda Lee Johnson, 2 children.

Education: 1957-1961—Vanderbilt University, B.A. degree. 1961-1964—University of Wyoming, J.D. degree.

Bar: 1964—Wyoming.

Military Service: 1964-1967—United States Air Force.

Experience: 1968-1971—Paul B. Godfrey, Esq., Associate. 1968-1971—Sole Practitioner. 1971-1974—Hanes, Carmichael, Johnson, Gage & Speight, Partner. 1971-1974—United States Magistrate (part-time). 1974-present—District Judge, First Judicial District, State of Wyoming.

JEFFERSON B. SESSIONS III

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF ALABAMA

Birth: December 24, 1946, Selma, AL.

Legal Residence: Alabama.

Marital Status: Married to Mary M. Blackshear Sessions, 3 children.

Education: 1965-1969—Huntingdon College, B.A. degree. 1970-1973—University of Alabama, School of Law, J.D. degree.

Bar: 1973—Alabama.

Experience: 1973-1975—Guin, Bouldin & Porch, Associate. 1975-1977—Assistant U.S. Attorney, Southern District of Alabama. 1977-1981—Stockman and Bedsole, Associate and Partner. 1981-present—United States Attorney, Southern District of Alabama.

CONFIRMATION HEARING ON: ARNOLD I. BURNS, ALAN B. JOHNSON, GEORGE H. REVERCOMB, DUROSS FITZPATRICK, HARRY D. LEINENWEBER, J. SPENCER LETTS, AND DICKRAN M. TEVRIZIAN, JR.

WEDNESDAY, DECEMBER 4, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:06 a.m., in room SD-226, Dirksen Senate Office Building, the Honorable Charles E. Grassley (acting chairman) presiding.

Also present: Senators Simpson, Specter, McConnell, and Simon.

Staff present: Duke Short, chief investigator; Cindy Lebow, minority staff director; Michael Epstein, minority counsel; and Laurie Westley, minority counsel.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator Grassley. I would like to call this meeting of the Senate Judiciary Committee to order. We meet this morning for the purpose of reviewing the nominations of various Presidential nominees. To expedite the process for our colleagues, we are going to call for opening statements by the various Senators who are here to recommend the appointments from their various States. So I would start with our colleagues from New York, Senator Moynihan and Senator D'Amato, in the case of Arnold I. Burns, of New York, to be Associate Attorney General. Would you folks come forward.

Senator Moynihan. Mr. Chairman, might we ask Mr. Burns to join us?

Senator Grassley. Yes. That is appropriate.

I would ask Senator Moynihan to proceed.

STATEMENT OF HON. DANIEL P. MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator Moynihan. Mr. Chairman, you are very generous to give us this opportunity this morning. My esteemed colleague, Senator D'Amato, and I wish to appear before you on behalf of the nomination of Arnold I. Burns to be Associate Attorney General of the United States.

Mr. Burns is a distinguished attorney, a New Yorker, a graduate of Union College, that most revered, ancient of institutions in Schenectady, and of the Cornell University Law School. He was also a member of the Judge Advocate General Corps of the U.S. Army.

He has served in a number of eminent law firms in New York City and he is now a partner of Burns, Summit, Rovins and Feldsman, his own firm.

He has been active in a whole range of matters, not the least of which is the Republican Party, which will serve him well in his forthcoming duties.

I say that with good humor because he is going to need some good luck. Mr. Burns is going to have overall responsibility for civil rights affairs in the Department of Justice. Mr. Chairman, knowing him as I do personally, although it is a brief acquaintance it is a real one—and knowing his reputation—I commend him to you in this regard.

That is a solemn responsibility—a constitutional responsibility as well as a civic one—I look forward to a vigorous, responsible, fairminded administration of the laws and the Constitution under Mr. Burns' direction.

He has proven himself a man of law and a man concerned with justice as well as law, and I cannot think of a better place for him to be. I hope it will prove the case—I am sure it will—in the Department of Justice in the years immediately ahead. I thank you, Mr. Chairman.

[The statement follows:]

Prepared Statement by Senator Daniel Patrick Moynihan

Mr. Chairman, I am pleased to be here today to introduce a distinguished New Yorker and candidate for Associate Attorney General, Arnold I. Burns.

Mr. Chairman, Arnold Burns is a person of high caliber, a man who has distinguished himself since his days as a law student at Cornell Law School, where he received the Order of the Coif.

His twenty-year association with the firm of Burns, Summit, Rovins & Feldesman, as well as his previous affiliation with the law firm of Dewey, Ballantine, Bushby, Palmer & Wood, have given him the extensive exposure to antitrust and civil matters required for this post.

Mr. Burn's contributions as a member of the boards of numerous charitable organizations are noteworthy as well. Among the boards on which Mr. Burns serves are those of the Boys Clubs of America, several distinguished New York law schools, universities and colleges, and the Council of Governing Boards, representing the trustees of the 117 independent colleges and universities in New York State.

Mr. Chairman, the position to which Mr. Burns has been nominated will be very demanding. The range of responsibilities facing the Associate Attorney General require a man of extraordinary legal talents and a vast reserve of personal energy. A man such as Arnold Burns.

Mr. Chairman, Mr. Burns has my full support.

Senator **Grassley**. Thank you, Senator Moynihan. Senator D'Amato.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator **D'Amato**. Thank you very much, Mr. Chairman, and let me thank you for giving me the opportunity of joining Senator Moynihan in commending Arnold I. Burns to you.

The fact is that he has been recommended as the thirdranking highest position in the Justice Department, a position of great sensitivity.

Mr. Chairman, I would ask that the full text of my remarks be placed in the record as if read in its entirety, and let me simply add that he brings to the Justice Department not only three decades of practical experience as an attorney handling the most difficult cases but Arnold Burns brings a dynamism combined with compassion, combined with intellectual ability, combined with an experience that I believe will give him that balanced approach that is so necessary in facing the day-to-day responsibilities in heading up the Civil Division of our U.S. Justice Department.

I commend him to you. Those who know Arnold know of his character, the strength, and yet the compassion in which he maintains himself in his position, and I think it is a magnificent choice, and I join with Senator Moynihan in commending him to you, and to this committee.

[The statement follows:]

Prepared Statement of Senator D'Amato

Mr. Chairman, I am very pleased today to have the opportunity to introduce Arnold Burns to you and to this committee. Mr. Burns is the President's nominee to be Associate Attorney General, the third highest ranking position in the Justice Department.

Mr. Burns is exceptionally well qualified for this most important position, which has responsibility for the Civil, Civil Rights, Anti-Trust, and Lands Divisions of the Justice Department.

He will bring to the Department more than 3 decades of experience as a practicing attorney, including 25 years with his own law firm of Burns, Summit, Rovins & Feldman.

Those who work with him describe Arnold Burns as a dynamic and compassionate person who gets the most difficult job done.

In addition to being a most able attorney, Mr. Burns has a record of service to his country, his profession, and his community. After graduating from Cornell Law School in 1953, he served in the United States Army until 1957. Most of that time he spent as an attorney in the Judge Advocate General Corps.

Mr. Burns has also been a member of both the New York State and New York City Bar Associations' Ethics Committees. Among his many civic contributions, Mr. Burns is a member of the board of directors, and vice president and chairman of the government relations committee, of the Boys Club of America.

Mr. Chairman, it gives me great pleasure to present to you, as the President's choice to be Associate Attorney General, a man that the dean of Cornell Law School describes as "an individual of great human strength, great compassion, and great warmth."

Thank you, Mr. Chairman.

Senator **Grassley**. Without objection, Senator D'Amato's statement will be printed in the record.

Senator **Moynihan**. Mr. Chairman, might I make the same request.

Senator **Grassley**. And the same for Senator Moynihan. I have no questions for either of the Senators, I want to thank you on behalf of the chairman of this committee, Senator Thurmond, who necessarily must be at the Senate Armed Services Committee and cannot be here. We both thank you very much, and we will call back the nominee just as soon as we are done with the rest of the Members of the Senate.

Senator **Moynihan**. Thank you, Mr. Chairman.

Senator **Grassley**. I see one of the Senators from Georgia, Senator Mattingly, is here for the nomination of Mr. Fitzpatrick. I would ask both Mr. Fitzpatrick and Senator Mattingly to come at this point, and we will hear Senator Mattingly's statement.

Senator Nunn, we understand, is on his way but we will proceed right now with Senator Mattingly.

STATEMENT OF HON. MACK MATTINGLY, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator MATTINGLY. Thank you very much, Mr. Chairman. It is really a very deep pleasure for me to introduce to the committee Mr. Duross Fitzpatrick, the President's nominee for the new district judgeship in the middle district of Georgia.

I was very pleased to recommend Duross to the President for this nomination and I commend him to the committee as one who is eminently qualified to be a Federal judge.

He was born and raised in Twiggs County, GA, and his family has some very deep roots in south Georgia. Now his father served for many years as a tax commissioner in Twiggs County. In addition, he served 2 years in the Georgia State Senate, and it might be of interest to the—there are no Democratic colleagues here right now on the committee—that although Duross is a long-time Republican, his father was elected as a Democrat. Now Duross tried to get elected as a Republican in the Georgia State Legislature, and just did not quite make it at the time.

But after a year of study at the University of Georgia, Duross served 3 years in the Marine Corps, and after his military service he received a forestry degree from the University of Georgia and worked in that industry before returning to the University of Georgia to get his law degree. Duross has practiced law in Macon, GA, for 1 year, before setting up his practice in his hometown of Cochran. And for the last 18 years he has maintained a general but highly diversified practice handling a great variety of cases.

He is no stranger to the courtroom where he has spent countless hours representing clients in both civil and criminal cases.

This includes his experience as a Blakely County public defender also.

There could not, in my view, be a better legal background for a nominee to this district judgeship. Duross knows and understands firsthand, the impact of the law on the average citizen. He has lived it every day of his life.

Yet there is more to Duross Fitzpatrick than just being a fine attorney in rural Georgia, what we call in Georgia a good "country lawyer."

He has a reputation that extends far beyond middle Georgia courtrooms where he practices law. I think there is no better evidence of this than his election by his peers as president of the State Bar of Georgia from June 1984 to June 1985.

I think this demonstrates his wide respect that he has earned from his fellow attorneys in our State, and he has also received bipartisan support for this nomination from every area of the legal community in Georgia. So I believe he will make an excellent judge, and I am very proud to recommend him to you.

But let me add one word about the middle district of Georgia. There is a tremendous case backlog in this district, as was recognized by the Congress when it added this new judgeship.

We have a great need for this position to be filled in order that the cases may once again reach court in a reasonable period of time.

It is my hope that this committee will take this into consideration as well as the high qualifications and widespread support for Duross Fitzpatrick, and a vote on his nomination can be scheduled without any unnecessary delay.

Mr. Chairman, that is the text of my statement for Mr. Fitzpatrick. I would just encourage your committee to try to expedite this so that he can be sworn in as rapidly as possible.

Senator **Grassley**. Mr. Fitzpatrick.

Senator **Mattingly**. I would like to say one other thing, Mr. Chairman, that the senior Senator from Georgia is not here just yet because he is also over at the Armed Services Committee where he and Senator Thurmond are convening the committee. I know that he wants to make a statement on behalf of Mr. Fitzpatrick, and I would hope that he could have the opportunity when he comes, that you would allow him to come forward and make his statement.

Senator **Grassley**. That will be our procedure. Thank you, Senator Mattingly. Before you leave, though, I would call on Senator Specter.

Senator **Specter**. Thank you very much, Mr. Chairman. First, I would like to echo Senator Mattingly's words about prompt action by both the committee and by the Senate on these very important confirmation proceedings, because around the country, a backlog requires prompt attention by the new appointees, and I certainly will cooperate in that endeavor.

Mr. Chairman, I would just like to make a brief comment about the nomination of Mr. Burns to be Associate Attorney General.

I have had the pleasure of working with Mr. Burns prior to his nomination and have found him to be a man of outstanding qualifications. I think the Department of Justice is fortunate to have a man of his caliber, from the legal profession, to come to take that important position. I regret that I cannot stay further for these proceedings, but I have other committee commitments. But I just wanted to make that brief comment, and I thank the Chair.

Senator **Grassley**. Thank you, Senator Specter.

At this point, Senator Mattingly, since Senator Nunn is not here, I suggest we ask Mr. Fitzpatrick to remain.

So I thank you, Senator Mattingly, and Mr. Fitzpatrick.

I would ask Senator Simon if it would be all right with him if, for the benefit of Senator Wilson, I could go on to the two nominees from the State of California before we invite Mr. Leinenweber up from Illinois. So I would call at this point Senator Wilson, Mr. Letts, as well as Mr. Tevrizian.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Wilson**. Thank you, Mr. Chairman. Let me express my appreciation for the courtesy extended to me this morning, and I am privileged to introduce to you two very distinguished Californians for appointment to the Federal bench, both of whom have been recommended by my judicial screening committee as being exceptionally well qualified, and that is the highest classification that we confer. And, in both the case of Judge Dickran Tevrizian and J. Spencer Letts, the qualification is entirely earned, because, Mr. Chairman, both of these nominees have had very distinguished careers.

They have had extensive litigative experience, both before Federal and State courts. Each has demonstrated a thorough understanding of the appropriate role that the Federal judiciary has been assigned by our Constitution.

Furthermore, Mr. Chairman, in the case of both nominees, their backgrounds have warranted the highest accolades from their colleagues, both those before whom they have appeared on the bench and opposing counsel. Their colleagues have given them not only the highest marks in terms of their professionalism but also in terms of character. In the interest of time, Mr. Chairman, I will not go through the individual records of achievement of each of the nominees. However, the careers of both warrant the confidence that the President has expressed by nominating them for the position of Federal district judge.

Judge Tevrizian is a native Californian. He was born and raised in Los Angeles. He is a product of the Los Angeles school system. He received his bachelor's degree in finance and his law degree from the University of Southern California, where he graduated with high honors.

Among his distinctions, Judge Tevrizian has been recognized by both Republican and Democratic Governors. He was first appointed to the bench by Governor Reagan. He was then elevated to the Superior Court by Governor Brown.

He is someone who has had extensive legal experience. As a member of the Superior Court, he accepted some of the most difficult assignments, dealing with the law and motion and writs calendars. He is also a judge who has earned a very enviable reputation in his handling of criminal cases.

After serving on the bench for 10 years, Judge Tevrizian returned to private practice in 1982. He has demonstrated expertise in both civil and criminal matters.

Judge Tevrizian's experience representing private clients and presiding on the bench has given him an exceptionally well-rounded background, that will serve both him and the central district of California extraordinarily well.

Mr. Chairman, Spencer Letts is a graduate of two distinguished Eastern universities. He received his bachelor's degree from Yale and his law degree from Harvard.

He then went to work at a firm well known to this committee, Fulbright & Jaworski. He moved to California in 1966 where he went to work as legal counsel for Teledyne.

Since 1966, he has served as a litigation attorney and general counsel at Teledyne. He also worked at three Los Angeles law firms, and he is presently serving as "Of Counsel" to the distinguished law firm of Latham & Watkins.

Spencer Letts has worked on issues as diverse as consumer and regulatory affairs and nuclear waste disposal. He has published articles on corporate law. He has lectured at Rice University and

UCLA. He has served as a member of the financial accounting standards board task force on merger accounting and helped draft insurance legislation for Governor Reagan. He has been, in short, a very busy man, and a man whose practice and whose teaching of the law in a number of extraordinarily complex and challenging fields has earned him very high marks, both from his students and from his colleagues.

Mr. Chairman, I urge the committee to carefully consider the qualifications of both Judge Tevrizian and Mr. Letts. I am sure that a thorough scrutiny of their backgrounds will convince every member of the committee that these men are extraordinarily well qualified to serve upon the Federal bench, and I am particularly grateful that they will be joining what is already a distinguished bench in the central district of California.

I ask only that in light of the needs of our southern California community—we seem to generate a great number of Federal cases—that the committee do all that I know it will, and can, to send these nominations to the Senate, with enough time remaining on the calendar so that we may vote on their confirmation before we adjourn this year.

Mr. Chairman, I am very grateful to you and to the other members of the committee, as well as to the staff, for your kind attention, and I will take no more of your time.

Senator **Grassley**. Thank you, Senator Wilson. Are there any questions from the committee? Senator Simon, no questions of Senator Wilson?

Senator **Simon**. I have none at this point.

Senator **Grassley**. OK. Senator Wilson, thank you very much. We will ask your nominees to wait while we now go on to——

Senator **Wilson**. That is fine, Mr. Chairman. I would ask only one further courtesy. I know that Judge Tevrizian has brought his very lovely family with him and I am sure he would appreciate an opportunity to introduce them.

Senator **Grassley**. We will welcome them at the time that we call him back for his testimony.

Senator **Wilson**. Thank you, sir.

Senator **Grassley**. Senator Nunn, I think we ought to accommodate you. And we would invite Mr. Fitzpatrick to come up with Senator Nunn.

Senator Nunn, we have already heard testimony from the junior Senator from Georgia. We will now hear your statement.

STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator **Nunn**. Thank you very much, Mr. Chairman. I know that you have a busy schedule. I had to open the Armed Services Committee together with Senator Thurmond. We are on reorganization matters now, and had a very important hearing, so I regret being late and holding you up.

Let me submit my entire statement for the record. I am sure Senator Mattingly has covered the distinguished career of Duross Fitzpatrick.

He grew up in a small town. He was educated largely in the State of Georgia. He went to school for a few brief years in Tennessee, joined the Marine Corps and served with great distinction, coming out after 3 years with the rank of sergeant.

He then went back to Georgia to law school. I first met Duross Fitzpatrick when I was a member of the legislature in Georgia in 1968-69. He then worked for Carr Dodson who was a distinguished member of the Georgia House from Macon, GA, and was the Republican minority leader.

Duross did a superb job there. He worked very well across the aisle. At that stage, Georgia was predominantly Democratic in the legislature but Duross was very, very effective in every respect because he had the intelligence, and he had the ability, and he had the integrity necessary to gain confidence of people in every aspect of the political arena.

Rather than go through all the virtues of our nominee, let me just say that he has done a marvelous job, I think, in being a real leader in the middle Georgia area.

I come from the middle Georgia area; he comes from a county even smaller than mine. He practices law in Twiggs County. He lives, I believe, in Blakely County. Duross dominates that area of Georgia because of his keen intelligence and because of his great reputation.

Duross was the president of the Georgia Bar Association in 1984-85, having just completed that term.

During that period of time he did a marvelous job in upgrading the State bar. He directed, and I think instigated more than any other single individual, a program of continuing education requiring the lawyers of the State of Georgia to go back and take education courses to upgrade their legal training and career.

That was not an easy matter to push through, it had some resistence, but I think most people now agree that it was the right thing to do and Duross had the courage to do it. I hate to indict a man with his own words, but that is what we "country lawyers" try to do. Let me just give you a little bit about the philosophy of Duross.

I was reading this morning very early some of the things that he has written in recent months as president of the Georgia bar, and I think this, more than anything else, tells us what kind of individual he is and it tells us about his philosophy.

So I'm quoting him from the first article he wrote as president of the Georgia Bar Association. I am quoting in part.

> Law is a profession, a great learned profession that was born in ancient times to serve those that were in need or oppressed. It is not and has never been a business. Like sports, the farther we get away from our roots and the closer we get to being a business, the more problems we have.

And going on down the page he says:

> But the uppermost thought should not be how much will I get but how much can I help.

Again quoting him:

> I think most of us love our profession, not because of the opportunity to become rich or powerful, but because we alone can right a wrong or stop an injustice.

Continuing the quotations:

> My wife Bev and I recently saw a stage production of "To Kill A Mockingbird" in Atlanta. The story was well known to me but my heart still swelled with pride when Atticus Finch took on the whole town and risked the ruin of his law practice to fight for the rights of his client. Here was a lawyer, who, when forced to choose between his obligation to his profession and the economic aspects of his law practice, chose to follow his conscience. Like Atticus, each of us will face times during our career when a choice must be made between the two sometimes conflicting obligations. If we are to call ourselves lawyers we must ensure that we always follow our professional obligation.

This is his philosophy. This is the kind of person he is. I have known him personally. He has been a leader in his political party. He has been a leader in the practice of law in his area. He has been a leader in the State bar.

I can think of no person that would be a better judge in the Federal courts of our State and our Nation than Duross Fitzpatrick.

I might say for Senator Simon's benefit, if Senator Grassley will disregard this remark, that Duross is suspected, occasionally, despite his dedicated loyal adherence to Republicanism, occasionally he's suspected of having voted for a Democrat. So I would throw that out, showing his wisdom in——

Senator GRASSLEY. Occasionally.

Senator NUNN. And in small counties in Georgia you can pretty well tell who votes Republican. [Laughter.]

I thank you, Mr. Chairman. I recommend this nominee highly. I think the President has chosen wisely and I think he will be an outstanding member of the judiciary.

His wife Beverly is a tremendous asset to him, he has two marvelous children, and I am sure that his family is here with him, but it is an honor for me to present him to you and to recommend him highly.

Senator GRASSLEY. Senator Nunn, as long as you support the nominee, I'm sure he will be confirmed by this Senate.

Senator NUNN. Thank you.

Senator GRASSLEY. So, Senator Nunn, I have no questions for you. Do you have, any Senator Simon?

Senator SIMON. I have no questions.

Senator GRASSLEY. OK. We would thank you, Senator Nunn, for taking time away from your important work on the Senate Armed Services Committee to be here with us in support of this nominee.

I would now call Senator Simon's nominee, Harry D. Leinenweber of Illinois, as well as Congressman George O'Brien. I welcome each of you here and I would call on Senator Simon. Is Senator Dixon here?

Senator SIMON. He is not here but I know he strongly supports the nominee also. If I may just say a word or two, and then if the nominee, and my colleagues will forgive me, I am supposed to be testifying over at the Foreign Relations Committee for a few minutes, and then I will be back.

The nominee is a person with a wide legal background. He has been approved not only by the American Bar Association. We have in Illinois something called the Chicago Council of Lawyers which is, to their credit, much more rigorous in what they demand of nominees than is the bar association. They also praise the nominee. We are very pleased and honored, in Illinois, to have him as a nominee here, and I am pleased to see my former House colleague, and your former House colleague, Chuck, here with us today. I am very pleased to present him to the committee.

Senator GRASSLEY. Thank you, Senator Simon. We now go to you, Congressman O'Brien. Welcome to the Senate.

STATEMENT OF HON. GEORGE M. O'BRIEN, A REPRESENTATIVE IN CONGRESS, FROM THE STATE OF ILLINOIS

Mr. O'BRIEN. Thank you, Mr. Chairman. Paul. It is with a great deal of pleasure and some sense of paternalism that I commend to your attention and support the recommendation and nomination of Harry Leinenweber.

Harry is a graduate of Notre Dame University and the University of Chicago Law School, and I think I met him the first day he walked into court in Joliet, IL.

I have known him 24 years. I have seen him practice. I have seen him defend and prosecute. I have tried cases against him, with him, and I have watched him perform.

He has acted as a special prosecutor, as an Associate Attorney General. He has tried all kinds of cases, both to juries and to courts alone, and has an exemplary reputation among the legal people in our area.

The reason I have something of this paternal attitude toward him is that when I left the State legislature, I think I was responsible for his running for my vacancy when I was fortunate enough to come to the Hill.

He was among the 10 top freshmen representatives in Springfield. He was among the 10 top representatives every year he served there.

I would think, if I were going to summarize, he is a kind of medieval type of man. He is not a specialist. He is good at everything he has tried, in my experience. I would think that if I wanted to try to draw the line close, I would say he is clean, publicly and privately; he is highly intelligent; he is hard-working, and he is caring.

I have made about 242 recommendations in my 13 years on the Hill. Of those I would guess two dozen are superior; four are outstanding. He is in the four.

I guess, Mr. Chairman, to wind up my remarks, I would like to steal a line from H.L. Mencken. Leinenweber is the kind of a guy who will forgive a sinner and wink at an ugly girl.

Thank you, Mr. Chairman.

[The statement of Senator Alan J. Dixon follows:]

PREPARED STATEMENT OF SENATOR ALAN J. DIXON

Mr. Chairman, I wish I could appear before this committee in person to introduce Harry Daniel Leinenweber. Mr. Leinenweber's nomination to be U.S. District Judge for the Northern District of Illinois deserves this committee's close attention.

Harry Leinenweber graduated with honors from the University of Notre Dame, and received his law degree from the University of Chicago, one of this nation's most prestigious institutions. We both served in Illinois state government in Springfield for many years. Mr. Leinenweber's nomination is the culmination of 30 years of public life beginning as Joliet City Attorney and Will County Special Prosecutor. He has been in private practice since 1962, and would bring significant experience to the bench.

I believe Harry Leinenweber would make a fine District Judge, and I urge the Committee to send this nomination to the floor with a favorable recommendation.

Senator **Grassley**. Thank you, Congressman O'Brien.

I would like to have Arnold I. Burns of New York, who is a nominee for Associate Attorney General, come back and before you are seated, I would like to have you respond to this oath.

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Burns**. I do, sir.

TESTIMONY OF ARNOLD I. BURNS, OF NEW YORK, TO BE ASSOCIATE ATTORNEY GENERAL

Senator **Grassley**. Please be seated and before you give your statement, if you would like to introduce your family and friends who are here, we would like you to do that now.

Mr. **Burns**. Thank you very much, Senator. First and foremost is my wife, Felice Burns. I have my daughter, Linda Burns with me; my son, Doug Burns; my daughter-in-law, Leslie Burns. That exhausts the Burnses who are here today.

Senator **Grassley**. Let me say congratulations to the family as well.

Mr. **Burns**. I have one of my law partners, Stuart Summit, with me today, and I have got a roomful of friends. Robert Miller, who is my friend and president of the Freedom Foundation at Valley Forge. I have got Robbie Calloway here, who is one of my colleagues in my Boys Clubs work, and I have got a host of others here, and I will not delay the proceedings by naming all of them. Thank you very much.

Senator **Grassley**. We would entertain a statement from you at this point and then we will have a few questions.

Mr. **Burns**. Good morning. I am very happy to be here. I am very honored to be here. I am very grateful, Mr. Chairman, to the President of the United States for honoring me in this way, and in recommending me, and sending a nomination to the U.S. Senate for a very high office in this land.

I am very mindful of the responsibilities that go with that office. I am grateful to you, and to the members of the committee, Mr. Chairman, for the opportunity to come here this morning, to appear before you as you make an independent assessment and evaluation of my qualifications for this high office.

I am here to answer any and all questions by members of the committee forthrightly and honestly as I can.

If the U.S. Senate should see fit to confirm my nomination, you have my commitment that I will work very effectively and cooperatively on a continuing basis with this committee, and will be as cooperative as I am this very morning.

I am happy to respond to your questions, sir.

Senator **Grassley**. Thank you. Would you summarize for us, briefly, your background and legal experience.

Mr. **Burns**. I have been, Mr. Chairman, a practicing lawyer in my State, in the State and Federal courts, for over three decades. I have, together with my partners, built a substantial and successful law firm—Burns, Summit, Rovins and Feldesman, which has a very broad-based and varied, and diverse practice. I also bring with me, in addition to my legal experience, I bring with me experience in many, many pro bono publico matters, and philanthropic activity in which I have been engaged.

In building and developing our law firm, Mr. Chairman, I have managed, supervised, administered a very small law firm, a medium-sized law firm, and a very substantial law firm, all the same one, as it grew and developed, and those are the qualifications, I believe, that I bring to the table.

Senator GRASSLEY. Mr. Burns, would you tell the committee something about the general duties you will have under Attorney General Meese, and how you intend to coordinate these activities with a Deputy Attorney General.

Mr. BURNS. As I understand it, Mr. Chairman, in 1977, the Congress made the Office of Associate Attorney General of the United States a matter of statutory enactment.

The plan was to bifurcate the Justice Department in terms of high-level policy supervision into a criminal justice area and a civil justice area, under the responsibility of the Deputy Attorney General and the Associate Attorney General, respectively.

It is my understanding that in this new job, if the Senate confirms my nomination, I will be principally responsible for supervising the work of the civil justice areas of the Justice Department, and I will, working with the Attorney General, and the Deputy Attorney General, be involved in the management and administration of the Justice Department, which I believe is the largest law firm in the world.

Senator GRASSLEY. Would you please tell us what you consider to be the goals and priorities facing you at the Justice Department, if you are confirmed, and then, what action will you take in accomplishing those tasks.

Mr. BURNS. The job for which I am nominated has now been vacant for some time, and I think that the attorney general and the Deputy Attorney General are looking to me to help them take a "hands on" management responsibility and an administration responsibility in the Department of Justice.

So it is my intention to do precisely that. It is my intention to set up procedures to coordinate the various activities of the Department under my responsibility, to work very closely and in harmony with the Attorney General and the Deputy Attorney General, to the end that we can continue the effective, vigorous, fair-minded, even-handed enforcement of the law of this land, with the dedication and devotion to the rule of law as our anchor to windward.

Senator GRASSLEY. Presently, the Office of Associate Attorney General is responsible for the five civil litigating divisions within the department.

Do you foresee any change in the direction of the division under your control, or, will you generally follow the policies previously established?

Mr. BURNS. As I sit here now and look into the crystal ball, I get absolutely nothing coming back, because my first job will be really a fact-finding one, and to really take a fresh look at a number of the areas under my responsibility.

So, I can, at this moment, foresee no change, and of course I will be operating under the guidelines and the policies of the Department established by the Attorney General of the United States.

Senator GRASSLEY. One of the important issues to the Department of Justice is the control of civil litigation within the department.

Efforts to transfer litigation authority to other agencies and departments are constantly being proposed. What, in your opinion, should be the role of the department in controlling the litigation activity of the Federal Government?

Mr. BURNS. Mr. Chairman, I think it is vitally important that the massive amount of litigation in which the U.S. Government is engaged, be coordinated and directed in a sensible and rational way, so that the courts are not innundated with a plethora of frivolous cases—so that cases are not brought in one jurisdiction, or in one district, which are conflicting with cases in other jurisdictions.

And that, to me, requires systematic coordination, and I think that is one of the principal roles of the Department of Justice, to do that job, and to control the litigation of the United States, and I think that that is how I feel about that.

I think it is very important that it be centralized in the Justice Department, sir.

Senator GRASSLEY. Will you respond to requests to appear and testify before any duly constituted committee of the Senate?

Mr. BURNS. I will, sir.

Senator GRASSLEY. Mr. Burns, I have no further questions. You may expect some questions in writing from members of the committee who cannot be here.

We would ask that you immediately respond to those. I appreciate very much your appearance before the committee.

Mr. BURNS. Thank you so much, Mr. Chairman.

Senator GRASSLEY. I would call Judge Alan B. Johnson of Wyoming, who has been nominated to be the U.S. district judge for the district of Wyoming.

I will ask you to raise your right hand. Do you swear that the testimony that you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge JOHNSON. I so swear.

TESTIMONY OF HON. ALAN B. JOHNSON, OF WYOMING, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF WYOMING

Senator GRASSLEY. Please be seated. And would you also introduce members of your family, or friends, who are accompanying you.

Judge JOHNSON. Mr. Chairman, I come alone from Wyoming today. I was here a couple of weeks ago, and my brother who works for the State Department in Washington, DC, as of 2 months ago was here, but cannot be here with me this morning.

Senator GRASSLEY. Thank you very much. For the record, I would like to say that our colleagues from Wyoming, even though they cannot be here, fully support your nomination.

Judge Johnson, you presently serve as district judge for the first judicial district for the State of Wyoming. This I believe is a court of general jurisidiction. Is that right?

Judge JOHNSON. That is correct.

Senator GRASSLEY. I am confident that you are very knowledgeable of State laws, but I would wonder, however, if you foresee any difficulty in the transition from State court to the Federal District Court?

Judge JOHNSON. I look forward to the opportunity to expand my horizons and to have the opportunity to assume the position as judge, of the newly created position of U.S. District Judge. I will be located in Casper, WY.

Wyoming has been, in terms of its rules and procedures, pretty much federalized over the last 20 years. We have the Wyoming version of the Federal Rules of Civil Procedure. We have adopted the criminal rules, and also, most recently, the Federal Rules of Evidence, virtually unchanged.

From that standpoint I do not anticipate any particular problems in terms of adjusting to the Federal bench. I do see that there will be an entirely, and much broader responsibility concerning substantive law that I will have to deal with and become familiar with in this new position. I look forward to that opportunity.

Senator GRASSLEY. There is a concern by some people about the deeply felt constitutional views of a Federal judge and the constraints of judicial precedent.

So I would like to know how you would resolve the tension that sometimes exists between personnel jurisprudence and precedent.

Judge JOHNSON. I think there has been much discussion concerning judicial activism, and the tendency on the part of a judge to resolve constitutional questions based upon his personal views. That does not mean that a judge does not have an active mind when he deals with a case, and has a responsibility to analyze and interpret the law in arriving at a proper decision.

He does that by looking at the past. He does not do it on an ad hoc basis creating his own personal jurisprudence.

Senator GRASSLEY. One of the criticisms of judicial activism is the tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals.

Do you feel this criticism is valid and would you please explain your reasoning behind your answer.

Judge JOHNSON. I come from a small State, but we have experienced many of the same problems we see across the Nation, where courts have been called upon to deal with problems of everyday life.

One example that I can think of is the issue of sovereign immunity which many States have had to deal with. The courts have stepped in and have oftentimes declared doctrines such as sovereign immunity, no longer to exist, thus forcing the legislature to respond.

Legislature is best able, with its staff, with its opportunity, with its representative position, to make decisions concerning public issues, and to respond to those decisions. The judge is reactive; he does not control what comes into his courtroom. It is presented to him in the context of a particular case.

I feel generally, it is the proper place of the legislature to create the laws, the Executive to create the rules and regulations, and the court to interpret those laws, rules, and regulations.

Senator GRASSLEY. I have no further questions, Judge Johnson, but as I said to Mr. Burns, I would expect that you might get some questions in writing, and we would appreciate having your answers promptly.

Judge JOHNSON. Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you very much and good luck to you.

I would like to call Judge Revercomb who is nominated to be the U.S. district judge for the District of Columbia He is from the State of Virginia.

I would like to ask you to raise your hand. Do you swear that the testimony you will give at this hearing is the truth, the whole truth, and nothing but the truth, so help you God?

Judge REVERCOMB. I do.

TESTIMONY OF HON. GEORGE H. REVERCOMB, OF VIRGINIA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

Senator GRASSLEY. Thank you very much. Be seated, and please introduce your family or friends who are here with you.

Judge REVERCOMB. Thank you, Senator. I would like to introduce my wife, McCall, my long-time administrative assistant and secretary, Mrs. Gloria Fuller, my law clerk, Mr. Michael Klein, the Attorney-Adviser to the Rules Committee of the Superior Court, which I chair, Mr. Peter D'Jinis. Thank you.

Senator GRASSLEY. Thank you. We are glad to have you back with us, and I thank you for being patient with the process.

I have a few questions that I would like to ask you.

First of all, since you have served as a judge of the Superior Court for the District of Columbia since 1970, and now, of course, you have been nominated to the U.S. District Court for the District of Columbia, what do you feel will be the most rewarding aspect of serving in this capacity, particularly any differentiation or challenging aspect, compared to your present position?

Judge REVERCOMB. Although there is some overlap in the types of cases tried in the two courts, there is a substantial difference in the civil and criminal jurisdiction of the courts. In our Federation, Congress enacts statutes which are national in scope, and also, from time to time, by its judicature acts, establishes the jurisdiction of U.S. District Courts.

I would consider it most rewarding to have the opportunity, indeed, the responsibility, and the challenge, of applying Federal statutes and case law to matters before me.

Senator GRASSLEY. Judge Revercomb, it has been suggested that our prisons often produce prisoners who then become professional criminals.

What is your opinion of what can, or should be done, to improve prisoner rehabilitation, so that life-long professionalism as a criminal is not maintained?

Judge REVERCOMB. I have some problem with a proposition that prisons make criminals; however, the environment of our prisons and jails is an important subject for several reasons, and rehabilitation efforts is one of them.

There is a wide disparity among our States in facilities and in adequate staffing of their penal systems. Since 1980, approximately $4 billion has been committed in new construction, and this should help alleviate those problems where they exist. Some States do not have serious problems, and some conform to very high standards. But there are some dangerous situations and there is an environment which must be improved in many of the systems.

There is a more fundamental problem to rehabilitation as I see it. The trend recently is to identify the dangerous offender and try to rehabilitate that person; but even in those systems, including the Federal Bureau of Prisons, rehabilitation, unfortunately, does not occur as often as we would like.

There are two recent innovations which I would mention. One is an alternative to incarceration and one pertains to changing some policies within the prisons.

There has been some experimentation with a highly restrictive, highly structured probation, so restricted, that indeed, it can be considered a form of punishment.

This of course requires more resources for probation and any program, of course, must be consistent with the protection of the public.

Insofar as within the prisons themselves, the Chief Justices Prison Industries Program is designed to give prisoners some meaningful work. There is less resistance to this now than traditionally, that is, from the labor market, although it still may present policy problems.

A characteristic of our prison which is almost peculiar to the American system, is warehousing large groups of people without any meaningful existence; frequently this may contribute to a person feeling of no value, and not thinking well of themselves, and, as a result, perhaps not respecting the rights of other people.

I believe improvements can be made, but also, of course, consistent with the protection of our society.

Senator GRASSLEY. My next question is divided into two parts. Are there any circumstances under which a district judge should attempt to establish new judicial precedent and, if so, what criteria would you consider in order to determine the propriety of reserving existing precedent?

Judge REVERCOMB. I fully support the doctrine or policy of following rules and principles previously laid down by judicial decision unless those rules contravene ordinary principles of justice.

I respond by saying that a trial judge, a U.S. district judge, might well have more difficulty in overturning precedent than an appellate judge, or, more likely than not, the trial judge would receive a mandate from the appellate court to follow the law.

However, it sometimes does begin—that is, overturning precedent sometimes does begin in the trial court, and I believe that either a trial court judge, or an appellate judge should not overturn precedent, unless for a compelling reason, such as when the reason or reasons behind a law fail, the law usually should and does fail; or perhaps, over a long period of time, when the values of society change, a precedent should be overturned.

It sometimes does occur but I do subscribe to what is basic to our legal system, that of stare decisis.

Senator **GRASSLEY**. Thank you very much. I would ask the Senator from Kentucky if he has any questions.

Senator **MCCONNELL**. No, Mr. Chairman. I am here to relieve you.

Senator **GRASSLEY**. Thank you. Judge, I thank you very much and wish you all the luck in the world, and, hopefully, you will be shortly confirmed.

Judge **REVERCOMB**. Thank you, Senator.

Senator **GRASSLEY**. Thank you very much.

Senator **MCCONNELL** (presiding). I would like to now call Duross Fitzpatrick of Georgia who has been nominated by the President of the United States to be U.S. district judge for the Middle District of Georgia.

If you would raise your right hand. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **FITZPATRICK**. I do.

TESTIMONY OF DUROSS FITZPATRICK, OF GEORGIA, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF GEORGIA

Senator **MCCONNELL**. Do you have any family, or friends here, Mr. Fitzpatrick, you would like to introduce?

Mr. **FITZPATRICK**. Mr. Chairman, I do, and if appropriate, I would like to introduce them at this time. My wife, Beverly, has accompanied me up here from Georgia. She is seated there, in the yellow sweater. I have three of my closest friends here. One of them, Powell Moore, I think is known to most members of the committee. He has been in Washington in various capacities for many years.

Next to him is a friend of mine, a fellow lawyer from Americus, GA, Henry Crisp who, as a matter of interest, is a great grandson of the last speaker of the House of Representatives that came from the deep south, Charles F. Crisp, back in the 1890's.

Behind him is Richard Bradley, known to his friends as Bo Bradley, who is my predecessor as the president of the State Bar of Georgia, and, they are all close friends, and it is gracious of them to come up and be with me.

Senator **MCCONNELL**. We welcome your family and friends. The chairman has some questions that he would like for me to propound to you, Mr. Fitzpatrick. In reviewing your file, I noted that in 1984, you served as president of the State Bar of Georgia. I am sure that during your tenure one of your concerns was the rendering of pro bono service by members of the bar.

Would you please tell the committee what advice you would give young attorneys concerning their responsibilities in providing this type of legal service.

Mr. **FITZPATRICK**. Mr. Chairman, I believe one of the great traditions of the law is the rendering of free legal services, or pro bono, as the profession calls it, to the unfortunate members of society who cannot afford a lawyer but very often find they need one.

The courts have taken care of the criminal side of that pretty well through various decisions, but the civil side is still not up to where it should be.

My advice to all members of the profession would be that they could never really share the satisfaction of being called a lawyer, unless, on occasion, they freely and willingly gave services to people who couldn't afford them and needed it.

I think that clinics joining in organized pro bono organizations is of course the best way, but I would advise any lawyer, that sometimes somebody will come into your office, and will be seeking some help, and you will find out in the first 5 minutes they cannot pay you, and I think rather than send them off to hunt somebody else, that you should take that on, and I commend that to people.

Senator McConnell. Thank you. Mr. Fitzpatrick, do you feel that a judge should assume direct control over complex issues and cases, in order to avoid delays, and to effectively manage such cases?

Mr. Fitzpatrick. Mr. Chairman, I come from a State where the State courts are pretty well restricted in how they get involved in litigation in the trial of a case, which is different from the Federal system.

In the State system—I of course was never a judge of a trial court—but I sense sometimes, that it would have been better if the State judges had a little more leeway in assuming control over cases, especially complicated cases.

So I think the answer to your question is yes, there would be opportunities where a judge would need to use, you might say, the—I hesitate to say the power of the office—the resources of the office to speed litigation along, and to make sure that the purpose of the trial is not lost in delay, which brings on unusual and exorbitant costs, very often, to plaintiffs and defendants, both.

Senator McConnell. In his famous dissent in Plessy against Ferguson in 1893, Justice John Harlan referred to our Constitution as, quote, "colorblind," unquote. Would you agree with this characterization?

Mr. Fitzpatrick. Mr. Chairman, I would agree with that characterization. I think that since *Plessy* v. *Ferguson* was overturned in 1954, that we have come a long way toward truly colorblind administration of justice in this country.

I think it has been a positive good. I come from a State where there was a lot of, you might say, dissension, in the early days, but I do believe that the administration of justice, that to have the proper administration of justice, that it has got to be colorblind.

You have got to judge the merits on the law, and on the facts as they are presented to you, and I very strongly support that position.

Senator McConnell. Thank you very much, Mr. Fitzpatrick. There may be additional written questions. If there are, we will submit them to you, and we appreciate very much your coming and are confident you will be confirmed.

Mr. Fitzpatrick. Thank you, Mr. Chairman. I appreciate the committee giving me this opportunity.

Senator McConnell. I would like to call now Harry D. Leinenweber of Illinois, who has been nominated by the President to be the U.S. district judge for the Northern District of Illinois.

Mr. Leinenweber, would you raise your right hand and repeat after me. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Leinenweber. I do.

TESTIMONY OF HARRY D. LEINENWEBER, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

Senator McConnell. Are there family members here that you would like to introduce, or friends?

Mr. Leinenweber. Senator, my family decided to stay where it was colder, in the Midwest. No; I am here by myself.

Senator McConnell. All right. Mr. Leinenweber, you have been a practicing attorney since 1962. You also served as a member of the Illinois General Assembly, House of Representatives, for 10 years.

With this background, do you believe that changes in the law should be reserved for the legislature, whose members can be altered by the voters, if the elected officials fail to reflect their values of society?

Mr. Leinenweber. Absolutely. That question really kind of states, I believe, what the proper roles are between the legislative and the judicial branch.

Senator McConnell. How would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator or was not prepared to adequately represent the interests of his or her client?

Mr. Leinenweber. That can be a difficult question for a number of reasons. One is, I believe litigants, particularly civil litigants have a right to retain their own attorney, and presumably make a value decision at the time they select an attorney. Second, there is a certain amount of trial strategy involved in the way attorneys handle cases. If, however, I became absolutely convinced, particularly in a criminal proceeding, that a litigant was not receiving a proper and adequate defense, I believe it would be incumbent upon me, as well as any other judge, to take some action, either by assisting counsel in the proper phrasing of questions, bringing in proper evidence, or, bringing in additional counsel by appointment, to assist in the representation of the individual.

Senator McConnell. Thank you. What are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. Leinenweber. Well, I do not believe a judge ever ought to issue an order he is not prepared to enforce, and I believe the type of enforcement, that should prove to be necessary, be considered when a judge takes a step in entering a judgment.

I believe that sort of goes along with one of the earlier questions involved, when you seek to impose broad-reaching types of judicial remedies oftentimes, it becomes very difficult to enforce, and I think a judge ought to consider that at the time he decides a case. Specifically, whatever order I would issue, I would be prepared to back up and enforce if the same was not being carried out.

Senator McConnell. Thank you, Mr. Leinenweber. There may be additional questions submitted to you. If there are, if you would just respond to them in writing. We appreciate your coming and look forward to your confirmation.

Mr. Leinenweber. Thank you, Senator. It has been a privilege and a thrill.

Senator McConnell. I would like to call now, J. Spencer Letts, of California, who has been nominated by the President to be U.S. district judge for the Central District of California.

Mr. Letts, if you would raise your right hand. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Letts. I do.

TESTIMONY OF J. SPENCER LETTS, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Senator McConnell. Thank you. Have a seat. You have been a practicing attorney for 25 years. Your litigation experience has been entirely civil in nature.

Do you feel that your lack of criminal trial experience will, in any way hinder you, in the performance of your duties as a Federal judge?

Mr. Letts. No, I think not. I think that is an element of the challenge of being a judge. I think there will be many elements of that experience that will be new to me, but the nature of my practice, as Senator Wilson described earlier, has been such that I have taken on a number of different challenges in areas that were new to me, and I am now comfortable with my ability to do that. The criminal area will be new to me but I am confident that I can handle it.

Senator McConnell. Would you tell the committee what procedures you follow in determining any potential conflicts of interest, and how you intend to resolve them.

Mr. Letts. With respect to conflicts of interest, I would not expect to be in a position to have very many because of the nature of the practice I have had. In those circumstances where the judicial code of conduct, or the relevant statutes would call for me to recuse myself, I would expect to do so.

Senator McConnell. What is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the constitution as that judge interprets it?

Mr. Letts. That is a question that, in my judgment, is difficult to answer without reference to particular facts. As a generalization I would say that the judge, particularly the trial judge, is bound to follow the precedent before it.

The only circumstance that I would think that was not the appropriate answer, would be where I did not consider the precedent to be a controlling precedent because the particular facts suggested that it was not in fact precedent for the particular application.

But if it was clear precedent I would expect to follow it. I think that is what trial judges do.

Senator McCONNELL. Thank you, Mr. Letts. Senator Simon has joined us, and I would like to see, now, if he has any questions.

Senator SIMON. Yes. Thank you. As my colleagues know, I have been somewhat concerned about the quality of nominations we have been seeing lately. This is the first time, for a number of weeks, that all the nominees, were approved by the bar association without any minority ratings of "not qualified," and I say that in commendation of these nominees.

I note in your biography, Mr. Letts, that you say that you appear in court fairly regularly but not always formally. I am just curious, what you mean by that.

Mr. LETTS. A high percentage of the litigation that I have been involved with, I have been involved in the role of general counsel, so I have usually had cocounsel with me. That has plusses and minuses in my experience.

I have worked with a number of trial lawyers on my side, but in those cases, as often as not, they would do the argument rather than I, and they would interrogate witnesses.

Senator SIMON. In the process of this nomination, has anyone asked you questions you felt were improper, or unethical?

Mr. LETTS. No; I really do not think so. There were a lot of questions but I considered all of them to be fair.

Senator SIMON. And the kind of questions you faced were of what nature?

Mr. LETTS. The ones that I am thinking of were testing of—of the kind of questions I was just asked by Senator McConnell—the testing of how you feel about stare decisis and how you feel about application of personal views to particular decisions.

Senator SIMON. And there were not questions about how you would rule on any case that might come before you?

Mr. LETTS. No, not in that vein. There would be back and forth. People would ask me a question, which I really did regard as entirely fair, and I would give my answer. Then I would get back and forth discussion.

I do not remember anybody ever asking a question that was not a product of a discussion, that would have come out like that. In truth, I do not think that I could say that anybody asked a question, even in the context of the conversation, that I found offensive.

Senator SIMON. You have received a questionnaire from the committee; from the bar association. You have been questioned by the Justice Department. Have any other organizations questioned you?

Mr. LETTS. No.

Senator SIMON. All right. I have no further questions, Mr. Chairman.

Senator McCONNELL. Thank you, Senator Simon. Are there any family members with you, Mr. Letts, that you want to introduce?

Mr. LETTS. No. I appreciate your asking. No, there are not. I appreciate your asking.

Senator McCONNELL. OK. Well, thank you for coming.

Mr. LETTS. Thank you.

Senator McConnell. I would like to call now, Dickran M. Tevrizian, who has been nominated by the President to be district judge for the Central District of California.

Mr. Tevrizian, if you would raise your right hand. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge Tevrizian. I do.

TESTIMONY OF HON. DICKRAN M. TEVRIZIAN, OF CALIFORNIA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Senator McConnell. Thank you. Have a seat.

Judge Tevrizian. I have brought my family with me.

Senator McConnell. Good.

Judge Tevrizian. I would like to introduce them to the committee.

Senator McConnell. All right. Would you do that at this time.

Judge Tevrizian. My wife, Geraldine; my oldest daughter, Allyson; my youngest daughter, Leslie; and my good friend, Thomas Gerardi, who is a member of the plaintiff's bar, one of the fine trial lawyers in the country.

Senator McConnell. Thank you. Glad to have all of you here. Judge Tevrizian, in reviewing your file, I noted that from 1978 to 1982, you served as a judge of the Superior Court of the State of California. From 1972 to 1978, you also served as a judge for the Municipal Court of the Los Angeles Judicial District.

With this background, would you please tell the committee what you consider to be the prerequisites for a just and fair trial.

Judge Tevrizian. I think first of all, you have to have a judge of good temperament, a judge that permits the attorneys to try the case, that does not try to try the case for them. I think you need a judge that is predictable, reliable, and has a good degree of common sense.

Senator McConnell. What are your views of the primary purposes of the criminal justice system?

Judge Tevrizian. First of all, I do not believe the courts should be used by judges to—let's call it try and influence their philosophical decisions on the law.

The criminal justice system is one that is set up by a series of statutes. It is up to the judges to enforce the statutes that come before them, give the litigants that come before the court a fair trial, and in the event of a guilty verdict, to punish appropriately.

Senator McConnell. In response to the committee questionnaire, you stated in part—and I am quoting from your answer: "The courts have relaxed standards surrounding justiciability requirements. Rules of standing serve to limit judicial recourse only to those suffering a particular injury." End quote.

Judge Tevrizian, would you give us your own perspective on the recent trend in the Supreme Court towards stricter requirements of standing.

Judge Tevrizian. Well, I think the courts should be used to resolve disputes between individuals and not to legislate. Many times, the litigants that are coming before the court are having the courts attempt to legislate for them a function that I do not believe the judiciary is equipped for.

Senator McCONNELL. Thank you. I also have a statement from Senator Cranston supporting both Mr. Letts and Judge Tevrizian which I would like to insert in the record at this point.

[The statement follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman, I regret that I cannot attend this hearing on the nominations of J. Spencer Letts and Dickran M. Tevrizian to the U.S. District Judges for the Central District of California. I recommend them to you as well qualified for the central district bench.

I have had good reports on both appointees from friends of mine in California familiar with the LA legal community. Mr. Letts has served as counsel for high tech firms as well as law firms in the Southern California area; Mr. Tevrizian—a native Los Angeleno—not only worked with local firms but has served as a Municipal and Superior Court Judge for Los Angeles County. Thus the nominees have the requisite knowledge of the region where they would preside as well as experience in legal matters.

At a time when the workload of all the courts is expanding—particularly in Southern California, which will soon be the largest population center in the country—it is more than ever important to have the best judges possible to settle disputes and to deal with the thorny judicial questions that will inevitably arise. I urge the committee to give these nominees the thoughtful consideration they deserve in terms of the scope of their prospective responsibilities.

Senator McCONNELL. I have no further questions. Senator Simon.

Senator SIMON. Yes. First of all, let me just note, as one who shared a college dormitory room for 2 years with someone of Armenian background, that it is a pleasure to have you before us, Judge. The judiciary ought to be a representative body, not in any pure sense, but reflecting our national blend of blacks and women and Hispanics, and others.

Are there other American Armenians in the Federal judiciary?

Judge TEVRIZIAN. No. I am the first nominee, Senator, and I am very proud of that because my father was an American by choice, not birth, and I only wish that he was alive to see this great moment that I am going through now.

Senator SIMON. Well, I could not recall any, and in the process of my 2 years, I became half Armenian, and I particularly welcome you here.

Judge TEVRIZIAN. May I ask who the individual that you shared the dormitory with was, because my wife's family is from Chicago.

Senator SIMON. Well, he is from Racine, WI. Sam Kochegian was his name, which you will recognize as a slightly Armenian name, and there is a very sizable Armenian population in Chicago as well as you know, in Fresno, and elsewhere. In going through your background, I notice that you are a trustee of the George Ignatius Foundation. What is that?

Judge TEVRIZIAN. Mr. Ignatius was an individual that never married and he accumulated a lot of money in the rug business, and when he died, he left all his money to charity, to have these various charities keep the Armenian culture alive, such as educate students, make the new immigrants coming over to this country better citizens.

And so the foundation was set up with the proceeds of his estate and we support various churches, community activities, educational activities, and the man's nephew was Paul Ignatius who was the Secretary of the Navy during the Johnson administration.

Senator SIMON. Part of the ABA code of ethics for judges is not to have affiliation with organizations that discriminate on the basis of race, sex, or so forth. Do you belong to any such organization?

Judge TEVRIZIAN. No. I do not. I do not belong to any organization like that.

Senator SIMON. The Bar Association's code of professional responsibility calls for every lawyer, and I am quoting, "regardless of professional prominence or professional workload to find time to participate in serving the disadvantaged." Can you tell me how you have done that in your professional life.

Judge TEVRIZIAN. Well, I have participated by becoming a trustee of the Ignatius Foundation, and I am sure you are aware that the tax laws prevent you from taking any kind of monetary consideration; otherwise, you lose your charitable status.

So, during the time that I was a judge of the municipal court and the superior court, I never received any compensation for serving as a trustee.

I have also spoke—because in Los Angeles we have a great deal of immigrants that are coming over from the Middle East because of the hostilities, as well as from Soviet Armenia, and one of the duties that I have performed is to go out to these new citizens and—or new arrivals, and teach them how to be better citizens, by teaching them to follow the rules and the laws of this country.

Senator SIMON. And let me just ask one final question. You heard me ask the previous nominee. Were any questions asked of you, that you felt were in any way improper?

Judge TEVRIZIAN. No. I heard the question that you asked of Spencer Letts, and the only questions that were asked of me were of a very general nature, and I do not think ever got to a situation where I would prejudge any kind of factual situation, that would ever come before me as a sitting judge.

Senator SIMON. Good. Well, I thank you, and obviously, Mr. Chairman, any nominee who had the good sense to marry a girl from Chicago has to be given very serious consideration by this Committee.

Senator MCCONNELL. Unquestionably.

Senator SIMON. All right.

Senator MCCONNELL. I believe that concludes our list of nominees, and this hearing is adjourned.

[Whereupon, at 10:22 a.m. the Committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

ARNOLD I. BURNS

NOMINEE, ASSOCIATE ATTORNEY GENERAL

Birth: April 14, 1930, Brooklyn, NY.

Legal Residence: New York.

Marital Status: Married to Felice B. Burns, 2 children.

Educational: 1947-1950—Union College, B.A. degree. 1948 (summer)—Columbia University. 1950-1953—Cornell University, School of Law, LL.B. degree.

Bar: 1953—New York.

Military Service: 1953-1957—United States Army, Judge Advocate General's Corps.

Experience: 1960-present—Burns, Summit, Rovins and Feldesman, Partner. 1957-1960—Dewey, Ballantine, Bushby, Palmer and Wood, Associate.

ALAN B. JOHNSON

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF WYOMING

Birth: January 14, 1939, Cheyenne, WY.

Legal Residence: Wyoming.

Marital Status: Married to Linda Lee Johnson, 2 children.

Education: 1957-1961—Vanderbilt University, B.A. degree. 1961-1964—University of Wyoming, J.D. degree.

Bar: 1964—Wyoming.

Military Service: 1964-1967—United States Air Force.

Experience: 1968-1971—Paul B. Godfrey, Esq., Associate. 1968-1971—Sole Practitioner. 1971-1974—Hanes, Carmichael, Johnson, Gage & Speight, Partner. 1971-1974—United States Magistrate (part-time). 1974-present—District Judge, First Judicial District, State of Wyoming.

GEORGE H. REVERCOMB

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF COLUMBIA

Birth: June 3, 1929, Charleston, WV.

Legal Residence: Virginia.

Marital Status: Married to Mary Collins McCall Henderson.

Education: 1946-1950—Princeton University, A.B. degree. 1950-1951—University of Virginia, Law School. 1953-1955—J.D. degree. 1980 & 1981 (summers)—LLM. degree (1982).

Bar: 1955—Virginia. 1956—West Virginia. 1959—District of Columbia.

Military Service: 1951-1953—United States Air Force.

Experience: 1955-1956—Hazlegrove, Shackleford & Carr, Associate. 1956-1957—Revercomb & Price, Associate. 1957-1958—Southern Railway System, Attorney, Law Department. 1958-1959—Federal Communications Commission, Legal Assistant. 1959-1961—Revercomb & Price, Partner. 1961-1962—Vandeventer, Black, Meredith, and Martin, Associate. 1962-1964—Sole practitioner. 1964-1969—Reeves, Harrison, Sams, and Revercomb, Partner. 1969-1970—U.S. Department of Justice, Associate Deputy Attorney General. 1970-present—Associate Judge, Superior Court of the District of Columbia.

DUROSS FITZPATRICK

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF GEORGIA

Birth: October 19, 1934, Macon, GA.

Marital Status: Married to Beverly Jean O'Connor, 2 children.

Education: 1953-1954—University of the South. 1957-1961—University of Georgia, B.S. degree. 1963-1966—University of Georgia, School of Law, LL.B. degree.

Bar: 1965—Georgia.

Military Service: 1954-1957—United States Marine Corps.

Experience: 1966-1967—Elliott and Davis, Macon, Georgia, Associate. 1967-1983—Private Practices, Cochran, Georgia. 1983-present—Fitzpatrick & Mulliss Cochran, Georgia, Partner.

HARRY D. LEINENWEBER

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: June 3, 1937, Joliet, IL.

Legal Residence: Illinois.

Marital Status: Married (separated)—Geraldinde Dunn Leinenweber, 5 children.

Education: 1955-1959—University of Notre Dame, A.B. degree. 1959-1962—University of Chicago School of Law, J.D. degree.

Bar: 1962, Illinois.

Experience: 1962-1979—Dunn, Stefanich, McGarry & Kennedy. Associate (1962-1967), Partner (1967-1979). 1963-1967—Joliet City Attorney. 1973-1983—Illinois General Assembly, House of Representatives, Member. 1979-present—Dunn, Leinenweber & Dunn, Ltd. Partner.

J. SPENCER LETTS

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: December 9, 1934, St. Louis, MO.

Legal Residence: California.

Marital Status: Married to Virginia Carroll Letts, 3 children.

Education: 1952-1956—Yale University, B.A. degree. 1957-1960—Harvard Law School, LL.B. degree.

Bar: 1960—Texas. 1967—California.

Military Service: 1956-1957—United States Army. 1957-1965—(reserves).

Experience: 1960-1966—Fulbright & Jaworski, Associate. 1966-1973—Teledyne, Inc., General Counsel. 1973-1974—Troy, Malin, Loveland & Letts, Partner. 1975-1978—Teledyne, Inc., General Counsel. 1978-1982—Teledyne, Inc., Legal Consultant. 1978-1982—Hedlund, Hunter & Lynch, Of Counsel. 1982-present—Latham & Watkins, Of Counsel.

DICKRAN M. TEVRIZIAN, JR.

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: August 4, 1940. Los Angeles, CA.

Legal Residence: California.

Marital Status: Married to Geraldine Alyce Vanley, 2 children.

Education: 1958-1962—University of Southern California, B.S. degree. 1962-1965—University of Southern California, J.D. degree.

Bar: 1966—California.

Experience: 1966-1966—Arthur Anderson & Company, Accountant. 1966-1972—Kirtland & Packard Associate, Partner. 1972-1978—Judge, Municipal Court of the Los Angeles Judicial District. 1978-1982—Judge, Superior Court of the State of California for the County of Los Angeles. 1982-1985—Manatt, Phelps, Rothenberg & Tunney, Partner. 1985-present—Sole practitioner. 1985-present—Lewis, D'Amato, Brisbois & Bisgaard, Of Counsel.

CONFIRMATION HEARING ON STANLEY SPORKIN

TUESDAY, DECEMBER 10, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 3:25 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jeremiah A. Denton (acting chairman) presiding.

Also present: Senators Simon and Heflin.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF SENATOR JEREMIAH A. DENTON

Senator DENTON. Today, we are holding an open hearing on the nomination of Stanley Sporkin, General Counsel of the CIA to be a judge of the U.S. District Court for the District of Columbia.

This has been a long and difficult process made longer and more difficult by the initial refusal of two agencies of Government to cooperate with the inquiry by providing documents which the committee had sought. It dragged on for many, many months.

Before going any further, myself, I will defer to my colleague, Senator Simon, from Illinois, he, who has only a few minutes and wishes to make a statement.

Senator Simon?

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Yes, thank you, Mr. Chairman.

I simply want to say that I have not been to as many of the hearings as my colleague, but I have attended all of them for at least part of each hearing.

On the basis of what I have seen, there is no basis whatsoever for holding the nominee up. Mr. Sporkin has shown, in addition to every other necessary characteristic, an unusual patience and I can say to his wife and son, you ought to be very, very proud of Mr. Sporkin.

What we do have, without getting into classified information, is some disagreement between the FBI and the CIA and Mr. Sporkin got caught in the middle of it.

The bar association has recognized him as well-qualified and there is nothing that I have seen to suggest that judgment is wrong.

I would like to enter into the record, Mr. Chairman, two letters. One is from a Mr. Harvey Pitt and the second one is from a Mr.

Thomas Crebbs. I would like to read a few sentences from Mr. Crebbs' letter.

He, at one time, was the director of the Alabama Securities Commission and he says:

> Knowing Stanley Sporkin as I do, I feel compelled to respond to the matters that you raised during our conversation. I, of course, am not in a position to refute all of them, simply because I do not have firsthand knowledge of the facts, if any, supporting them.
>
> However, based upon my knowledge of, and experience with Mr. Sporkin, I believe them to be rather scurrilous remarks without any basis in fact, and intended only to defeat his selection as a Federal District Judge.
>
> I am glad to have the occasion to respond to your charges. They are false.

And then he goes on:

> You related to me the substance of discussions he had with others to the effect that Mr. Sporkin abused his colleagues and subordinates. I can speak directly to these statements—they are false. You also mentioned that others criticized the performance of the Division of Enforcement during Mr. Sporkin's tenure as its Director. I suspect the fact that he was so successful in enforcing the securities laws, has led some people to make the charges you have reported to me. It is important to keep in mind that people who violate the securities laws do not like to be caught. According to your sources, Mr. Sporkin was want to retaliate against attorneys, issuers, or others who had occasion to criticize him. I do not, for an instance, believe that.
>
> You have indicated that, according to some, Mr. Sporkin lacks judicial temperament. I do not, for the reasons cited above, believe that to be true.
>
> I think a more credible case is to be made for exactly the opposite belief. Mr. Sporkin is a brilliant, innovative, fair-minded attorney. He is virtually without peer in the possession of these attributes. I can think of no person who is better suited or qualified to sit as a Federal District Judge.

Well, I would like, Mr. Chairman, to enter those full statements in the record, and I hope that we can finally, quickly, and expeditiously move Mr. Sporkin's situation to resolution on Thursday and Friday and that this Nation will be served by him on the Federal bench.

Senator DENTON. Thank you, sir.

Senator SIMON. Thank you, Mr. Chairman.

Senator DENTON. We are, Senator Specter, and I will recognize you to introduce Mr. Sporkin, running short on time.

I deferred to Senator Simon because he has to leave at 3:30 p.m. and I have to leave at 4 p.m.

So without wishing to cause you to feel cramped, I do want to mention that we only have a half an hour or otherwise he is going to have to answer a great many questions in writing. But I welcome the opportunity to give you the chance to introduce Mr. Sporkin and I have great respect for you, as my colleague, as chairman of a subcommittee on which I have done some work with you and I have great admiration for your leadership and with that, I introduce the distinguished Senator from Pennsylvania, Senator Arlen Specter.

Senator SPECTER. Thank you, Mr. Chairman.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. I shall be brief, relatively brief, because Mr. Sporkin's outstanding record, really speaks for itself.

I am pleased to introduce Stanley Sporkin, to this committee. I have known Mr. Sporkin since he entered the Yale Law School in the fall of 1954, where I attended law school with him, having been 1 year ahead of him at that time. And I have known him in the intervening 31 years.

I have followed his very distinguished career as Director of Enforcement of the Securities and Exchange Commission. I have followed his very distinguished career in his current position at the Central Intelligence Agency. I knew him as a friend at law school and observed his keen intellect, his great tenacity, and his great capabilities as a lawyer; and I have seen those capabilities in practice.

I have known Mr. Sporkin's family and I know his father, the Hon. Maurice W. Sporkin, who has been a distinguished judge on the court of common pleas in Philadelphia, having been elected there in 1953. It was a singular election victory in that particular year, and I remember it well.

I know Mr. Sporkin's wife, Judith, who is present here today and have had an opportunity, although not at close range, to observe his very fine family over the years.

I know that Mr. Sporkin's public service record has been a distinguished one. He clerked for two Federal district judges in Delaware. He has received the President's Award for Distinguished Federal Service, which is the highest tribute that can be accorded a Federal employee, as I understand it. He also has been awarded the prestigious Rockefeller Award and the National Civil Service Achievement Award.

With some 29 years in the practice of law myself, I have some substantial idea of just what it takes to be a judge on the U.S. District Court, having practiced in that court rather extensively. I believe that Stanley Sporkin will be an outstanding judge, a truly outstanding judge—honest, determined, uncorruptible, tenacious, fair and judicious.

I am pleased to call him friend, and I am pleased to recommend him to this committee.

Thank you.

Senator DENTON. Thank you, Senator Specter.

I want to recognize the presence of a very well qualified judge, who was the Chief Justice of the Supreme Court of Alabama, my senior colleague from Alabama, Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

I do not have a statement. I am trying to understand the facts involved in this controversy. The only comment I would make is to make the committee aware of a letter which I have seen from Thomas L. Krebs, who at one time was the director of the Alabama Securities Commission. I know Mr. Krebs and know him to be a very fine meticulous and objective indvidual, and one that does not lightly express an opinion.

And so, I would merely make that comment concerning this very fine letter which he has written on behalf of Mr Sporkin.

Mr. SPORKIN. Thank you, Senator.

Senator DENTON. Thank you, Senator Heflin. I want to place in context my own part in this hearing.

I have never taken an active role in going into opposing any candidate for the Federal judgeship, particularly one which is strongly supported by the Reagan administration. The coincidence which draws me into this position is that I have oversight responsibilities over the Federal Bureau of Investigation, as chairman of the Subcommittee on Security and Terrorism. So, perhaps, because of that position, I was the object of missives sent, representative allegations from the Federal Bureau of Investigation and people at different levels in the Justice Department regarding Mr. Sporkin's involvement in a case regarding a sensitive FBI investigation of a former senior CIA employee and there is no hint of, in any of those allegations, regarding Mr. Sporkin's patriotism.

The substance of the allegations deals with raising issues which bring into question judgment, and ethical behavior which we would expect to be necessary on the part of one being nominated to such an important position; and even impropriety, if some of the allegations were true.

Judicial temperament and integrity would also be involved, were these allegations to be true. So now, having had a number of closed hearings on that general subject area, I have to play the antagonist because it is left to me to do so.

We have had many nominees pass through the Senate like Mr. Donovan, the Secretary of Labor; Mr. Meese, the Attorney General, who are jocularly instructed beforehand that they better be patient, as you have, Mr. Sporkin, and be ready to take the heat because you are going to get a lot of tough questions.

And this time, it is my job to have to ask them.

Mr. Sporkin, please stand and raise your right hand.

Do you swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Sporkin**. I do.

TESTIMONY OF STANLEY SPORKIN, OF MARYLAND, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

Senator **Denton**. Mr. Sporkin, what was your policy at the Securities and Exchange Commission regarding acceptance of gratuities by members of your staff?

Mr. **Sporkin**. They were not to accept gratuities.

Senator **Denton**. Did you subscribe to that policy as well?

Mr. **Sporkin**. I sure did.

Senator **Denton**. What is your view regarding employees, your personal view, of the SEC accepting lunches, entertainment, gifts, theater tickets and so on, from those with whom they are doing or have done official business?

Mr. **Sporkin**. Well, Senator, there are ethical requirements there, and whatever those ethical standards were, they had to be followed. And some of that is obviously diminimus and is accepted as practice. But whatever the standards were, we enforced them, or I believed in them.

Senator **Denton**. Do you know Mr. Jack Kent Cooke?

Mr. **Sporkin**. I do know Mr. Cooke.

Senator **Denton**. When and how did you first become acquainted with him?

Mr. **Sporkin**. Well, I met Mr. Cooke, I think back, in late 1981. And he was introduced to me by a lawyer in town.

Senator **Denton**. Did you handle any case directly or as a consultant involving interests of Mr. Jack Kent Cooke?

Mr. **Sporkin**. Oh, at the SEC?

Senator **Denton**. While at the SEC.

Mr. **Sporkin**. Oh, years and years ago, back in the early 1970's. Again, when you say, involving his interests, I think at that time, he was pretty much out of the company. I do not think that I ever met him at that time.

Senator **Denton**. When and how did you first become acquainted with Mr. Edward Bennett Williams?

And did he have official dealings with you, when you were at the SEC?

Mr. **Sporkin**. Yes, I do not remember the first case that Mr. Williams had. He represented a number of people before the SEC. He is, as you know, a very prominent attorney and it was in a professional capacity.

Senator **Denton**. Have you ever accepted gratuities from either or both of these gentlemen, with respect to tickets for yourself and your wife to Washington Redskins' games?

Mr. **Sporkin**. Well, I have been Mr. Cooke's guest since 1981 at a number of football games, my wife and I.

Senator **Denton**. Do you have an idea of about how many football games?

Mr. **Sporkin**. Oh, probably about 10.

Senator **Denton**. Did you accept free travel, lodging and game tickets to the Tampa Superbowl?

Mr. **Sporkin**. Yes, I did.

Senator **Denton**. Would you estimate what the might have amounted to in terms of a gratuity?

Mr. **Sporkin**. I think that I showed that in my disclosure form, as about $1,200.

Senator **Denton**. I do not have that immediately available but do you have that, Mr. Lisker?

Mr. **Lisker**. We will check the files.

Senator **Denton**. That is a non-public form, is that correct, this disclosure form that you are referring to?

Mr. **Sporkin**. I sent it to you, Senator. You asked for it and I sent it to you.

Senator **Denton**. But it is not available to the public that is the question.

Mr. **Sporkin**. That is not available to the public.

Senator **Denton**. When you add to this figure the games that you have attended, about 10 and the other hospitality that you might have received, how much do you think that we are talking about equivalently in dollars?

Mr. **Sporkin**. Let's see, probably about $1,700.

Senator **Denton**. Included in that trip to the Superbowl, was there any cash involved?

Mr. **Sporkin**. No.

Senator **Denton**. Or walking around money?

Mr. **Sporkin**. No, sir.

By the way, at that Superbowl, as you know, I think that there were 250 prominent Washingtonians that went down—there was a judge, very prominent people. And I think that you realize, Senator, that there are no dealings between Mr. Cooke and the CIA.

Senator DENTON. Did you say that you did not receive any cash?

Mr. SPORKIN. Absolutely not, not a nickel.

Senator DENTON. Our information is that as a part of that package, there was a $100 in so-called walking around money for incidental expenses for what that is worth.

Mr. SPORKIN. I do not know where that information comes from, Senator, but I did not get it.

Senator DENTON. The Washington Redskins' office.

Mr. SPORKIN. I did not get it.

Senator DENTON. In view of the policy and your statement against that sort of thing, do you think that it is OK for you to do that, if you would frown on it for other Federal employees who receive such offers from friends with whom they have done or are doing official business?

Mr. SPORKIN. Well, Senator, the question that you asked me before was, with the SEC and doing business with people who do business at the SEC.

When I met Mr. Cooke, I was not at the SEC, I was at the CIA, and you will have to understand that we became friendly and as a guest of his, there came a time, when he said, when the Redskins had earned the right to go to the Superbowl he asked me and my wife whether we would go down on the airplane with him.

And we agreed to do that. I checked, I asked for permission from Mr. McMahon, who was the Deputy Director of Central Intelligence and I spoke to Mr. Casey, and neither or them had any objection to my doing it.

Now, I do not know why being a Federal employee should prohibit that kind of a situation, to go and watch a football game.

Senator DENTON. Well, then, would you persist as a Federal judge, in accepting such gratuities from people like Mr. Cooke or Mr. Williams, who may appear before you or whose business interests may be the subject of litigation before you?

Mr. SPORKIN. Absolutely not. But the point that I think that you keep—you mention Mr. Williams, Senator, and the point there is that I did not receive any tickets from Mr. Williams.

Senator DENTON. Well, Mr. Williams, I understand managed Mr. Cooke's box.

Mr. SPORKIN. Managed his box?

Not that I know of.

Senator DENTON. He was supposed to be the decider of who used the box.

Mr. SPORKIN. He had nothing to do with this. This relationship that I had with Mr. Cooke and my going to the football games had nothing to do with Mr. Williams, at all.

Senator DENTON. All right, now, in light of your friendship with those men and your statement that you would not continue to receive such hospitality from them as a Federal judge, would you promise that you would recuse yourself from any matter in which the Williams' law firm represents a party and from any case in which Mr. Cooke's business interests are subject to your review?

Mr. SPORKIN. I would have to, Senator.

Senator DENTON. Will you explain to the committee the SEC rules regarding dissemination of SEC investigative information to another agency of Government?

Mr. SPORKIN. Would you repeat that question?

Senator DENTON. Yes.

Would you explain to the committee, the SEC rules regarding dissemination of SEC investigative information to another agency of Government?

Mr. SPORKIN. The rules were that we had the authority to do so when there was a cause to do it, a reason to do it.

As a matter of fact, the statute specifically refers to the reference of information from the agency to the Justice Department where there are matters involving criminal charges.

As I recall, the regulations, also state that the agency is to cooperate with other Government agencies by referring matters to them; with State agencies; with self-regulatory agencies; with foreign agencies, and departments of Government.

Senator DENTON. Regarding cooperation though, the dissemination and the release of investigative information, in the hands of the SEC to another agency of Government, to my understanding, normally takes a majority vote of the Commissioners of the SEC, is that correct, or incorrect?

Mr. SPORKIN. Oh, boy.

I thought that there was some delegated authority to me to do that. And again, I have been away from it for about 5 years and I just—you probably are more current than I am because I just—I am sure that I had delegated authority in that area.

Now, there are instances where we went to the Commission——

Senator DENTON. Do you remember being delegated that authority from someone in particular?

Mr. SPORKIN. Well, there was a regulation that delegated it and said that I could cooperate with other agencies and to share information.

Senator DENTON. Well, the question really refers to your having given or the question of whether you gave the Louis J. Roussel transcript to the IRS in New Orleans without complying with the regulation of the Commission, which would have permitted you to do so.

Mr. SPORKIN. I know the name, Mr. Roussel, and you are asking me whether I gave a transcript from the SEC in what year, Senator?

Senator DENTON. 1977 or so.

Mr. SPORKIN. I would not remember that, Senator, at this point.

Senator DENTON. You do not remember it?

Mr. SPORKIN. By the way, if we did do it, it would have been proper. Mr. Roussel was under indictment as I recall or under some civil case, and it would be absolutely proper to cooperate with another agency of Government. There is no, I know of no prohibition from cooperating with another agency of government, Senator.

Senator DENTON. Well, there is an allegation that that release was without authority and then unfortunately set in motion a chain of events which, I am sure, you were innocent of any knowledge of possibility of, but that unfortunate chain of events involved compromising the identity of a big witness in that case, because someone shared the transcript with a reporter. So the question of authorization is important, because in this particular case, it did result in a very serious problem.

Mr. SPORKIN. Senator, I can deny that I personally had anything to do with sending that transcript——

Senator DENTON. No, I said that myself.

Mr. SPORKIN. No, if anything was sent, it would have been by someone who worked for me. Remember, I had hundreds of people who worked for me at the SEC I think that it was over 200 in Washington and then I had responsibility for the regional offices that might have had another 500 or 600 people.

Senator DENTON. So, you are sure that you did not give or authorize the giving of that transcript to the IRS in New Orleans regarding the *Louis J. Roussel* case?

Mr. SPORKIN. I have no specific recollection.

What could have happened is that under the delegated authority, it might have required, that I, as the director of the division of enforcement, would have signed a piece of paper that would have given that, but that would have been a perfectly proper thing to do.

The fact that the IRS shared that information with somebody, if it is true, it was not done for that purpose, Senator. It was done for the purpose of affecting a result, and one of the things, Senator, that I think is important, and what must be realized, that if, an agency of the Government has information that goes to the criminal liability of somebody and does not turn over that information it may well be obstructing justice.

Senator DENTON. Well, this divulgence resulted in compromising the identity of an important witness.

Are you personally familiar with the Federal Rules of Criminal Procedures, rule 6(e)?

Mr. SPORKIN. That is the grand jury?

Senator DENTON. Yes, sir.

Mr. SPORKIN. Yes, about getting use of grand jury minutes?

Yes, well, I knew of it when I was practicing, I sure did.

Senator DENTON. The way that it is written here, it says the rule prohibits grand jurors, interpreters, stenographers, typists and most important, attorneys for the Government from disclosing matters that are occurring before the grand jury and a knowing violation of that rule may be punished as contempt of court.

Have you ever solicited any attorney to violate the secrecy of the grand jury by furnishing you secret information to which you are not entitled?

Mr. SPORKIN. Senator, I say that I do not practice that way and I would not be soliciting anybody to violate any law.

Senator DENTON. Well, is your answer to that question, no?

Mr. SPORKIN. I have no recollection of doing that, Senator.

Senator DENTON. Does that mean that it is possible that you did or——

Mr. SPORKIN. Senator, I just have no recollection. I can only go on recollection, and I have none.

Senator DENTON. We have an affidavit which states that you tried to get information of the Vesco grand jury from the author of the affidavit, and that he refused.

Mr. **Sporkin**. I tried to get copies of grand jury minutes from the author of an affidavit, who is the author of the affidavit?

Senator **Denton**. We will furnish the name to the other members of the committee and publicly if I can get his permission to do so.

Mr. **Sporkin**. But Senator, an affidavit would not be a grand jury document, I mean it could be——

Senator **Denton**. No, he simply said in an affidavit, that you solicited him to get the transcripts of the Vesco grand jury from him and that he refused.

Mr. **Sporkin**. How would he have the transcripts?

Senator **Denton**. He was the attorney of the case and you know, this will be gone into further, but if that is all that you wish to say about it, that is fine.

Mr. **Sporkin**. What I am trying to be helpful about, Senator, is that I would not know how an individual would have a transcript of a grand jury minutes, and if he did have a transcript, then there would be no breach of grand jury secrecy for someone else to have that.

Grand jury, the only—I mean if it is a grand jury document, it would seem to me that it would be somehow to breach the secrecy of the grand jury but not if somebody had obtained a transcript, that would no longer, it seems to me, to be a breach of the grand jury.

Senator **Denton**. I will defer to Mr. Lisker for a clarification of that question.

Mr. **Lisker**. The point is that the gentleman whose affidavit stated that you solicited him to give you the transcript, was the attorney working the grand jury and he claimed that you were not entitled to receive that and you insisted according to his story and he turned you down.

And that is simply the question of whether or not you solicited him contrary to provisions of rule 6(e).

Mr. **Sporkin**. Well, I think, again, I do not know who told you that and you say that you have an affidavit there.

May I see the affidavit?

Mr. **Lisker**. No, not at this time. Not without the permission of the affiant because it has his name in the affidavit.

I would be happy to read you the affidavit without the name, if you like?

Mr. **Sporkin**. Well, the concern that I have is that you realize, Mr. Lisker, that when you are working a case, with the Department of Justice, we are talking now, back in 1972, I believe the practice there was that that information could be shared with the investigating officer.

And if you know, Mr. Lisker, I was the investigating officer on that case. So I do not know what the——

Mr. **Lisker**. Well, I will just read you the pertinent paragraph. It says:

> He often considered himself above and sole interpreter of the law. He has, for example, given confidential investigative files to other agencies, without complying with Commission regulations and attempted to obtain access to grand jury proceedings in violation of rule 6(e), Federal Rules of Criminal Procedure.

Mr. **Sporkin**. No, what can I—that is somebody's conclusion.

I do not know who wrote that and I do not know what the basis of that is.

You say that is an assistant U.S. attorney?

Mr. LISKER. Well, I simply said that he was an SEC attorney who was running the Vesco grand jury.

Mr. SPORKIN. Well, no, that cannot be, Mr. Lisker.

An SEC, wait, I think that the record is not clear at all then. What you are now telling me, that there was an SEC attorney who you say was running—he was not running the——

Mr. LISKER. On the SEC's——

Mr. SPORKIN. Well, there is nothing wrong, Mr. Lisker, remember that attorney was working for me. I was his supervisor. I was entitled to have the information that he had.

Now, what you are reading from there, is that it was someone who worked for me.

Mr. LISKER. I did not say that but I just said that it was an SEC attorney.

Mr. SPORKIN. Well, it would have to be because I was in charge of the case.

And therefore, if he had information, that information would be information that I would be allowed to see.

Senator DENTON. Would you believe it appropriate for the CIA general counsel to represent an agency official at the expense of the Agency on a case that arose from matters occurring prior to that official's tenure within the Agency?

And of course, I am referring to the possibility that you represented Mr. Casey at the time that he appeared before the Senate Select Committee on Intelligence.

And you were general counsel for the CIA and some of the matters that they went into referred to situations existing before his connection with the Agency.

Mr. SPORKIN. I did not represent Mr. Casey, personally, Senator.

Mr. Casey had his own attorney, Mr. Milton Gould from New York and I represented the Agency, Senator.

Senator DENTON. Is it true that after the 1980 election of President Reagan that the transition team at the SEC recommended that you be removed from your position and reassigned?

And that you were to be offered an appointment in the Postal Inspection Service, and that at or about this time, were you offered the general counsel position at the CIA?

Mr. SPORKIN. Is that true?

Senator DENTON. I am asking you.

Mr. SPORKIN. It is not a true statement the way that it is read, Senator.

The way that you read that, Senator, I was never offered a position in the Postal Authority. I can read——

Senator DENTON. Well, were you about to be fired from the SEC?

Mr. SPORKIN. Not that I know of, Senator. And let me mention to you what the transition report said, because the transition report did recommend that, it said and I will quote:

> To that end the Chairman may require some new division heads, particularly with respect to the Division of Enforcement and the Office of General Counsel. Moreover a new Executive Director may be necessary to assist in reducing the size of the various administrative offices with the SEC.

Now, this transition report also stated, and I am quoting Senator, "the integrity, dedication, and zeal of the staff of the SEC's Enforcement Division is the envy of Government. It is widely recognized that the Division of Enforcement benefits from highly trained professionals, good leadership and a dedication to the principles of integrity.

It also said, "That at least five of the modern time senior staffers are presently spread throughout different government agencies, where their work is enhancing the overall programmatic activities of the CFTC, FERC, GSA and DOE and various bank regulatory organizations as well as others. The technique of investigation and litigation and enthusiasm which the staffers of the SEC bring to their work is truly a model for all of Government and any discussion of a reorganization, a realignment of the enforcement effort at the SEC it must be noted that the system which presently exists, is a valuable system.

That is quoted word for word from the transition report, sir.

Senator **DENTON**. Well, in all fairness, we have had access to people who were very much favorably disposed toward your performance and almost nothing in the middle and then a group who were very violently opposed.

And——

Mr. **SPORKIN**. That was a hard job that I had.

Senator **DENTON**. Yes, and then in all completeness, how would you respond to the—I have some pretty bad things written about me.

How would you respond to the Barron's article, Judge Stanley Sporkin, the former SEC activist is unfit for the Federal bench?

That was November 4, 1985 and of course, was an editorial, a contributing editor of Barron's named Peter Brimelow wrote the article.

I will not read it all but it is very analogous to about half a dozen letters we got from people who were in a position to render judgments which were as important as those who were rendering favorable judgments, apart from the closed session thing that we have been having.

How would you respond to that? Are they biased because they are on the side of cheating business and you played havoc with their conspiracies and they take it out on you like this or is this man objective?

How would you respond to it?

I am rarely given a chance to respond in a hearing to a similar question.

Mr. **SPORKIN**. Well, it is hard to tell what motivates people but I think that if you read that article objectively there are a few facts in there and there are a lot of conclusions and I think that if you look at the record of Barron's that they have been against me from the moment that I took office and probably before that.

You have to understand Barron's does not even believe in the SEC It does not believe that it has a function to serve the American public. And you know, it is an interesting thing, but I had a tough job at the SEC

What the problem is that people do not understand how tough that job was. We had a very limited staff and we were charged with enforcing the securities markets. The securities markets in our Nation are the finest in the world. There are no Japanese or German models that have replaced them and there probably will not be. Because there is an ingredient in our market that is not present in those markets and that is that people believe in the honesty and fairness of our markets. They have confidence in our markets.

And it is because of that ingredient of honesty and fairness, in my view, is why those markets flourish and why they are the best and they must be kept that way.

And they are only going to be kept that way if you have somebody sitting in that position that I sat in, that is willing to enforce those laws fairly, and vigorously. We had to use strategies to enforce those laws. I developed the strategy called the access strategy because we did not have the people to do it otherwise.

And so I say to you that because and the other part of the—the other basis that we did is that when we found somebody we had to deal with those people and a lot of people who were caught, obviously were unhappy about it. And I think that they, you know, these are people who have influence in this Nation and are sometimes misunderstand what we are trying to do.

I might say that there are a number of business people that you will talk to who thought a lot of me, thought very highly and thought that we were doing a good job. And were really patting us on the back. So, it is a tough job, Senator, and I do not know how else I could have done it to be fair to the market system, to be fair to the laws of this Nation and to be fair to myself, because I do not want to undertake a job that I cannot do in a proper way.

Senator **DENTON**. Well, I gave you a complete opportunity to answer the charges in that article and to my awareness, you took advantage of it well.

Mr. **SPORKIN**. Thank you, Senator.

Senator **DENTON**. There is an article by Connie Bruck, entitled, "Waning Days for the Zealot of the SEC," it was in the November 1980 issue of the American Lawyer and there is a school of thought that opposes judicial activism.

And there are statements that are attributed to you in that article which would raise concerns among those who oppose judicial activism.

And apparently you oppose it because in answer to Chairman Thurmond's judicial activism question, you stated, "Litigants are entitled to have their cases heard as expeditiously as possible and have the fundamental right to have justice dispensed on a fair and impartial basis. In fulfilling these essential obligations, however, courts must not become a third chamber of the legislature or a surrogate President."

Mr. **SPORKIN**. I believe that, Senator.

Senator **DENTON**. Well, then, I will give you a chance to respond to the November 1980 issue of the American Lawyer in which you are stated to have credited Yale Law School with having nurtured your conviction that the law should be used creatively to fashion the social good and they say you said it was there at Yale that you learned, "You could have an impact on the world, that you should not be a slave to the law, but it should be a mechanism to promote what is proper."

And I will read on, Sporkin's first chance to apply his philosophy came right after he graduated from law school in 1957, when he clerked for Caleb Wright, Federal District Court Judge in Wilmington, DE for 3 years.

Quote: "I was tremendously oriented away from trying to search what the law was, pressing a button somewhere to find out how many cases on this point, how many on the others and deciding it for whichever had more," Sporkin recalls.

Continuing the quote, "I used the Yale approach, what should the public policy be? And then, I would see if the law would support it."

How do you reconcile those?

Mr. SPORKIN. Well, Senator, I do not think that you want to judge who is going to work by the computer. You would not need a Judge. All that you would need would be to put in a problem and find out how many cases on one side and how many cases on the other. What we were saying there, and you have got to understand in the context in which we were operating at the SEC, that you do not give up your creativity or your ability as a lawyer because you work for the Government.

And I was always bothered by the criticism that people believed that a Government lawyer should be someone who is a very pedestrian type of a person. I thought that it was enough that I was working for my Government and I believed that I could use my skills as a lawyer should use his skills.

And I think, Senator, when you realize that you have to apply the law in the position that you are in, you have read from a number of different articles there, when I was at the SEC. The job at the SEC was to enforce the securities laws, to make sure that there was public disclosure. I now have another job at the CIA. The job at the CIA, as you know, is a job that is the opposite. It is to enforce or help the national security interests.

And I think that you will see, Senator, I do not think that you will find a single article about me other than those articles that are described in these proceedings in the 5 years that I have been there. And therefore, you have to do the job as a lawyer in the role that you are as a judge, I have got to perform as a judge. And therefore, I have got to do certain things.

What do you have to do? It seems to me that what are the ingredients that I have that would make me a good judge?

Well, No. 1, I think that I can get to the heart of an issue. That is probably the strongest point that I have. I am decisive. One of the things that has stood me well in having attained high positions in government, all on merit not on any other basis, it is because I will make a decision. I will then decide cases, decide them promptly and also decide them at times with the necessary compassion and decency, because people have to be treated fairly, and objectively.

And that is why I think that I will do well. I think that I know the judicial process, as well as could be expected and I think that I will perform in that role. It will be a third, a different kind of a role.

Senator **Denton**. In 1980 you were in a debate with a gentleman named Monroe Freedman, a professor at the Hofstra Law School and an attorney for the American Civil Liberties Union.

And according to my information, Mr. Freedman charged in that debate that the SEC under you, failed to set limits on what its investigators may or may not do, a license which frequently leads them to exceed their authority and ride roughshod over individual rights.

In the same vein, and I quote, "The SEC seriously abuses its power of obtaining publicity to impose severe punishment without due process."

He accused the agency of seeking to "Co-opt the private bar into the service of the government", thereby depriving individuals of the zealous representation to which they are entitled under the Constitution.

And then when he charged that the SEC has deliberately set out to chill the freedom of speech of those caught in its toils, your reply was, "we do not engage in wiretapping, we do not have black bag jobs, and we do not invade psychiatrist's office."

That seems to be a frivolous reply to a number of serious questions. I just wondered if you would respond that way now or if you had, if you felt that it did not deserve a dignified reply or what?

Mr. **Sporkin**. I do not think that was a frivolous response on my part, Senator. What I was trying to get across is that a person, such as Mr. Friedman, or Professor Friedman, he did not have a grasp of what our mission was and therefore he could not understand what we had to do. He was looking at it solely from the side of the defense bar and therefore, how does he get his clients off?

Now, the point is that in the type of law that we had at the SEC the type of practice, was that it was almost impossible—I would not say, impossible, but it was very difficult to be able to tread on somebody's basic rights, because what you had there were some of the finest lawyers in the United States representing these people, up against some youngsters out of law school and it always amused me that the accusations coming from a person like Professor Friedman was that somehow these young kids were going to violate the rights, when, on the other side, you had lawyers like Judge Simon Rivkin or Leonard Lieman or some of these others, Williams and they were going to be able to protect the rights of their clients.

And one of the things that I think that I would also like to add is the fact that Mr. Monroe Friedman in that very debate had this to say at the close of the debate.

And I would like to quote, if I may, Senator?

Senator **Denton**. Please.

Mr. **Sporkin**. "Just 6 years ago I went out and spoke to some prominent and knowledgeable practitioners about the SEC, I revisited some of those people and some others in the past few weeks, as well as reading the Enforcement Training Program Manual. One of the things that has come up consistently in the comments that I have gotten from lawyers, including the ones that I had been to 6 years ago, is that enforcement abuses are not what they were 6 years ago and that there has been improvement. I think that it is to the credit of Mr. Sporkin, and to the agency that there has been improvement."

He then goes on to say:

> Another thing impressed me, because it is a cliche among the private bar, that the only lawyers one cannot trust to keep one's word after having made an agreement are prosecutors. I do not know that I have ever spoken to a lawyer in private practice who did not feel that way; that while another lawyer in private practice will stick to his or her agreement, prosecutor cannot be trusted. A prominent member of a major firm who has done considerable work before the SEC said to me, one thing that I will say about Stanley Sporkin, he keeps his word. He is a hard man to pin down, but once you have pinned him down, you can trust him. I think that is an important thing.

End of the quote from Mr. Friedman.

So he gave a mixed bag and again, I say, that he is defending a—he is looking strictly from the defense side.

Senator **Denton**. We have several commentators who have alleged that the Commission's institution of an action against a Mr. Dirks was motivated by vindictiveness. And that is the most common allegation that I recall having seen—a tendency toward vindictiveness. Against Mr. Dirks was motivated by vindictiveness on your part because Mr. Dirks investigated and reported on violations by Equity Funding after you had dismissed reports from the same source to which you and Mr. Dirks had access.

Would you care to respond to that?

Mr. **Sporkin**. Senator, could you please just repeat the last?

Senator **Denton**. Sure.

Mr. **Sporkin**. Just the last three words, I missed them.

Senator **Denton**. After you had dismissed reports from the same source to which you and Mr. Dirks had access.

In other words, he investigated and made some reports which apparently embarrassed you and caused you to become vindictive against Mr. Dirks.

Mr. **Sporkin**. Senator, again, there is one thing that I think—it is unfortunate that people say it, but I am not a vindictive person, Senator.

But beyond that, I think that the *Dirks* case shows, I think, something. Senator, it would have been very easy——

Senator **Denton**. Excuse me, without objection, I will include the Ray Dirks case as reported here in the record, but go ahead.

Mr. **Sporkin**. It would have been easy in the *Dirks* case to walk away from that case, but the facts of it bothered me and the facts were simply these.

That what happened here is that Mr. Dirks learned from an individual associated with Equity Funding that the company was in disarray, that the company had, that somebody was there falsifying policies and the company was a house of cards.

Now, what Mr. Dirks did was that he tried to tell the authorities and he went around, but in addition to that, he went and told his clients about the situation and those clients sold stock on the market and the people on the other side of the trade were not privy to that information.

And I forget the many millions of dollars of stock that were sold, I do not know whether it was $20 million or what, but that bothered me, Senator, that that was not the right way for Mr. Dirks to perform.

Now, that did not mean that the SEC should take Mr. Dirks' license away from him. Indeed, I think that there were settlement discussions but I did think that there had to be a point made that it was not proper for a person who obtains secret inside information from a source at the company to utilize that information to benefit his own clients and not the public.

Now, I might say, in fairness to Mr. Dirks, the Supreme Court disagreed with my position, but up until that point, both the Commission and the court of appeals had agreed with that position.

Now, you know, I thought that it was a position to take but I cannot predict what the Supreme Court is going to do in a case.

Senator DENTON. Do you feel now, in retrospect, that you made any error in that case?

Mr. SPORKIN. I do not, well, again, if I, obviously the Supreme Court has spoken, and I cannot take a position contrary, but if I did not have the Supreme Court decision, I would take that same position, because I believe that insiders should be aware, or that investment advisors and that is what Mr. Dirks was, should be aware that that is not the proper way to conduct themselves.

Senator DENTON. Well, the last issue here refers to using the SEC or allegations there toward, using the SEC to go after newsletters utilizing former CIA employees.

While general counsel of the CIA have you ever asked any employee of the SEC to investigate any publication on account of its published statements regarding the CIA or former employees of that agency?

Mr. SPORKIN. Well, Senator, I learned about a letter that was being circulated by that organization, I think, that you just referred to.

Senator DENTON. We have two letters addressed to my office from the Newsletter Association and I will ask that they be placed in the record, at this point.

They are from newsletter associates Glen King Parker, October 19, 1984; and November 4, 1985.

Mr. SPORKIN. Senator, what happened in the case that I think—well, wait, I think again, they are referring to several things.

Senator DENTON. Do you want me to refresh your memory, it is just a two-paragraph thing here?

Mr. SPORKIN. Sure, if you would.

Senator DENTON. The October 1984 letter in pertinent part, reads as follows:

> While Mr. Sporkin was the Director of the Division of Enforcement, the Securities and Exchange Commission totally ignored the Congressional mandate to exclude the press from the definition of "investment advisor" under the Investment Advisor Act of 1940. Under Mr. Sporkin's leadership, the SEC staff launched a wide-ranging attack on freedom of the press of financial magazines and newsletter publishers that continues to this day.
>
> Mr. Sporkin's conduct of numerous cases involving the press evidenced a total disrespect for the First Amendment guarantee of freedom of the press.
>
> Mr. Sporkin's reign was also marked by a reliance on "regulation by press release." Charges against publishers and others were publicized by Mr. Sporkin in a fashion designed to force an adversary to surrender to end the publicity barrage, rather than permitting legitimate disputes to be resolved through proper administrative and judicial processes.
>
> Mr. Sporkin's preference for circumventing the judiciary may reflect on his suitability to become a member of the judiciary.

That is one of the letters.

Do you care to respond?

Mr. **Sporkin**. Senator, the unfortunate part about that letter, it is obvious that the person who wrote it did not really know what we were doing at the SEC.

Again, they are referring to a recent Supreme Court case, which was decided in 1985, earlier this year, and somehow they are trying to hook me in to that case and I have not been to the SEC in 5 years.

The point is that we had a mandate at the SEC to enforce the law. We had a number of acts. One act required broker/dealers to be registered with the SEC. Another act required that people who provided investment advice to be registered with the SEC and the definition was that an investment advisor is someone who, for a fee, would provide recommendations to buy or sell securities.

Now, from the time that that act was passed, I guess it was in 1940, oh, I forget how many hundreds of people who put out newsletters, who believe that they were under that act, came in and registered with the SEC.

And so, that was 20 years before I came to the SEC.

Now, that is a very difficult provision to enforce with respect to some people who put out, who give advice by a newsletter, which is called impersonal kind of advice, investor's advice. There is an exception for someone who publishes a bonafide newspaper, and those became close questions, Senator.

The choice was whether we were going to enforce the law or not enforce the law, and we did it the way that we saw it. But there was no bias or prejudice on my part. There was no bias or prejudice on the part of anybody else at the SEC to try to be unfair to these people. The question was, whether they fell within the requirement to be registered or not.

Now, the Supreme Court this past year, just decided a case, that said that the act, itself, could not have meant to include these people who give impersonal advice.

And, I might say, there is a dissent by the Chief Justice, a dissent by Justice White, and concurred in by the Chief Justice and by Justice Rehnquist, which says that by gosh, that the act did include these people but they said that there may be a question of constitutionality.

Now, it seems to me that where you have an act, and I am charged with administering that act, I cannot make those judgments that the act is unconstitutional. A court has to make that judgment.

Senator **Denton**. The other letter, November 4, Mr. Parker goes on to say,

> On June 10, 1985, the U. S. Supreme Court unanimously ruled that the Securities and Exchange Commission's program of financial newsletter and magazine licensing regulation and censorship was illegal.
>
> The majority opinion in the Lowe case, held that Congress had clearly excluded the press from SEC jurisdiction when it wrote the Investment Advisor's Act, 45 years ago. This ruling is significant vis-a-vis Mr. Sporkin because he led SEC efforts to expand government control over the financial press.
>
> The essence of the Supreme Court's decision is that the SEC's newsletter program was illegal from inception. Everything that Mr. Sporkin ever did in this area was nothing more or less than a gross violation of the civil rights of the publishers, editors, reporters and writers involved.
>
> If there was ever any doubt about Mr. Sporkin's unfitness for the Federal Bench, it has been resolved by this Supreme Court decision.

You have partly answered that [illegible] your previous answer.

Mr. Sporkin. Yes, Senator, those rules and regulations were there 20 years before I came to the SEC. If you read, again, as I say, in the concurring opinion, concurring in the result, but there, Justice White made it quite clear that he read the law the way that we, at the SEC had read it, that it was entitled to be included.

And, to add to that, Senator, you had hundreds of investment people putting out this impersonal advice, who registered, so that their lawyers thought that it complied.

And to hold me now and say that I should have guessed what the Supreme Court was going to do in 1985, particularly since I had nothing to do with the case coming to the Supreme Court in the first place, I do not know whether I would have made the same kind of recommendation that somebody else might have made in that case, I do not know.

So, I think that it is unfair that they could come with that strong language about a matter that I was so tangentially involved in, not involved in.

Senator Denton. I want a clarification on the answer to the first question.

While general counsel at the CIA have you ever asked any employee of the SEC to investigate any publication on account of its published statements regarding the CIA or former employees of that agency?

Mr. Sporkin. Well, what happened, Senator, again, I think that that is a part of that letter.

What happened was that some time ago, it came to our attention at the CIA that somebody was putting out one of these newsletters and had referred in it to a certain board of directors indicating that they had CIA affiliation. We looked at it and we found no affiliation. And so, I think that what we did there was that we referred the matter across the board to the Department of Justice and to the SEC which I am required by law to do, Senator, if I find a matter that violates the law, I have to report it.

Now, I do not recall if I specifically spoke to anybody at the SEC. I think that the record shows that Mr. Cohen wrote a letter to the SEC referring the matter to it, which it seems to me would have been the proper thing to do.

But we cannot permit somebody to refer to CIA people when it is not true. And that is what happened.

Senator Denton. My final question, I will ask you to respond to in writing. It deals with the extent of your trial experience and I will submit that to you in writing.

Mr. Sporkin. OK, thank you.

Senator Denton. Thank you, Mr. Sporkin.

Mr. Short. Mr. Chairman, Senator Mathias received a letter from Lloyd Cutler supporting the nomination and he would request that it would be placed in the record.

Senator Denton. Without objection, it is so ordered, and we have several other letters which we will also place in the record.[1]

---

[1] Material can be found in committee files.

Senator DENTON. Thank you for your patience.

Mr. SPORKIN. Thank you, Senator.

Senator DENTON. And we do need the answer to this question before Thursday.

Mr. SPORKIN. Yes, Senator, thank you.

Senator DENTON. Thank you.

The hearing stands adjourned.

[The following material was subsequently supplied for the record.]

NEWSLETTER
na
ASSOCIATION

COLORADO BUILDING
SUITE 603
1341 G STREET, NW
WASHINGTON, DC 20005
(202)347-5220

OFFICERS
Lawrence Ragan
President
David Swit
1st Vice President
Glen K. Parker
2nd Vice President
Ted Sedgwick
Secretary
Stanley I. Hartman
Treasurer

DIRECTORS
Edwin Brown
Atcom, Inc.
Karen Fine Coburn
Cahners Publishing Co.
Robert Crawford
ProCom, Inc.
Stanley Degler
Bureau of National Affairs
William Haight
Magna Publications
Stanley I. Hartman
Newsletter Corporation
of America
Ken Kovaly
Technical Insights
George P. Lutjen
McGraw-Hill Publishing Co.
James J. Marshall
Government Information
Services, Inc.
Barrie Martland
Marpep Publishing
Dr. Leslie Norins
American Health Consultants
Glen K. Parker
Institute for Econometric
Research
Lawrence Ragan
Lawrence Ragan Communications
Peter Sabine
The Financial Times
Ted Sedgwick
Pasha Publications
David Swit
Washington Business
Information, Inc.
Richard Thompson
Thompson Publishing Group
Paul Warren
Television Digest
Joel Whitaker
Whitaker Newsletters
John D. Willis

EXECUTIVE DIRECTOR
Frederick D. Goss

October 19, 1984

Office of the Honorable Jeremiah A. Denton
Attention: Mr. Joel Lisker
Hart Senate Office Building, Room 516
Washington, D. C. 20510

Dear Mr. Lisker:

This letter is in response to a solicitation of our views on the suitability of Stanley Sporkin for appointment to a Federal judgeship.

Our organization cannot and does not take positions on political issues. However, we can supply you with facts regardings Mr. Sporkin's conduct with respect to First Amendment issues during his tenure with the Securities and Exchange Commission.

While Mr. Sporkin was Director of the Division of Enforcement, the Securities and Exchange Commission totally ignored the congressional mandate to exclude the press from the definition of "investment advisor" under the Investment Advisors Act of 1940. Under Mr. Sporkin's leadership, the SEC staff launched a wide-ranging attack on freedom of the press of financial magazine and newsletter publishers that continues to this day. Mr. Sporkin's conduct of numerous cases involving the press evidenced a total disrespect for the First Amendment guarantee of freedom of the press.

Mr. Sporkin's reign was also marked by a reliance on "regulation by press release." Charges against publishers and other were publicized by Mr. Sporkin in a fashion designed to force an adversary's surrender to end the publicity barrage, rather than permitting legitimate disputes to be resolved through proper administrative and judicial processes. Mr. Sporkin's preference for circumventing the judiciary may reflect on his suitability to become a member of the judiciary.

It is not only the financial press that learned to fear Mr. Sporkin's excesses. Former SEC Commissioner Roberta S. Karmel has a written a fine book, Regulation by Prosecution, that details some of his misconduct towards corporate America.

If your committee holds hearings on Mr. Sporkin's nomination, you should inquire of him whether or not, during his current employment at the Central Intelligence Agency, he ever asked the SEC's current Director of Enforcement, John Fedders, or any other SEC personnel, to investigate any publication on account of its published statements regarding the CIA or former employees of that agency. If you hold hearings, I would be willing to testify.

As you may know, the Supreme Court is currently reviewing the SEC's entire press licensing operation. If, as we hope, that press licensing is struck down as unconstitutional there may well be additional evidence regarding Mr. Sporkin's suitability which publishers who are now licensed would then feel free to discuss.

Sincerely,

Glen King Parker

Glen King Parker, Chairman
Freedom of the Press Committee

GKP:hn

NOV 05 198

NEWSLETTER
na
ASSOCIATION

COLORADO BUILDING
SUITE 700
1341 G STREET, NW
WASHINGTON, DC 20005
202/347-5220

OFFICERS
David Swit
President
Ted Sedgwick
1st Vice President
Glen K. Parker
2nd Vice President
Karen Fine Coburn
Secretary
Stanley I. Hartman
Treasurer

DIRECTORS
Allie Ash
Capitol Publications, Inc.
Edwin Brown
Alcorn, Inc.
Karen Fine Coburn
Cahners Publishing Co.
Robert Crawford
ProCom, Inc.
Stanley Degler
eau of National Affairs
Stanley I. Hartman
Newsletter Corporation
of America
James J. Marshall
Government Information
Services, Inc.
Barrie Martland
Marpep Publishing
Lewis Moore
McGraw-Hill Publishing Co.
Dr. Leslie Norins
American Health Consultants
Glen K. Parker
Institute for
Econometric Research
Thomas Phillips
Phillips Publishing, Inc.
Lawrence Ragan
wrence Ragan Communications
Ted Sedgwick
Pasha Publications
David Swit
Washington Business
Information, Inc.
Richard Thompson
Thompson Publishing Group
Paul Warren
Television Digest
Joel Whitaker
Whitaker Newsletters, Inc.
John D. Wills

EXECUTIVE DIRECTOR
Frederick D. Goss

November 4, 1985

Office of the Honorable Jeremiah A. Denton
Attention: Mr. Joel Lisker
Hart Senate Office Building, Room 516
Washington, D. C. 20510

Dear Mr. Lisker:

This is a follow-up to my letter of October 19, 1984 in response to your solicitation of my views on the suitability of Stanely Sporkin for appointment to a Federal judgeship.

On June 10, 1985, the U. S. Supreme Court unanimously ruled that the Securities and Exchange Commission's program of financial newsletter and magazine licensing, regulation, and censorship was illegal. Lowe v. SEC, 105 S.Ct. 255

The majority opinion in Lowe held that Congress had clearly excluded the press from SEC jurisdiction when it wrote the Investment Advisors Act 45 years ago. This ruling is significant vis-a-vis Mr. Sporkin because he led SEC efforts to expand government control over the financial press.

The essence of the Supreme Court's decision is that the SEC's newsletter program was illegal from inception. Everything Mr. Sporkin ever did in this area was nothing more nor less than a gross violation of the civil rights of the publishers, editors, reporters, and writers involved. If there was ever any doubt about Mr. Sporkin's unfitness for the Federal bench, it has been resolved by this Supreme Court decision.

Permit me to direct your attention to the fine editorial in today's edition of Barron's on the subject of Mr. Sporkin's suitability to be a judge.

Sincerely,

Glen King Parker, Chairman
Freedom of the Press Committee

GKP/jma

DAVID A. ROSS
ATTORNEY AT LAW
1440 N STREET, N. W.
WASHINGTON, D. C. 20005

(202) 667-1056

December 11, 1985

The Honorable Jeremiah Denton
c/o Senate Judiciary Committee
198 Russell Office Building
Washington, DC

Re: Stanley Sporkin Confirmation
Hearings, Dec. 10, 1985

Dear Senator Denton:

This letter supplements and clarifies my sworn, confidential affidavit of Nov. 7, 1985 to the Judiciary Committee concerning my allegation that Mr. Sporkin attempted to acquire Vesco grand jury information from me while I was "attached" to the U.S. Attorneys Office in the Southern District of New York, which was "in charge" of the Vesco grand jury investigation over Vesco's alleged looting of several I.O.S. Ltd. mutual funds.

First of all, Mr. Sporkin did not ask for any grand jury "transcripts." Such a request would have been clearly improper. Instead he wanted to know the substance of what was going on in the grand jury, and I refused to give him any information because it was confidential grand jury material.

Secondly, he was not "in charge" of the criminal grand jury investigation. He was "in charge", however, of the then pending civil injunctive case in the same judicial district. Because of these "parallel" proceedings and potential "taint" of the civil proceedings, among other things, it was essential to isolate SEC attorneys working exclusively on the criminal case, such as myself, from those working on only the civil case, such as Mr. Sporkin.

Third, while working for the U.S.Attorneys Office on the grand jury matter, I was not under Mr. Sporkin's supervision or direction. In military terms, I was "OPCON" to that Office, while the SEC only retained administrative command over me for purposes of pay, leave, travel, etc. Furthermore, by the time of this incident, I had been transferred, at his request, to the New York Regional Office in order to save the SEC travel money.

Sincerely,
David A. Ross
David A. Ross

AFFIDAVIT

WASHINGTON) SS.
DISTRICT OF COLUMBIA)

Affiant, DAVID A. ROSS, being first duly sworn and upon his Oath states:

1. I am a resident of and admitted to practice law in the District of Columbia. I am also admitted in the State of New York. I was a staff attorney/special counsel in the Division of Enforcement, Securities and Exchange Commission, Washington, DC between May 1967 to May 1976. I have also appeared before and observed federal judges in S.D.N.Y., S.D. Florida, W.D. Oklahoma, and N.D. Illinois.

2. This Affidavit is submitted to the Senate Judiciary Committee for its sole, confidential use in connection with its hearings and deliberations on the nomination of Stanley Sporkin to the United States District Court for the District of Columbia.

3. I have already provided certain staff members of the Committee with information on why Mr. Sporkin became General Counsel to the CIA and why Mr. Casey submitted his name for the vacancy on the D.C. District Court.

4. It is my professional opinion, based on experiences before federal judges, my own background and training in the law, and my personal observations and conversations with Mr. Sporkin while I was employed by the SEC and under his direct and indirect supervision that his nomination should NOT be approved for the following reasons:

a. He lacked a fundamental sense of objectivity: he often presumed guilt and was "allergic" to facts that did not support his preconceived notions of what had occurred as developed by investigation.

b. He lacked "judicial demeanor and temperament" in that he displayed a "tyrant's disposition" by quickly exploding in childish temper tantrums and yelling contests with staff. His personal appearance, tone of voice and mannerisms also conveyed disrespect and a lack of consideration for others.

c. He often considered himself above and sole interpreter of the law. He has, for example, given confidential investigative files to other agencies without complying with Commission regulations and attempted to obtain access to grand jury proceedings in violation of Rule 6(e) F.R.Cr. P.

FURTHER AFFIANT SAYETH NOT

David A.

DAVID A. ROSS

SWORN TO BEFORE ME THIS 7th DAY

OF NOVEMBER, 1985.

Margo A. Elliott
My Commission expires: 8 May 89

[From Barron's, Sept. 11, 1978]

WATCHING THE WATCHDOGS

IN THE EQUITY FUNDING SCANDAL, THEY WERE FAST ASLEEP

(By Robert M. Bleiberg)

Admirals and generals, so we are told, are notorious for preparing to fight the last war. In the realm of securities regulation, similarly, the watchdogs tend to sharpen their teeth more on the misdeeds perpetrated years or even a decade or so ago than on those that are happening right under their supposedly suspicious noses. On this score, take the recent doings of our favorite federal regulatory body, the Securities & Exchange Commission. As set forth in some detail here not long ago ("Who's Afraid of 10b–5?", *Barron's*, July 24), there's reason to believe that almost everyone and his brother-in-law are breaking the rules that govern trading on inside information. The SEC, however, apparently has other poor fish to fry.

Thus, in the past few months, the agency has announced settlements with several listed corporations of complaints concerning illegal political contributions and other payments which date back to the late Sixties. It recently censured the accounting firm of Ernst & Ernst and suspended two partners for "improper professional conduct" involving a company called Westec, a stock-rigging scandal in the mid-Sixties which our Managing Editor, Alan Abelson, helped expose at the time. Last week the SEC finally got around to taking action in the case of Equity Funding Corp. of America, perhaps the greatest single fraud in U.S. financial annals. More than five years after the company went belly-up, an SEC administrative law judge found four investment companies and a securities analyst guilty of violating Rule 10b–5 by selling stock in Equity Funding on alleged inside information. For the former, the official recommended censure; for the latter, suspension "from association with a broker or dealer" for 60 days.

A lot of water has gone over the dam (and out of the stock) since the debacle. Shareholders of the old Equity Funding got back some 12 cents on the dollar in stock in the reorganized concerned that emerged from bankruptcy as Orion Capital Corp. Private litigation involving thousands of claims has been settled for upwards of $50 million, mostly out of the pockets of the company's accountants, actuaries and underwriters. Equity Funding's chief executive officer and others in top management slots have gone to jail. Raymond L. Dirks, the securities analyst who, through his tireless detective work, blew the whistle on the fraud, has had his share of ups and downs. After losing his job on Wall Street and being threatened with disciplinary action by the New York Stock Exchange, Dirks took time out to write a best-seller called *The Great Wall Street Scandal.* Currently back on the Street and doing famously as "Ray Dirks Research," a unit of John Muir & Co., Big Board member, the analyst last week vowed to fight the SEC, if necessary, all the way up to the U.S. Supreme Court.

From a part of the financial world whose perennial cop-out is "We can live with it," that's a headline-making case of man bites watchdog. Other aspects of the belated official action strike us as equally noteworthy. For one thing, the decision by David J. Markun, administrative law judge, drips venom. Apropos of nothing, he maliciously cites a luncheon which Ray Dirks once hosted for Stanley Goldblum, Equity Funding's headman and chief architect of the fraud, as well as an episode in which Goldblum asked Dirks to try "to ascertain whether Allen [sic] Abelson of *Barron's* was about to publish a (apparently unfavorable) story about Equity Funding. . . ." Far from the "public-spirited hero he seeks to portray himself as in this proceeding," Dirks, sneered Markun, employed methods that "would give him higher visibility and greater public recognition as an analyst and an opportunity at the same time to develop direct good will and potential future clients. . . . Dirks was an indispensible and knowing actor in the violations committed by the selling respondents."

That's the regulators' case—and they're stuck with it. In years to come, learned jurists will have to rule on the merits of such arcane concepts as "selective dissemination," the "probability yardstick" and "special ties." Here and now, at least to a layman, several points which the trial examiner either minimized or ignored are clear. To begin with, the tale of corporate villainy that Dirks peddled from place to place, involving as it did charges of fictitious insurance policies and an esoteric kind of computer fraud, evoked universal disbelief. Bureau chiefs of a leading business daily tried unavailingly for weeks to check it out, all the while prudently printing nothing. So-called sophisticated operators on Wall Street viewed the whole affair as a bear raid and a heaven-sent buying opportunity. Time and again—in utter disregard of 10b-5—they sought and obtained personal denials of the widespread rumors from top management before placing and executing huge orders to buy. Selective dissemination? What about biased enforcement?

Far and away the heaviest blame rests with the regulatory bodies, state and federal, beside whose sins of omission and Commission anything that Respondents may have done simply pales. Weeks before the collapse, four State Insurance Departments, including those of California, Illinois, New Jersey and New York, were apprised either at first- or second-hand that something was amiss. None reacted in more than routine fashion, while key investigators in several openly voiced skepticism over the probability of such hanky-panky. As for the Securities & Exchange Commission, its performance makes the state authorities look good. Told by the latter in early March of possible fraud at Equity Funding, an SEC official in Los Angeles replied that he couldn't look into it for a couple of months; too busy. Even worse, sworn testimony now indicates that SEC was alerted to the scandal more than a year before it erupted. For reasons of its own, perhaps involving what might be called an SEC old boy network the agency sat on its haunches. Who's watching the watchdogs?

Watchful or not, they still can bite. In the summer of 1976, more than three years after Equity Funding plunged into Chapter X, the SEC charged several investment companies, notably Boston Co. Institutional Investors, John W. Bristol Co., and Dreyfus Corp., as well as Dirks, with violating the securities laws by trading on inside information. Last week, an administrative law judge found all hands guilty as charged. Dreyfus Corp., which evidently took pains to inform the buyer, Goldman Sachs, of the ugly rumors, escaped further penalty. For the other investment companies, "Judge" Markun, as noted, urged censure; for Ray Dirks, a 60-day suspension. Whatever his co-respondents may decide to do, the latter has retorted, in effect "see you in court."

That should be quite a show. As the evidence makes plain, Ronald Secrist, former Equity Funding employee and original whistle-blower, sought out Dirks only after trying in vain to get the authorities' ear. As Dirks passed along the story and rumors began to fly, they triggered not only heavy selling but also opportunistic buying, by such supposedly savy operators as Leo Goldner ("Clipped Hedge," *Barron's*, Sept. 22-29, 1969) and Loews Corp.'s Lawrence Tisch, who, apparently, sought and had received personal assurances from Stanley Goldblum.

In a staggering official flight of fancy. "Judge" Markun dismisses these discomfiting facts. "As to certain entities referred to in Respondents' arguments," he ruled, "a strong pre-disposition not to believe the allegations, quite apart from the nature of the inside information, existed because of special ties to Goldblum or Levin of Equity Funding. Thus J. Ira Harris of Salomon Brothers was a long-time acquaintance of Goldblum. Lawrence Tisch, of Loews Corp., was introduced to Goldblum by Harris Mercy, of Goldman Sachs, was a long-time personal friend of Equity Funding's Levin, with whom he talked frequently. Individuals such as these three, because of the special ties, had such strong faith in the integrity of Goldblum or Levin that their reactions to whatever inside information they had was not objective, and their reactions are therefore not significant on the issue of materiality." That's not law—that's practicing psychiatry (or possibly mind-reading)—without a license.

If Ray Dirks is guilty of anything, it smacks of being nabbed for jaywalking while rushing to report a rape. And what of the eternally vigilant authorities, who somehow managed to bungle the crime of the century? On March 8-9, 1973, several members of the staff of the Los Angeles Regional Office of the SEC were told in detail of Secrist's allegations by the New York Insurance Department. They were too busy to investigate. In 1971, an Equity Funding computer expert tipped off the same office to the fraud; its response was to discuss the matter with Equity Funding's associate counsel; a former assistant director of the SEC's Enforcement Division, who in all innocence must have assured them that nothing was wrong. In any case, the matter was dropped. Justice, we know, is blind—but it's not supposed to be deaf and dumb.

[From Barron's July 11, 1983]

AFTER THE DIRKS CASE

IT'S TIME TO CHANGE THE ILL-CONCEIVED RULES ON INSIDER TRADING

(By Robert M. Bleiberg)

For connoisseurs of fine irony, July promises to be a vintage month. On Friday, July 1, Orion Capital Corp., the phoenix that rose from the ashes of the defunct

Equity Funding Corp. of America, one of the greatest frauds in the annals of U.S. finance, closed on the New York Stock Exchange at $27 per share, within hailing distance of its yearly (and all-time) high of 28⅞. At that price, once-hapless holders of Equity Funding common, who settled for roughly five cents on the dollar in the new stock (plus the proceeds of a class action suit against the offending accountants), were halfway home on their original investment. Owners of senior debentures, who received 70 Orion shares per thousand dollars of face value, were way ahead of the money game.

Contrariwise, for Raymond L. Dirks, the securities analyst who, through tireless and courageous detective work, blew the whistle on the fraud, the score added up differently. Accused and subsequently found guilty by the Securities and Exchange Commission of violating federal regulations against trading on inside information, Dirks lost his job and had to launch a new career on Wall Street. To defend his good name, he has been locked ever since in legal combat with the SEC, a protracted struggle that ended on Friday, July 1, when the U.S. Supreme Court, in a strongly worded 6–3 decision, rejected the SEC's arguments and found in Dirks' favor. Out-of-pocket cost of the litigation to the latter: half-a-million dollars.

Unlike most of the financial community, which long ago learned to take the cash and let the credit go—five co-defendants, including a clutch of institutional investors and private partnerships, failed to appeal the Commission's misguided, punitive ruling—Dirks, despite his demonstrated Street smarts, chose otherwise. We are all in his debt. First of all, for uncovering the fraud; delivering the majority opinion, Supreme Court Justice Lewis F. Powell, Jr., approvingly cited this comment from a lower court: "Largely thanks to Dirks, one of the most infamous frauds in recent memory was uncovered and exposed, while the record shows that the SEC repeatedly missed opportunities to investigate Equity Funding." Moreover, by refusing to "live with" the agency's vindictiveness and blatant bias, Ray Dirks, without a nickel's worth of help from all those high-minded civil libertarians, has struck a heavy blow in behalf of individual rights.

As for the SEC, it emerges from the affair with its reputation as a watchdog in shreds. (As the record makes abundantly clear, the high touted "copy on the beat" turned out to be a Keystone Kop who clumsily sought to nab Dirks for jaywalking while he was rushing to report a rape.) Many months before the analyst blew the whistle, concerned employees of Equity Funding had gone to the agency with alarming reports of the fraud, only to be shrugged off (and their identities disclosed to a vengeful management). Just weeks prior to the ultimate collapse, Dirks' informant brought his damaging story to the Los Angeles branch of the SEC; a staff attorney said he was too busy to look into the allegations and suggested waiting till next year (this, by the way, was in March of 1973). By subsequently turning on the whistle-blower, the SEC did its best (or worst) to compound the felony. Indeed, its behavior in the whole affair proved so contrary to the sound public policy of encouraging the exposure of fraud that the U.S. Department of Justice, in an unusual if not unprecedented move, entered the fray on Dirks' behalf.

A scathing indictment, indeed, now followed by what ought to be a crushing legal setback. Incredibly, however, the SEC has opted to tough it out. Last Monday, the agency's general counsel called the ruling a "strong reaffirmation of the basic concepts of insider trading." The chairman told the Wall Street Journal that in his view, it "would not have a material effect on the cases we've brought in the past"; as if to underscore the point, the agency last Thursday filed charges against a clerk-typist for a leading Wall Street law firm, accusing him (and his "tippees") of profiting illegally from inside information. And the SEC has thrown its weight behind pending legislation which, among other things, would impose treble damages on those who trade in securities "while in possession of material nonpublic information."

Here is bureaucracy run wild. As even the customarily craven "securities bar" nerved itself to testify, the SEC for 15 years—ever since the notorious Circuit Court decision in the Texas Gulf Sulphur case, which higher authority at the time chose not to review—has vigorously pursued violations of the rules against insider trading without spelling out what they are ("Why give crooks any guidance?" one Commissioner in effect exclaimed). In its rush to judgment, the pending measure ignores such legal niceties as the statute of limitations and the right to trial by jury. Needless to add, it rides roughshod over what scanty light the highest court in the land, in such cases as *Raymond L. Dirks v. the Securities and Exchange Commission,* lately has been able to shed. In a new era of deregulation and careful weighing of benefits vs. costs, one agency is still doing business at the same old doctrine stand.

Just how doctrinaire—and legally outrages—is pointed up by the dismal count of SEC court defeats on the issue. In the early Seventies, the Commission charged Bausch & Lomb and its chairman with violating Rule 10b–5 (the catch-all regulation which purports to govern insider trading) by furnishing securities analysis with an estimate of future earnings which hadn't been made public. Seems that in an effort to dispel rumors, the chief executive gave interviews to several analysts, during which he spoke in general terms of his company's prospects. When word somehow got around that he had made a specific forecast of 60 cents per share (which he knew to be in error), he phoned one of the analysts to give him a more accurate figure. He also promptly notified The Wall Street Journal, which printed the story the next day. Nobody in Bausch & Lomb bought or sold a share of stock while all this was going on; nonetheless, the SEC brought charges and even sought an injunction against the non-existent wrongdoing. Four years—and heaven knows how many dollars—later, the case was thrown out of court.

Similarly, in *Chiarella v. U.S.*, the case involving a financial printer who, while employed by Pandick Press, made shrewd guesses about the identities of takeover targets although their names were blanked out on the prospectus, the Supreme Court overturned a lower court decision in the SEC's favor. Since the printer bore no "relationship of trust or confidence" to those from whom he bought the stock, he was not guilty of violating the securities laws (for which, incidentally, he had been sentenced to a year in jail). "A duty to disclose or abstain [from trading] does not arise from the mere possession of nonpublic market information," ruled the court. "Such a duty arises rather from the existence of a fiduciary relationship," a finding which the same judicial spokesman has just reaffirmed in the Dirks case.

As *Barron's* has observed before ("Watching the Watchdogs—In the Equity Funding Scandal, They Were Fast Asleep," Sept. 18, 1978), the agency's behavior borders on the unbelievable. In November 1971, nearly 18 months before the ultimate collapse, the SEC's Los Angeles regional office was alerted by former employees of Equity Funding that things were seriously amiss. After an investigation of sorts, it found nothing wrong. Nor was the agency more responsive in March 1973, when Ronald Secrist, ex-employee and Dirks' chief source, was trying to sound the alarm. Far and away its worst dereliction—as the U.S. Solicitor General, on petitioner's behalf, argued before the Supreme Court—lay in moving against Dirks.

Specifically: "The Commission's erroneous imposition of liability in this case has serious consequences for federal law enforcement, which frequently depends on private initiative to uncover criminal conduct. If the antifraud provisions of the federal securities laws, backed by administrative, civil, and criminal sanctions, forbid analysts to trade with or transmit evidence of crime obtained through honest investigation, then few analysts will have an incentive to invest the resources needed to investigate corporate frauds like Equity Funding. Few analysts will be willing to devote substantial resources and expose themselves to personal danger to investigate rumors of crime—as petitioner did—if they are forbidden to utilize the information they obtain until after it is fully revealed to the investing public. . . . The Commission's approach, therefore, is certain to reduce, and may well eliminate, the role of securities professionals in detecting and analyzing major corporate crimes."

Such stinging rebukes might give ordinary mortals pause, but the SEC is plainly made of sterner stuff. In any case, despite *Chiarella*—indeed, on the thin pretext that a typist in a law firm somehow has a greater fiduciary obligation than a financial printer—the SEC last week accused a former employee of Weshtell, Lipton, Rosen & Katz and his "tippees" of illegally trading on inside information. In a more far-reaching thrust, the agency, with the enthusiastic support of House Democrats, is pushing a bill that would authorize it to seek treble damages in insider trading cases. Other Congressional initiatives which it's quietly encouraging would give it the power to issue cease-and-desist orders and to impose heavier penalties, financial and otherwise, across the board. In the public sector, evidently, nothing succeeds like failure.

Reform of a different kind is long overdue. Ever since the Texas Gulf Sulphur case, the courts repeatedly have urged on the SEC the pressing need for issuing definitions, guidelines and rules on insider trading. Yet none has ever been forthcoming; on the contrary, the Commission has chosen to stonewall. Such a code, one SEC bigwig incautiously remarked, "would only enhance the substantial premiums guile and subtlety already command. . . . All you wind up doing is putting a premium on some crook's ingenuity." Under this Orwellian approach, anyone may be found guilty of breaking the law, wittingly or otherwise; for a decade and a half, Wall Street (and Main Street) have been living in perpetual jeopardy.

As for tender offers and the abuses which they seem to have spawned, Professor Henry Manne, legal scholar and author of a seminal work on insider trading, has a modest proposal to offer. Make such transactions—which, by the way, even in their most eyebrow-raising form, are legal in most foreign countries, not to mention (as Judge Powell did in *Chiarella*) under certain exemptions to the U.S. securities laws—a matter of private contractual agreement, fully disclosed to shareholders, present and future. That would effectively remove from the legal arena a bungling body which, to judge by the Equity Funding fiasco and what has followed, seemingly finds it impossible to tell villain from victim, let alone right from wrong.

[Whereupon, at 4:31, the committee was adjourned.]

BIOGRAPHY

Stanley Sporkin

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF COLUMBIA

Birth: February 7, 1932, Philadelphia, PA.

Legal Residence: Maryland.

Marital Status: Married to Judith Sally Imber, 3 children.

Education: 1949-1953—Pennsylvania State University, A.B degree. 1954-1957—Yale University, LL. B. degree.

Bar: 1958—Pennsylvania.

Experience: 1957-1960—Law Clerk, Hon. Caleb M. Wright, U.S. District Court, District of Delaware. 1960—Law Clerk, Hon. Paul Leahy, U.S. District Court, District of Delaware. 1960-1961—Haley Wollenberg & Bader, Associate. 1961-1981—U.S. Securities & Exchange Commission. (1961-1963)—Special Study of Security Markets. (1963-1972)—Division of Trading & Markets, Chief Enforcement Atty (1966-1967), Asst Director (1967-1968), Associate Director (1968-1972). (1972-1981)—Division of Enforcement Deputy Director (1972-1974), Director (1974-1981). 1981-present—Central Intelligence Agency, General Counsel.

○